



# UNDOCUMENTED MIGRANT WOMEN IN EUROPE: **A NEGLECTED CHAPTER IN FUNDAMENTAL RIGHTS PROTECTION**

---



# UNDOCUMENTED MIGRANT WOMEN IN EUROPE: A NEGLECTED CHAPTER IN FUNDAMENTAL RIGHTS PROTECTION

---

**Authors:** Hajar Salimi Khaligh, Alyssa Ahrabare, Anna Zobnina



A Member State has the right to decide on its own immigration policies; however, immigrants' fundamental rights must be protected and guaranteed in accordance with EU and international law, by which Member States are bound.

European Parliament resolution (2014) on undocumented women migrants in the European Union, par. C

Member States should ensure that migrant, refugee and asylum-seeking women and girls do not face discrimination on any grounds. Member States are encouraged to take measures to enhance the ability of undocumented migrant women and girls to access their fundamental rights, and for those of them who are victims of violence against women or trafficking in human beings, to report the crimes without fear of removal.

Council of Europe (CoE) Committee of Ministers Recommendation (2022) on protecting the rights of migrant, refugee and asylum-seeking women and girls, par. 5 and par. 7

States parties must pursue all appropriate means to eradicate trafficking and exploitation of prostitution to ensure that laws, systems, regulations and funding are in place to make the realization of that right effective, rather than illusory.

Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation no. 38 (2020) on trafficking in women and girls in the context of global migration, par. 4



## About the European Network Of Migrant Women (ENoMW)

The European Network of Migrant Women (ENoMW) was formalised in 2012 with the aim to support, visibilise and promote the specific concerns and rights of migrant women at the European level. Since then, ENoMW has developed its political presence, advocacy, and membership to become a Europe-wide platform present in 23 countries, representing a unique cultural richness of women's global struggle for economic, political, and physical freedom. ENoMW is a space led by and for migrant, refugee and ethnic minority women and girls with the feminist vision to come together and find ground for collaborative work across their differences. The organisation's missions are to build the capacity of its members and advocate to help shape social policies and design action programs addressing migrant women's specific needs. ENoMW also conducts projects with the aim to fight for migrant women's human rights, economic empowerment, anti-discrimination, co-governance, access to health, access to justice, and freedom from male Violence against Women and Girls (VAWG).

## About the Thomson Reuters Foundation

The Thomson Reuters Foundation is the corporate foundation of Thomson Reuters, the global news and information services company. The organisation works to advance media freedom, raise awareness of human rights issues, and foster more inclusive economies. Through news, media development, free legal assistance, and convening initiatives, the Foundation combine its unique services to drive systemic change. Its mission is to inspire collective leadership, empowering people to shape free, fair, and informed societies.

TrustLaw is the Thomson Reuters Foundation's global pro bono legal programme, connecting high-impact NGOs and social enterprises working to create social and environmental change with the best law firms and corporate legal teams to provide them with free legal assistance in order to produce ground-breaking legal research and offer innovative training courses worldwide.

# ACKNOWLEDGMENT

This report is a publication by the European Network of Migrant Women (ENoMW) with design support from the Thomson Reuters Foundation.

We acknowledge the contribution of TrustLaw, Thomson Reuters Foundation's global pro bono service, in facilitating the legal research on existing laws relating to the fundamental rights of undocumented migrant women at the European Union level, and the nine countries covered in the report: Belgium, France, Germany, Italy, Portugal, Hungary, Spain, Sweden and Greece. We thank the law firms Hogan Lovells LLP, Latham & Watkins LLP, Uría Menéndez and Linklaters LLP and Selma Koriichi (Independent lawyer) for their generous pro bono legal research informing this report.

We want to thank our members and partners who reviewed the country level research through a feminist lens: Dr. Noura Raad, co-president of the European Network of Migrant Women (France), Chiara Parolin, lawyer and member of Aura (Italy), Juliana Jimenez, legal expert, member of RadicalGirlsss and individual member of the European Network of Migrant Women (Spain), Noa Nogradi, member of PATENT and NANE (Hungary), Borbála Juhász of the Hungarian Women's Lobby (Hungary), Lídia Balogh, an expert on women's human rights and trafficking (Hungary), Ágnes Szalóki, an expert in human rights and asylum (Hungary), Kinga Milánkovics, an expert in care work (Hungary), Júlia Spronz, legal aid expert (Hungary), Mariana Cunha, legal expert, president of Association against Femicide (Portugal), Inge Kleine (PhD), women's counselling centre in Munich Kofra (Kommunikationszentrum für Frauen) (Germany), Clara Berglund, Secretary General of the Swedish Women's Lobby (SWL) (Sweden).

We are also very grateful to all the members in the Legal Working Group of ENoMW for initiating this research and for providing their supervision and guidance in the process of legal mapping that became the foundation of this report.



## DISCLAIMER

This report is offered for information purposes, it does not constitute legal advice. Readers are advised to seek assistance from qualified legal experts in relation to their specific circumstances. We intend the report's contents to be correct and up to date at the time of publication, but we do not guarantee their accuracy or completeness, particularly as circumstances may change after publication. The European Network of Migrant Women, the Thomson Reuters Foundation, Hogan Lovells LLP, Latham & Watkins LLP, Uría Menéndez, Linklaters LLP and Selma Korichi accept no liability or responsibility for actions taken or not taken or any losses arising from reliance on this report or any inaccuracies herein. The contents of this report should not be taken to reflect the views of the law firms or the lawyers who offered pro bono research. Similarly, Thomson Reuters Foundation is proud to support our TrustLaw member the European Network of Migrant Women with their work on this report, including with publication and the pro bono connection that made the legal research possible. However, in accordance with the Thomson Reuters Trust Principles of independence and freedom from bias, we do not take a position on the contents of, or views expressed in, this report.

# LIST OF ACRONYMS AND ABBREVIATIONS

AIDS	Acquired Immunodeficiency Syndrome
AME	L'aide Médicale de l'État
CEDAW	the Convention on the Elimination of All Forms of Discrimination against Women
CESU	Chèque Emploi Service Universel
CFR	Charter of Fundamental Rights of the European Union
CMU	Complémentaire Santé Solidaire
CoE	Council of Europe
COVID-19	Coronavirus disease
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ENoMW	European Network of Migrant Women
EP	European Parliament
ESC	The European Social Charter
EU	European Union
EUSF	European Union Solidarity Fund
FGM	Female Genital Mutilation
GBV	Gender-Based Violence
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
ID	Identity
ILO	International Labor Organization
MS	Member States
OHCHR	Office of the High Commissioner for Human Rights
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UMW	Undocumented Migrant Woman
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime

# TABLE OF CONTENTS

<b>INTRODUCTION</b>	<b>13</b>	refugee and asylum-seeking women and girls	<b>32</b>
<b>SCOPE OF THE REPORT</b>	<b>15</b>		
<b>METHODOLOGY</b>	<b>16</b>		
<b>TERMS AND DEFINITIONS</b>	<b>18</b>		
<b>1-1 Domestic and Care Workers</b>	<b>18</b>		
<b>1-2 Victims of Human Trafficking, Prostitution and Other Forms of Sexual Exploitation</b>	<b>19</b>		
<b>1-2-1 Equality Model</b>	<b>19</b>		
<b>1-3 Victims of Male Violence in the Home</b>	<b>20</b>		
<b>1-4 Asylum-seeking Women</b>	<b>20</b>		
<b>1. EUROPE-WIDE PROTECTION</b>	<b>22</b>		
<b>1.1. European union law</b>	<b>24</b>		
EU Primary Law	<b>25</b>		
Treaty of European Union (TEU) and Treaty on the Functioning of the European Union (TFEU)	<b>25</b>		
Charter of Fundamental Rights of the European Union (CFR)	<b>25</b>		
EU Secondary Law	<b>25</b>		
Racial Equality Directive (2000/43/E.C.)	<b>26</b>		
Equal Treatment Directive (2006/54/E.C.)	<b>26</b>		
Directive on Equal Access to Goods and Services (2004/113/EC)	<b>26</b>		
Qualification Directive (2011/95/EU)	<b>26</b>		
Returns Directive (2008/115/E.C.)	<b>26</b>		
Directive on the residence permit for victims of trafficking (2004/81/E.C.)	<b>27</b>		
Anti - Trafficking Directive (2011/36/EU)	<b>27</b>		
Victims Rights Directive (2012/29/EU)	<b>27</b>		
Concluding Remarks	<b>28</b>		
Key Recommendations	<b>28</b>		
<b>1.2. The Council of Europe Regime</b>	<b>29</b>		
Civil and Political Rights	<b>30</b>		
Social and Economic Rights	<b>30</b>		
The Istanbul Convention	<b>31</b>		
Recommendation of the Committee of Ministers to Member States on protecting the rights of migrant,			
<b>2. COUNTRY-SPECIFIC PROTECTION</b>	<b>35</b>		
<b>2.1. Belgian Law</b>	<b>36</b>		
Domestic Legal Framework: General Protection for UMW	<b>36</b>		
Protection for Groups at Risk	<b>37</b>		
Domestic and Care Workers	<b>37</b>		
Asylum-seeking Women	<b>38</b>		
Victims of trafficking, prostitution and other forms of sexual exploitation	<b>38</b>		
Victims of Male violence in the home	<b>38</b>		
Covid-specific Measures	<b>39</b>		
Concluding Remarks	<b>39</b>		
Key Recommendations	<b>39</b>		
<b>2.2. French Law</b>	<b>40</b>		
Domestic Legal Framework: General Protection for UMW	<b>40</b>		
Protection for Groups at Risk	<b>42</b>		
Domestic and Care Workers	<b>42</b>		
Victims of Human Trafficking, Prostitution, and Other Forms of Sexual Exploitation	<b>42</b>		
Asylum-seeking Women	<b>43</b>		
Victims of Male Violence in the Home	<b>43</b>		
Covid-specific Measures	<b>43</b>		
Concluding Remarks	<b>44</b>		
Key Recommendations	<b>44</b>		
<b>2.3. German Law</b>	<b>45</b>		
Domestic Legal Framework: General Protection for UMW	<b>45</b>		
Protection for Groups at Risk	<b>46</b>		
Domestic and Care Workers	<b>46</b>		
Victims of Human Trafficking, Prostitution, and Other Forms of Sexual Exploitation	<b>46</b>		
Asylum-seeking Women	<b>47</b>		
Victims of Male Violence in the Home	<b>47</b>		
Covid-specific Measures	<b>48</b>		
Concluding Remarks	<b>48</b>		

Key Recommendations	<b>48</b>	Protection for UMW	<b>62</b>
<b>2.4. Italian Law</b>	<b>49</b>	Protection for Groups at Risk	<b>63</b>
Domestic Legal Framework: General		Domestic and Care Workers	<b>63</b>
Protection for UMW	<b>49</b>	Victims of Human Trafficking, Prostitution	
Protection for Groups at Risk	<b>50</b>	and Other Forms of Sexual Exploitation	<b>63</b>
Domestic and Care Workers	<b>50</b>	Asylum-seeking Women	<b>64</b>
Victims of Human Trafficking, Prostitution		Victims of Male Violence in the Home	<b>64</b>
and Other Forms of Sexual Exploitation	<b>50</b>	Covid-specific Measures	<b>65</b>
Asylum-seeking Women	<b>51</b>	Concluding Remarks	<b>66</b>
Victims of Male Violence in the Home	<b>51</b>	Key Recommendations	<b>66</b>
Covid-specific Measures	<b>52</b>	<b>2.8. Swedish Law</b>	<b>67</b>
Concluding Remarks	<b>53</b>	Domestic Legal Framework: General	
Key Recommendations	<b>53</b>	Protection for UMW	<b>67</b>
<b>2.5. Portuguese Law</b>	<b>54</b>	Protection for Groups at Risk	<b>68</b>
Domestic Legal Framework: General		Domestic and Care workers	<b>68</b>
Protection for UMW	<b>54</b>	Victims of Trafficking, Prostitution and	
Protection for Groups at Risk	<b>55</b>	Other Forms of Sexual Exploitation	<b>68</b>
Domestic and Care Workers	<b>55</b>	Asylum-seeking women	<b>68</b>
Victims of Human Trafficking, Prostitution		Victims of Male Violence in the Home	<b>69</b>
and Other Forms of Sexual Exploitation	<b>55</b>	Covid-specific Measures	<b>69</b>
Asylum-seeking Women	<b>55</b>	Concluding Remarks	<b>69</b>
Victims of Male Violence in the Home	<b>56</b>	Key Recommendations	<b>69</b>
Covid-specific Measures	<b>56</b>	<b>2.9. Greek Law</b>	<b>70</b>
Concluding Remarks	<b>57</b>	Domestic Legal Framework: General	
Key Recommendations	<b>57</b>	Protection for UMW	<b>70</b>
<b>2.6. Hungarian Law</b>	<b>58</b>	Protection for Groups at Risk	<b>71</b>
Domestic Legal Framework: General		Domestic and Care workers	<b>71</b>
Protection for UMW	<b>58</b>	Victims of Human Trafficking, Prostitution	
Protection for Groups at Risk	<b>59</b>	and Other Forms of Sexual Exploitation	<b>72</b>
Domestic and Care Workers	<b>59</b>	Asylum-seeking Women	<b>71</b>
Victims of Human Trafficking, Prostitution		Victims of Male Violence in the Home	<b>72</b>
and Other Forms of Sexual Exploitation	<b>59</b>	Concluding Remarks	<b>73</b>
Asylum-seeking Women	<b>59</b>	Key Recommendations	<b>73</b>
Victims of Male Violence in the Home	<b>60</b>	Covid-specific Measures	<b>73</b>
Covid-specific Measures	<b>60</b>	<b>ANNEX 1. Recommendations for the</b>	
Concluding Remarks	<b>61</b>	<b>Proposal for a Directive of the European</b>	
Key Recommendations	<b>61</b>	<b>Parliament and of the Council on</b>	
<b>2.7. Spanish Law</b>	<b>62</b>	<b>Combating Violence against Women</b>	
Domestic Legal Framework: General		<b>and Domestic Violence</b>	
			<b>75</b>





European Network of Migrant Women

## INTRODUCTION

Migrant, refugee and asylum-seeking women and girls in Europe face persistent inequalities as well as specific barriers to protection and enjoyment of their fundamental rights. As a group they are at the intersection of multiple systems of structural oppression (patriarchy, colonialism, and capitalism) and, as a result, they face multiple forms of violence (male violence, racism, exclusion, administrative violence, etc.). Among them, some belong to other discriminated groups (women with disabilities, lesbians, under-age girls, single mothers, etc.). One particularly at-risk group is undocumented migrant women (UMW).

The COVID-19 pandemic has amplified existing discrimination and violence against women and created new outcomes that disproportionately impact migrant women and girls. In the face of this unprecedented health emergency, European countries adopted extraordinary measures such as extensive lockdowns, restricting freedoms and human rights in the process. Migrant women and girls have

been overwhelmingly affected by these measures which illustrates the failure of legislative systems across Europe to effectively guarantee migrant women and girls the enjoyment of their protected rights. From the early stages of the pandemic, European Network of Migrant Women highlighted the augmented risk, for women in precarious situations, to lose their legal status and to consequently be exposed to more violence. This concerned, in particular, domestic and care workers at risk of losing their jobs and housing, asylum-seeking women whose applications for permanent status were delayed indefinitely, victims of male violence in the home whose legal status depends on their spouses, women in prostitution including victims of trafficking for sexual exploitation.

Regretfully, as Europe recovers from the pandemic, these women continue to live at extreme risks of unemployment, poverty, homelessness, trafficking, male violence in the home, exploitation in

prostitution and labour exploitation, and femicide, while continuing to live behind multiple barriers to justice, and in fear of losing their legal status.

Furthermore, in the past year, the takeover of Afghanistan by the Taliban and Russia's invasion of Ukraine reminded us that in war and conflict women and girls are at grave risk of male sexual violence, exploitation and of displacement. It is very likely that the world will keep facing global struggles including pandemics, natural disasters and incidents of economic downturn linked with the climate crisis. Unless the root-causes of these calamities are addressed, the number of displaced women and girls will continue to increase, and, without meaningful

protection, they will continue to be disproportionately impacted. In 2019, the European Union set out an ambitious agenda to strengthen the rule of law - one of the founding values of the European Union enshrined in the Article 2 of the Treaty on European Union. For this agenda to be realised, it is urgent to recognise the protection of fundamental rights of those most at risk of discrimination in the EU - migrant, refugee, and asylum-seeking women - as central to the EU strategy on fundamental rights. In the current political and socio-economic situation that the EU is facing, it is urgent that the EU and international legal frameworks protecting these rights are effective and enforceable.



# SCOPE OF THE REPORT

When pushed into irregularity, migrant women face exacerbated *de jure* and *de facto* discrimination. This report examines laws relating to undocumented migrant women's (UMW) fundamental rights in the EU and CoE law and standards, and in nine focus countries, in order to highlight the existing legal provisions and the gaps in this area of fundamental rights protection. As such the report provides an overview of the available rights that the EU and the selected member states have an obligation to fulfil in relation to UMW. The sub-focus of the report is on the Covid-specific socio-economic measures which have been taken in the selected European countries in order to investigate the level of protection provided to UMW or those at risk of being pushed into an undocumented status.

There are different applicable laws for UMW residing within the territories of European countries. Their fundamental rights are protected under European Union Law, Council of Europe's system of human rights, international human rights treaties, as well as national fundamental rights system, most of them designed to provide protection for all residents regardless of their migration status. However, specific rights are limited to citizens or are conditional on the possession of a valid resident permit. In this report, we investigate the level of protection of fundamental rights provided for UMW at the European level and in nine European countries i.e. Belgium, France, Germany, Italy, Portugal, Hungary, Spain, Sweden, and Greece. The report also provides a limited number of examples of inconsistencies and failures in implementation of laws, provided by the national experts who took part in the review of the legal mapping. However, it must be noted that the law enforcement and implementation, in policy and in practice, are not the main focus of this publication.

For the purposes of this report, we have chosen to focus on access to rights - as stipulated in primary and secondary law of EU and selected member states - of undocumented migrant women, as well as four groups identified as being at particular risk of losing their documented status, i.e. *female migrant domestic workers, victims of trafficking and sexual exploitation, victims of male violence in the home and asylum-seeking women*. These four groups have been identified through discussions and consultations with ENoMW membership during the COVID-19 lockdowns, as being at heightened and immediate risk of losing their status due to the extraordinary measures taken by the states during the pandemic and due to their pre-existing structural disadvantages. However, we acknowledge that other groups amongst migrant women face disproportionate risks of discrimination and violence in Europe.



REUTERS/Annegret Hilse

## METHODOLOGY

---

This report is the result of collaborative work between the team of legal experts and practising lawyers within the European Network of Migrant Women and a group of legal firms and independent lawyers associated with the TrustLaw Firm of Thomson Reuters Foundation. At the foundation of this report is a much larger legal study conducted by a team of lawyers, coordinated by Hogan Lovells LLP as an associate partner of TrustLaw.

Policies and practices in the EU member states tend to marginalise undocumented migrant women, limiting their agency and increasing their risks of facing violence and abuse. According to the reports of the member organisations of European Network of Migrant Women, in many member states, policies regarding UMW's access to fundamental rights are not being properly enforced due to numerous barriers ranging from sexism, racism, lack of funding for the relevant administrations, language barriers and the lack of awareness among public bodies as well as migrant women themselves. However, this report focuses on the existing legal frameworks and protective mechanisms in law in relation to UMW's access to fundamental rights, as well as the gaps that are yet to be addressed. Our goals are to raise awareness of policy makers so they can comprehensively and efficiently address UMW's access to fundamental

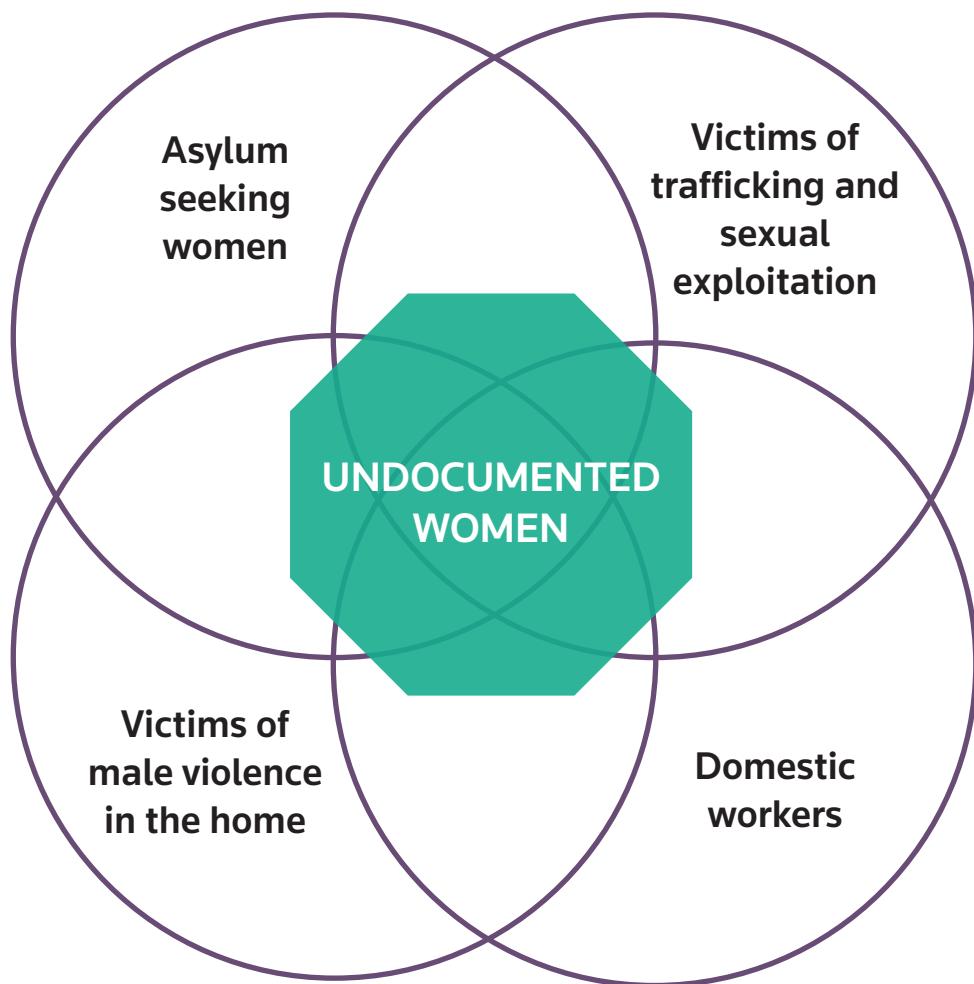
rights, and to give tools to legal practitioners and migrant women's organisations so that they can better support UMW in accessing justice and rights.

To understand the barriers faced by migrant, refugee, and asylum-seeking women and girls, it is instrumental to disaggregate and take a specific approach to each target group. This is the basis of the intersectional approach necessary to efficiently tackle specific discriminations faced by different groups. For the purpose of this report, we have chosen to focus on undocumented migrant women.

Many vulnerability factors exist in the lives of undocumented women who are also at the intersection of several marginalised groups and are likely to fall victims of various forms of violence. Within asylum-seeking women, victims of trafficking and sexual exploitation, victims of male violence in the home, and domestic workers, undocumented women are even more exposed. At the same time, based on the reports of ENoMW's members, during and post the COVID-19 period, these four groups among migrant women have been facing significant risks of losing their status, due to specific legal vulnerabilities these groups already have.

As a result, rather than focusing on the target group of undocumented women alone, the report considers their legal protection along with the pro-

## Undocumented women and groups of risk of losing documented status



tection for the groups at risk of becoming undocumented. This allows us to conduct a more in-depth intersectional analysis to identify the deficiencies and shortcomings existing within the country-level and regional legal frameworks in Europe.

The process of writing this report included several stages. First, a group of legal experts within the European Network of Migrant Women defined the context, scope and goals for this legal research, in order to guide our partnership with the lawyers introduced by TrustLaw, Thomson Reuters Foundation's global pro bono service. As a result, the work of the lawyers was guided by specific questions formulated by ENoMW's experts. The research produced by the lawyers was then reviewed by the legal experts in ENoMW, external legal experts and the

authors of the report, all of whom provided their analysis and expertise on migrant women's human rights in Europe, as well as policy recommendation directed to member states and at EU level.

The selection of the nine countries covered in this report was determined by the membership of ENoMW present in these countries, as well as by the need for a comparative mapping of different legal regimes and further monitoring of their implementation at national level. It was also determined by different political trends within different EU countries, on migration, integration, tackling male violence against women, and fundamental rights protection as a whole, relevant to undocumented migrant women and the four at-risk groups addressed in this report.

# TERMS AND DEFINITIONS

For the purpose of this report, an undocumented migrant woman (UMW) is a woman who has migrated irregularly or regularly and is present within the territory of a European country without being a national or possessing a resident permit or is in the status of having an expired residence permit.

It must be noted that the term “illegal migrant”, due to its implication of criminality and discriminatory effects, has been replaced by United Nations General Assembly (UNGA), UN Office of the High Commissioner for Refugees (UNHCR), United Nations High Commissioner for Human Rights (OHCHR), as well as the European Parliament (EP) and European Commission (EC), and several national laws by the term “irregular” or “undocumented” or “non-documented migrants”. Moreover, the term “illegal migrants” brings about consequences in policy-making that hinder the entitlement and the exercise of fundamental rights by migrants; hence, undocumented migrant women is the focal point of this report. Additionally, this report covers several groups that have been identified as being at particular risk of losing their documented status as follows:

## 1-1 Domestic and Care Workers

International labour organisation (ILO) Convention no. 189 defines a domestic worker as “any person engaged in domestic work within an employment relationship in or for a household or households”. Today, there are over eight million domestic workers in Europe, 91% of whom are women. According to ILO, about 17% of domestic workers are migrants; however, statistics vary significantly depending on the country and region. 75% of the sector’s workforce in Italy are migrant workers, and in Spain the rate is 60%. These countries are the two main destinations for migrant female domestic workers in Europe.

According to the ILO, 29.9 % of domestic workers are completely excluded from national labour legislation. Within the European Union, domestic work is unevenly regulated in the member states, resulting in domestic workers often not being viewed as regular workers and their employment rights and social protection being limited. The intersection of sex, migration and labour status multiplies the discriminatory effects of laws and policies for migrant women domestic workers, often putting them in precarious and/ or irregular situations.

## 1-2 Victims of Human Trafficking, Prostitution and Other Forms of Sexual Exploitation

In accordance with the Palermo Protocol of the UN Convention against Transnational Organised Crimes, and the EU directive on preventing and combating trafficking in human beings and protecting its victims (2011) human trafficking is defined as “the recruitment, transportation, transfer, harboring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.” As a minimum, the exploitation includes “the exploitation of prostitution of others or other forms of sexual exploitation, forced labour services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.” The position of vulnerability refers to a “situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.” Both trafficking in human beings and sexual exploitation of women and children are defined in the Art. 83 of the TFEU as “particularly serious crime with a cross-border dimension”.

According to the EC third report on trafficking in human beings (2020), sexual exploitation remains the most common form of trafficking, with 60% of the registered victims and women being the vast majority (92 %) of the victims of trafficking for sexual exploitation in the EU. In this report, the EC highlighted that the increased risk of trafficking remains in the context of migration, as trafficking networks continue to abuse the vulnerabilities of people and asylum procedures, mainly for the purpose of sexual exploitation. That migrant women are disproportionately impacted by the crimes of trafficking and exploitation in prostitution was also highlighted in the CEDAW General Recommendation N 38, as well as the OSCE/ODIHR - UN Women report “Addressing Emerging Human Trafficking Trends and Consequences of the COVID-19 Pandemic”.

### 1-2-1 Equality Model

The Equality Model (also known as the Nordic or Swedish Model) decriminalises all those who are exploited in prostitution, while providing support services to help them exit. It also makes paying - or seeking to pay - for sexual acts a criminal offence, in order to shift the burden from those exploited in prostitution onto those who exploit and profit from the exploitation of others. This legal approach is aimed at reducing and eliminating the demand that drives sexual exploitation and sex trafficking; it has been adopted and is currently implemented by several European jurisdictions (France, Iceland, Ireland, Northern Ireland, Norway, Sweden), as well as in Canada and Israel. In Europe, migrant women account for the majority of victims of trafficking for sexual exploitation and are overrepresented among those exploited in prostitution, which the European Network of Migrant Women recognises as an expression of patriarchal inequalities between women and men, racial/ ethnic and class discrimination, and a form of male violence against women. This form of violence affects migrant women disproportionately. Consequently, migrant women victims of trafficking and those exploited in prostitution are among the groups at risk of losing a undocumented status. On the other hand, undocumented women present a group at a particular risk of sexual exploitation and trafficking.

## 1-3 Victims of Male Violence in the Home

The Council of Europe's Istanbul Convention defines violence against women as "a violation of human rights and a form of discrimination against women" and "all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life". It defines gender-based violence against women as "violence that is directed against a woman because she is a woman or that affects women disproportionately". At the same time domestic violence is defined by the convention as "all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim". For the purposes of this report we use the term *male violence* to highlight the social dimension of violent acts perpetrated by men against women and supported by social norms and stereotypes. The term also brings to light the systemic and historical nature of domination of men over women, naturalised in all areas of public and private life. The term *male violence in the home* is used to denote all acts of male violence committed against migrant women within the family or domestic unit, or between former or current spouses or partners, whether or not the perpetrator shares -or has shared -the same residence with the victim.

In the case of UMW and associated risk-groups, it is important to note two aspects when male violence is perpetrated against women within a household: (a) an act of violence (physical, sexual, psychological) is often accompanied by a risk of losing legal status and residence permit when women legally depend on their partners, spouses, or family members; and (b) a differentiated and lower-level of legal protection for UMW who are victims of domestic violence.

## 1-4 Asylum-seeking Women

Under Art.14 of the Universal Declaration of Human Rights, everyone has the right to seek and enjoy in other countries asylum from persecution. An asylum-seeker is an individual who has fled their country and is seeking protection from persecution and serious human rights violations in another country, but who has not been legally recognised as a refugee yet. This includes the women waiting for their application results, those who have not applied for international protection due to misinformation or

any structural barriers (linguistic, digital, transportation, etc), those who have seen their application rejected and those possessing an expulsion order. This undocumented status can last for an extended period which hinders these women's access to certain rights, protection and services (e.g., healthcare or maternity services) and puts them at high risk of male violence and retraumatisation, sexual and labour exploitation and trafficking, marginalisation and social exclusion.



REUTERS/Edgard Garrido



# 1. EUROPE-WIDE PROTECTION

Any individual within the territories of the European countries is entitled to the protection of specific human rights under the EU Law system, Council of Europe System, as well as the national legal systems. The EU system of fundamental rights protection imposes an obligation on the member states of the European Union and EU institutions to respect human rights as enshrined in the Charter of Fundamental Rights of the EU (CFR) when implementing EU law. However, EU law consists of different sources that may be applicable to different rights holders: **(a)** EU Primary Law, including Treaty on the European Union (TEU), Treaty on the Functioning of the European Union (TFEU), Charter of Fundamental Rights of the European Union (in the post-Lisbon era), and **(b)** EU Secondary Law that comes from the principles and objectives of the treaties which include regulations, directives, decisions, recommendations and opinions by the EU.

The Council of Europe's (CoE) system of human rights protection is based on international treaties to which member states of the council are signatories. The most important treaties for the purpose of our study are the European Convention on Human Rights (ECHR), and the Istanbul Convention, which imposes obligations on the state parties to comply with the human rights obligations enshrined in the Conventions. The European Court of Human Rights (ECtHR) is the treaty body to review the compliance of the member states of the ECHR with the human rights referred to in the ECHR. It should be noted that the ECHR obliges the member states to comply with a set of civil and political human rights, while the European Social Charter deals with the protection of social and economic human rights. Although the EU, under the Art.6 TEU, has already taken measures to accede to the ECHR, to which all its member states are signatory, the process is still ongoing.



## 1.1. EUROPEAN UNION LAW



According to the principle of conferral under Art.5(1) TEU, the limits of EU competences are governed by the principle of conferral. In other words, under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the member states in the Treaties to attain the objectives set out therein. Hence, the division of competencies between the member states and the Union is legislated under TEU and TFEU.

The creation of a common immigration policy falls under the notions of the area of freedom, security and justice (Art.4 TFEU) within the shared competences of the EU. The core legal basis for the purposes of this report is Article 79 TFEU which confers the EU competence to legislate in the area of immigration.

Article 79 TFEU provides that:

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in the Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:
  - (a) the conditions of entry and residence, and standards on the issue by the Member States of long-term visas and residence permits, including those for the purpose of family reunification;
  - (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in the other Member States;
  - (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorization;
  - (d) combating trafficking in persons, in particular women and children.



As seen, even though a direct reference is made to the fair treatment (and hence, fundamental rights) of third-country nationals residing legally in the member states, no explicit reference is made for the protection or exclusion from the protection of fundamental rights for undocumented migrants. Hence, certain fundamental rights are applicable under EU law to everyone, which also include UMW. These rights are enshrined in primary and secondary sources of EU law.

## EU Primary Law

### Treaty of European Union (TEU) and Treaty on the Functioning of the European Union (TFEU)

As seen above, no specific reference is made to the fundamental rights of undocumented migrants in the TEU and TFEU. However, since adopting measures in order to manage irregular migration falls within the scope of EU shared competences, the EU may take measures that impact the rights of the migrants in an irregular situation.

### Charter of Fundamental Rights of the European Union (CFR)

As provided in the CFR, everyone enjoys the rights enshrined in the Charter, regardless of their migration status, which is the focal point of protection at the EU level with respect to UMW.

The CFR imposes obligations on the MS and EU institution regarding two sets of fundamental rights distinguished as (a) civil and political, e.g. right to life, protection from torture and inhuman or degrading treatment or punishment, protection from slavery and forced labor, respect for private and family life, the right to marriage, and (b) social and economic human rights; e.g., adequate housing and shelter guaranteeing human dignity, emergency health care, rights in employment, reasonable working conditions, access to courts to defend rights, trade activity, and the right to primary and secondary education for all children.

Nevertheless, it must be borne in mind that under Art.51 of the CFR, the EU institutions and EU member states are obliged under CFR only when they are implementing Union law. As a result, the EU Charter has no jurisdiction in areas over which the EU has no competence.

What is of great importance for us is the fact that “everyone,” including UMW, may enjoy the majority of the rights protected under the Charter, irrespective of their immigration status. Furthermore, the CFR -in its Articles 21 and 23 -prohibits any discrimination based on sex and provides that equality between women and men must be ensured in all areas, including employment, work and pay, without distinguishing between citizens and migrants. Hence the protection of the rights enumerated above, to a great extent, covers UMW.

However, a limited number of provisions contained in the Charter are restricted to citizens or lawful residents only. Important examples in this point are the right to consular protection (Article 46) and certain political rights (Articles 39 and 40) as well as social security benefits (Article 34(2)), freedom of movement (Article 45) and access to the labour market (Article 15). The Charter also restricts certain rights which are granted to everyone according to “national laws and practices.” This is, for example, the case of Article 34 on social security and social assistance and of Article 35 on healthcare.

## EU Secondary Law

The EU shared competences (e.g., migration management) are governed by the principle of subsidiarity, i.e. the EU can only act if the objectives cannot be achieved at the national level. In order to exercise this competence, since 2000, a set of legislation was adopted that also protects the fundamental rights of migrant women with particular attention to the most vulnerable groups as seen below:

### Racial Equality Directive (2000/43/E.C.)

Under this directive, differentiated treatment is prohibited on the basis of racial or ethnic origin. The scope of the directive includes- but is not limited to -employment, education, social protection, access to goods and services. However, under this directive, there is no prohibition of discrimination on the basis of citizenship or nationality, which may affect the fundamental rights of migrant women.

### Equal Treatment Directive (2006/54/E.C.)

This directive prohibits discrimination on grounds of sex in employment, training, membership of workers', employers', or professional organizations, and some aspects of social security. It also includes equal treatment of women and men in relation to: equal pay; access to employment, vocational training, and promotion; working conditions; occupational social security schemes; and the burden of proof.

### Directive on Equal Access to Goods and Services (2004/113/EC)

This directive sets a framework of minimum rules for ensuring that the EU fundamental principle of equality between women and men is respected in the access to and supply of goods and services. Particularly important for asylum-seeking and migrant women - including undocumented - who are victims of violence is the fact the directive provides for a differentiated treatment between women and men as long such treatment is justified by a legitimate aim. According to the directive, "a legitimate aim may, for example, be the protection of victims of sex-related violence (in cases such as the establishment of single-sex shelters), reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person's home)" .

### Qualification Directive (2011/95/EU)

This directive is of great importance for asylum-seeking women, particularly those entitled to subsidiary protection. Its purpose is to lay down minimum stan-

dards and approximation of the national laws of the MS of the EU for the qualification of third-country nationals or stateless persons as refugees, or as persons who otherwise need international protection, and the content of the protection granted.

A significant example in point is that, even though the directive refers to national legislation, the details of the benefits of social assistance and healthcare for beneficiaries of subsidiary protection status, it imposes an obligation on the member states to provide at least minimum income support, assistance in case of illness, pregnancy and parental assistance, in so far as they are granted to the nationals of the state concerned under national legislation.

Rights guaranteed under the directive for the beneficiaries of the refugee or subsidiary protection status include, among others, an adequate standard of living; equal access to the education system for minors; equal access to the higher education system; and recognition of proof of formal education for adults; equal access to employment and all vocational training and employment-related education and activities; equal access to accommodation, as well as social welfare benefits.

### Returns Directive (2008/115/E.C.)

This directive is another important piece of legislation for the protection of UMW who are in a return procedure. The directive establishes common standards for the return of third-country nationals staying irregularly in the territory of EU member states, and provides for minimum safeguards pending return.

The directive aims to guarantee in the return procedure the respect for fundamental rights of undocumented migrants, as enshrined in international and regional instruments, in particular the CFR, as well as national laws.

These rights and entitlements mainly incorporated in Art.14 of the directive are (inter alia) the right to family unity; emergency healthcare and essential treatment of the illnesses; access to basic education for the minors, and consideration of special needs of

vulnerable individuals. Moreover, Art.17 provides that detention measures of children within the return procedure should be a “measure of last resort and for the shortest appropriate period of time”.

Furthermore, the directive, in Art.13, guarantees effective remedy to appeal against or seek review of decisions related to return, as well as the right to obtain legal advice, representation, and, where necessary, linguistic assistance.

It must be noted that in September 2018 the European Commission presented a proposal to recast the directive that have not been completed yet.

### **Directive on the residence permit for victims of trafficking (2004/81/E.C.)**

This directive specifically addresses third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration. The directive entitles victims who cooperate with the competent authorities to a temporary residence permit which is renewable. Access to treatment, including emergency medication and psychological assistance and free legal assistance, are guaranteed under the directive before the issue of a residence permit.

Within the period of validity of the residence permit, the MS concerned is under the obligation to ensure certain rights for the recipient: among others are access to the education system, labour market, vocational training, as well as access to specific schemes and programs for social integration. Access to treatment, as highlighted above, is *a fortiori* guaranteed during the period of validity of the residence permit.

With respect to victims of human trafficking who are minors, MS are obliged to always take due account of the child’s best interest during the procedure and to ensure that the procedure is in accordance with the age and maturity of the child. It also guarantees the rights of minor victims to equal access to the education system of the MS concerned as nationals.

### **Anti - Trafficking Directive (2011/36/EU)**

This directive aims at preventing and combating trafficking in human beings and protecting its victims’ rights through criminal proceedings. The rights guaranteed under this directive are access to legal counselling and legal representation, access to specific treatment aimed at preventing secondary victimisation, and access to existing schemes of compensation for victims of violent crimes of intent.

It also recognises the ‘gender-specific’ phenomenon of human trafficking and different purposes of trafficking of men and women, and acknowledges that assistance and support measure should be also ‘gender-specific’; hence, for example, sex and pregnancy are recognised among the vulnerability factors giving rise to an intensified criminal punishment for the perpetrators.

### **Victims Rights Directive (2012/29/EU)**

This directive establishes minimum standards on the rights, support and protection of victims of crime. It obliges the member states to ensure that all crime victims are treated with respect, informed about their rights and case in a way they understand, and protected during proceedings. The directive specifies that support must include individual assessments for all victims and identify those with special needs, and it mentions the victims of GBV, stating in particular that “women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence”. However, overall, the directive is very general in its provisions on GBV and it does not sufficiently regulate the support and protection of female victims. Nonetheless, for undocumented women of importance is the fact that this directive specifies that “Member States should take the necessary measures to ensure that the rights set out in this Directive are not made conditional on the victim’s residence status in their territory or on the victim’s citizenship or nationality”.

## Concluding Remarks

The European Union has a number legal instruments designed to protect, uphold and promote the fundamental rights of all people on its territory, regardless of their sex, ethnicity and residency status. The Union has also adopted specific instruments to ensure equality between women and men, and non-discrimination on the basis of sex, race, ethnic or social origin. Currently, a proposal for a directive of the European Parliament and of the Council on combating violence against women and domestic violence, published by the European Commission on 08.03.2022, presents another opportunity for the European Union to enforce the fundamental rights of all women on its territory, without discrimination as to their legal and socio-economic status. While addressing discrimination against women in irregular situations may be considered a challenging area from the perspective of EU competences, fulfilling undocumented migrant women's fundamental rights remains an obligation of the member states, both under European Union and international law. This includes fulfilling undocumented women's rights to dignity, life and integrity, freedom from torture, degrading treatment, slavery and forced labor, respect for private life, equality before the law, and the right to an effective remedy.

In relation to undocumented women and associated risk-groups, efforts are yet to be made by the European institutions, with regards to both including expertise on intersecting violence faced by migrant women and girls in new legislation and to monitoring pre-existing relevant Union law.

## Key Recommendations

The EU must undertake measures to:

- Monitor the full compliance of member states with EU law effectively; in particular with directives and regulations that directly concern and protect undocumented migrant women and associated risk-groups;
- Use infringement procedures against member states in cases of failure to properly integrate EU law protecting undocumented migrant women and associated risk-groups in the national legal framework;
- Use its shared competence to legislate in the area of freedom, security, and justice, under Article 4 of the TFEU and Article 8 of the TFEU which provides that "*the Union shall aim to eliminate inequalities, and to promote equality, between men and women.*", and to adopt measures in this regard to specifically protect undocumented migrant women;
- Use shared competence in the area of freedom, security and justice and, pursuant to Article 83 of the TFEU, legislate on setting minimum rules and sanctions on the crimes of sexual exploitation of women, and to criminalise all parties committing such crimes, including persons directly sexually exploiting undocumented migrant women and those profiting from such exploitation; such legislation must ensure the minimum standards of protection and support for all sexually exploited, including undocumented women;
- Use shared competence on labour rights pursuant to Article 153 of the TFEU to legislate on setting minimum requirements for working and employment conditions, providing the legal ground for adopting measures to protect employed undocumented migrant women;
- Exercise EU shared competence pursuant to Article 79 of the TFEU regarding immigration policies and the scope of competences broadly worded in Article 79.



REUTERS/Arnd Wiegmann

## 1.2. THE COUNCIL OF EUROPE



The member states of the Council of Europe are under the obligation to respect and protect the human rights of everyone residing in their territory. These rights are enshrined in two main documents, with a distinction among civil and political rights on the one hand, and social and economic rights on the other hand.

## Civil and Political Rights

Under the European Convention on Human Rights, member states are obligated to respect and protect fundamental rights (of a civil and political nature) of everyone, regardless of their nationality and legal status. Notably, the ECtHR, in *Amuur v. France*, held that States have an “undeniable sovereign right to control aliens’ entry into [...] their territory”. This decision however emphasises that States must exercise this right in line with the provisions of the ECHR. Hence, a range of rights protected under the ECHR protects the UMW as well, e.g., the right to life (Art.2), the right not to be subject to torture or inhuman and degrading treatment (Art.3), the right to legal aid and fair trial (Art.6), and the right to respect for family life (Art.8). It must be noted that the most relevant case law of the ECtHR with respect to immigration concentrates mainly on the right to respect for family life and the right not to be subject to torture or inhuman and degrading treatment and only a few examples are available that specifically address migrant women.

In *Mahmudi and others v. Greece*, the landmark case of the ECtHR with respect to migrant women concerning the detention of an Afghan family - including a woman who was eight months pregnant and four minors- in the Pagani detention centre on the island of Lesbos, the Court held that, in spite of the applicant’s special status, no specific supervision was provided. Hence, the Court found the violation of Art.s 3, 5 and 13 of the ECHR due to the special vulnerability of the applicant.

In *Aden Ahmed v. Malta* (2013), where the case concerned a Somali national, Ms. Ahmed, and her detention in Malta after entering the country irregularly, by boat, to seek asylum in February 2009, the Court found the violation of Art.s 3 and 5 based on immigration detention conditions and her particular vulnerability due to her fragile health and personal emotional circumstances.

A highly important case with regard to UMW is *NV v. the United Kingdom* which relates to a Ugandan female national who was admitted to hospital days after she arrived in the UK as she was seriously ill and suffering from AIDS-related illnesses. Her application for asylum was unsuccessful. She claimed that she would be subjected to inhuman or degrading treatment if made to return to Uganda because she would not be able to get the necessary medical treatment there. However, the Court found no violation of Art.3 holding that the Convention did not place an obligation on states parties to account for disparities in medical treatment in states not parties to the Convention by providing free and unlimited medical treatment to all aliens without a right to stay within their jurisdiction. This decision of the Court has made it consistent with the Convention, that individuals with serious health problems be deported in case of lack of residence rights, notwithstanding the disparities in the health system of their country of origin. Hence, health issues have not been considered a case of vulnerability granting rights to undocumented migrants.

## Social and Economic Rights

Under the European Social Charter (ESC), specific rights are guaranteed for migrants in irregular situations. This includes the right to health (Art.11) and the right to medical assistance (Art.14). There is also an obligation for the MS to prevent epidemics and pandemics under which the MS may manage the entry of the asylum-seekers in a safe manner which may affect their rights to some extent. But in any case, the right to seek international protection and the principle of non-refoulement and necessary healthcare must be considered.

## The Istanbul Convention

Council of Europe Convention on preventing and combating violence against women and domestic violence is the main human rights treaty in Europe providing legal standards aiming to ensure women's fundamental rights to a life free from discrimination and violence through prevention, protection, prosecution of perpetrators and coordination of policies. To date, 34 member states of the Council of Europe have ratified the convention, as well as the EU. It is also possible for non-member states of the Council of Europe to sign and ratify the convention.

Under the Istanbul Convention, state parties are bound to protect women from (*inter alia*) psychological and physical violence, sexual violence including rape, forced marriage, female genital mutilation, forced abortion, forced sterilisation, and sexual harassment. The Convention ensures that all victims of any acts of violence enjoy the right to receive information on their rights, available support and legal measures, access services facilitating their recovery from violence, shelter, assistance in complaints, and access to telephone helplines and specialist support services.

It is noteworthy for the purpose of our study that the Istanbul Convention, having a victim-centered approach, expressly provides for the obligation of the state parties to the non-discriminatory application of the Convention. Hence, the protection and support provided under the Istanbul Convention must be available to any woman without discrimination, including with respect to her age, disability, marital status, association with a national minority, migrant or refugee status.

Moreover, with special regard to migration and asylum, the Convention ensures that victims whose residence status depends on that of the spouse or partner as recognised by the internal law, in the event of the dissolution of a marriage or relationship, are granted upon application and in the event of particularly difficult circumstances,

an autonomous residence permit, irrespective of the duration of the marriage or relationship, which may be renewable under specific circumstances. In addition to this, under the provisions of the convention, victims of forced marriage brought into another country for the purpose of the marriage and who, as a result, have lost their residence status in the country where they habitually reside, may regain this status.

The Convention, apart from the obligation to provide for a gender-sensitive asylum procedure, also bind state parties to take the necessary legislative or other measures to ensure that violence against women may be recognised as a form of persecution within the meaning of the 1951 Convention relating to the Status of Refugees.

Regretfully, many states, including some covered in this report, have introduced reservations on the articles that provide specific protection to migrant women victims of violence, including undocumented women. This includes Article 59 of the convention that provides for an independent legal status for the victims of domestic violence, which was subject to many reservations that remain in force.



## **Recommendation of the Committee of Ministers to Member States on protecting the rights of migrant, refugee and asylum-seeking women and girls**

The Council of Europe, in May 2022, adopted a new recommendation on the rights of migrant, refugee and asylum-seeking women and girls to provide protection for their rights while considering their specific characteristics and needs. The recommendation, taking into account the challenges faced by migrant women and girls at all stages of migration, provides the Member State with recommendations on protecting migrant, refugee and asylum-seeking women and girls' human rights in particular, in the areas of health, education, employment, access to justice, and social services. The new recommendation, highlighting the multiple and intersecting discriminations experienced by migrant women and girls, encourages the Member States to take measures to ensure undocumented migrant women and girls' access to fundamental rights, and to ensure undocumented victims of violence against women, including trafficking and sexual exploitation, are able to report crime(s) against them without fear of removal and expulsion. Furthermore, having regard to the Istanbul Convention and the Convention in Action Against Trafficking in Human Beings, the new recommendation addresses the rights and entitlements of the victims of all forms of violence against women including human trafficking. It also recommends the Member State ensure that public policies fully consider the integration and empowerment of migrant, refugee and asylum-seeking women through awareness-raising and access to information, including digital services and connections.







## 2. COUNTRY-SPECIFIC PROTECTION

In addition to what was discussed earlier, each European state provides specific protection for migrants' rights, particularly UMW's rights. The rights and entitlements for undocumented migrants under national fundamental rights systems range from the provision of basic human rights (e.g., access to food, shelter, healthcare and education) to specific measures strengthening their legal status, such as automatic regularisation of undocumented migrants during the Covid-19 pandemic. Below, we will explore country-specific legislation in selected European jurisdictions under which certain rights are recognised for UMW.

## 2.1. BELGIAN LAW



The Belgian Constitution, in line with international treaties which the Belgian State has ratified, as well as domestic legislation, establishes the legal framework for the protection of UMW's rights. Apart from being bound by EU law, Belgium is a signatory to most international and regional human rights treaties, e.g., UN core treaties on human rights, CEDAW, Refugee Convention, Istanbul Convention and the European Convention on Human Rights. The provisions of these treaties are directly applicable in Belgium, with no need for transposition to national legislation.



### Domestic Legal Framework: General Protection for UMW

Even though no specific provision or piece of legislation under the Belgian system addresses UMW, the Belgian Constitution ensures certain fundamental rights for everyone. An important example in point is Art.23 of the Belgian Constitution which provides that "everyone has the right to an existence worthy of human dignity." On this basis, an undocumented migrant woman is entitled to

access to education (for minors), access to urgent medical care, including abortion and birth control medication, and access to psychological, social and legal assistance. More specifically, Art.57 §2 of the Organic Law on Public Social Welfare Centres gives the right to UMW to enjoy free urgent medical care provided in social welfare centres in cases where they cannot afford it.

## Protection for Groups at Risk

Under Art.75 of the Aliens act, entering and/or residing in the country undocumented and therefore illegally is a crime and can be punished with a prison sentence of between eight days and three months, and a fine of up to 200 EUR. Hence, UMW can be viewed as a vulnerable group that receives the weakest protection of fundamental rights. They struggle with a lack of access to information on their rights and access to shelter in case of male violence occurring within a household due to their fear of being deported. Moreover, as discussed earlier, specific groups of migrants are at a high risk of being pushed into undocumented status.

### ► Domestic and Care Workers

Although since the ratification of the ILO Convention no.189 on Domestic workers by Belgium in 2015, domestic workers' situation improved significantly, there still remains a differentiated system of protection for domestic workers in terms of employment conditions and access to social security, depending on the type of work they perform and the type of employment contract. As a general rule, every domestic worker who performs manual domestic work in the context of an employment contract must be registered at the National Social Security Office irrespective of the number of working hours. Only certain non-manual intellectual activities (so-called "occasional activities") are excluded from social security as long as the employee is not exercising these activities professionally or regularly, and as long as they do not exceed the limit of 8 hours per week.

Under Belgian law, a residence permit is not always accompanied by a work permit; hence, there are two types of illegal employment relationships with regard to migrant workers; **(a)** documented migrant workers with no work permit and **(b)** undocumented migrants with no residence and work permit. Nevertheless, every migrant worker enjoys certain fundamental labour rights, e.g., the right to minimum wage

and favourable working conditions, a certain number of holidays and vacations, protection of property, to be heard in employment disputes, etc. Moreover, any sanction due to an illegal employment relationship is imposed on the employer, and the employee cannot be sentenced. The law of 11th February 2013 provides for sanctions and measures against employers of irregularly-staying third-country nationals and imposes an obligation on the employer of undocumented migrants to remunerate them an equivalent amount to what is paid to a documented employee.

Nonetheless, it must be noted that undocumented migrant workers in Belgium are not entitled to unemployment benefits. Moreover, upon the termination of the employment relationship, the residence rights of migrant workers can end if these are work-dependent, which puts migrant workers at serious risk of becoming undocumented.

With respect to discrimination on the basis of sex, in addition to Art.11 Belgian Constitution, the law against discrimination between women and men (2007, amended in 2018), as well as the law on equal treatment for men and women with regard to working conditions, access to employment and promotion opportunities (1999), prohibits sex discrimination in several areas including work. Moreover, anyone who has been the victim of discrimination on the basis of sex, including (undocumented) migrant women workers, is entitled to receive free legal assistance from the Institute for the Equality of Women and Men. However, the GREVIO observes the lack of policies addressing intersectional discrimination against women based on different grounds, e.g., national or social origin, migrant or refugee status. Hence, it has repeatedly and strongly encouraged the Belgian authorities to continue promoting an approach incorporating multiple discrimination in its guidelines. Moreover, no specific provision protects undocumented domestic workers against discrimination on the basis of sex.

## ► Asylum-seeking Women

Under the Belgian Law, asylum-seekers waiting for their application must enjoy a wide range of rights, including urgent medical care, food, shelter, daily allowance, legal assistance and translation services.

Under the Alien Act, specific forms of gender-based violence constitute prosecution and thus are grounds for international protection in accordance with Refugee Convention 1951: For example, female genital mutilation, forced marriage, honor-related violence, rape, sexual exploitation forced prostitution and persecution as a result of sexual orientation are the so-called gender-specific persecutions that are recognised under Belgian law for the purpose of asylum. Moreover, asylum-seeking women who are victims of domestic violence are entitled to be heard individually in the context of the application process. However, GREVIO reports have shown that their rights are not sufficiently protected, or they are mostly unaware of this right in practice.

All the decisions made by immigration authorities can be challenged before the Council for Alien Law Litigation, which can also decide on the substance of the case.

## ► Victims of trafficking, prostitution and other forms of sexual exploitation

With respect to victims of human trafficking, chapter IV of the Aliens Act provides a legal basis for UMW to obtain residency rights in exchange for cooperating with the authorities in order to prosecute those responsible for human trafficking. In this case, the victim must enjoy to a great extent the same fundamental rights and entitlements as Belgian citizens, as well as access to particular assistance, including psycho-social, medical and legal assistance, and access to language courses and education.

Furthermore, under Art.36 of the law of 17 January 2007 on the reception of asylum-seekers and certain other categories of foreign nationals, asylum-seekers of vulnerable status and with special needs, e.g., preg-

nant women, victims of human trafficking, victims of rape or other serious forms of psychological, physical or sexual violence are entitled to specific shelters.

Belgium has legalised the system of prostitution in 1995. Since March 2022, the amendments to Articles 380 to 382 of its Penal Code further decriminalised pimping and brothel owning, except in cases of "abnormally" high profits which the law fails to define. Other amendments include the non-criminalisation of brothel owners and buyers in cases of sexual exploitation of minors between 16 and 18 years old if they claim they were not aware the child's age. Under international law, any person under the age of 18 in the sex trade is a victim of child sexual exploitation, child sexual abuse and/or trafficking in children for the purposes of sexual exploitation. Thus, these amendments to the Belgian law constitute a major setback in the protection of children, in particular of girls, from sexual abuse in prostitution. Furthermore, these amendments also enable the advertising of prostitution on the internet.

## ► Victims of Male violence in the home

Under the Belgian Alien Act, the authorities cannot revoke an immigrant's residency rights if the victim is no longer married or in legal partnership with the abuser who is also an immigrant and who is the reason for the victim's legal documented stay in Belgium. However, despite the fact that Belgium is a signatory to the Istanbul Convention, there is no automatic right to independent legal status for UMW who are victims of domestic abuse, nor does the law provide a possibility for UMW victims of domestic violence to make an application "independent" from their marriage or partnership with the abuser, nor is there any obligation not to deport a victim of male violence following the end of her residence permit.

## Covid-specific Measures

Within the context of measures to combat Covid-19 pandemics, the Belgian government adopted measures in refugee centres, e.g., the distribution of protective medical equipment, mandatory testing upon arrival in shelters, as well as the extension of ongoing applications for asylum, subsidiary protection, and residence rights, even though a positive decision in relation to the extension of residency was not guaranteed in Belgium. UMWs could also have access to food and nutrition schemes and COVID-19-related emergency health services free of charge. Nevertheless, except for general health and safety measures, no additional protection was provided for the vulnerable groups of migrants, such as domestic migrant workers or women exploited in prostitution.

## Concluding Remarks

An UMW under the Belgian legal system enjoys some fundamental rights that are protected for everyone residing in the Belgian territory; including (*inter alia*) access to education (for minors), access to urgent medical care- including abortion and birth control medication, access to psychological, social and legal assistance.

However, migrant women with a vulnerable status are not protected from being pushed into undocumented status. The plethora of laws regulating domestic work and workers' access to the social security system have, in general, a negative effect in terms of rights of workers and their awareness of these rights. Women migrant workers suffer even more due to a lack of protection against intersectional discrimination. Moreover, due to non-compliance with the provisions of the Istanbul Convention, migrant victims of male violence in the home- although entitled to access to shelter and legal assistance- are more likely to lose their status if their relationship with the family member on whom their status depends ends.

Within the context of the COVID-19 crisis, the Belgian government (apart from the distribution of sanitation equipment and provision of emergency healthcare for everyone, including UMW) did not undertake any socio-economic measures to protect risk-groups such as women in prostitution and domestic workers.

## Key Recommendations

The Belgian government must comply with its obligations under international and European human rights law to ensure that everyone, including UMW enjoys fundamental rights enshrined for everyone in the treaties to which Belgium is a signatory. It must (*inter alia*) undertake legislative and other measures, to:

- ensure the rights of victims of male violence in the home to independent legal status in accordance with Article 59 of the Istanbul Convention;
- prohibit multiple discrimination resulting from the intersection of different grounds of discrimination including sex, national or social origin, and migrant or refugee status which affect migrant women disproportionately; and
- adopt the Equality Model, guaranteeing support and exit programs for women in prostitution, and criminalizing all forms of pimping and buying of sexual acts.

## 2.2. FRENCH LAW ■ ■

A range of fundamental rights of UMW is guaranteed and protected in France under international and regional treaties to which the French State is a signatory, e.g., International Bill of Rights, CEDAW, ECHR, the Istanbul Convention, Council of Europe Convention on Action against Trafficking in Human Beings and Conventions protecting the right to education of UMW's children, as well as a number of EU directives. In addition to these, the national system of fundamental rights ensures the protection of certain rights for UMW, which will be further discussed below.

### Domestic Legal Framework: General Protection for UMW

Under the French legal system, medical reasons constitute a ground for temporary legal status and residency rights in France, i.e., a UMW suffering from a sickness that is in need of medical treatment will be granted temporary legal status for her and her family members in addition to the right to work for the duration of residence under the notion of family and private life. No passport or proof of legal entry to France is required for such an application; however, the residence rights that are granted under this notion are temporary and, at best, are valid for a maximum of one year. Hence, the risk of becoming undocumented for these right holders after the expiration of their residence rights cannot be overlooked.

The right to free medical care and exemption from payment for certain medication is guaranteed under AME and CMU for UMW, including asylum-seekers. Moreover, free maternal and child health services and consultations are offered to undocumented pregnant women, parents, and children under six years, and homeless pregnant women. Homeless mothers with their children are entitled to shelter, regardless of whether they have legal status or not. The right to a postal or administrative domicile is also guaranteed under French law to all migrants, whether EU citizens or not, and even when they are in an undocumented situation in France. However, in practice, lack of space in emergency shelters leads to homelessness of migrant

women and their children, especially when awaiting a decision on their refugee status. The right to a postal domicile can backfire, as not being able to give an address can constitute an obstacle for UMW in their administrative procedures.

With respect to the right to access to justice according to Article 15-3 of the French Code of Criminal Procedure, the police and gendarmerie services are obliged to receive complaints submitted by victims of criminal offences, and no condition concerning their legal status in the country is specified in this regard. Consequently, the law allows any UMW who is the victim of a criminal offense, e.g., assault, sexual assault, rape, domestic violence, etc., to file a complaint with the police regardless of her legal situation as a migrant. In practice, testings by migrant rights organisations such as Cimade have shown many occurrences of the police discouraging UMW victims of violence to file a complaint and threatening them with expulsion.

Concerning the right to work and social benefits: in principle, a UMW has no right to work in France unless the employer applies for it, justifying that no other competent jobseeker is available for the position. In this case, the UMW regularisation is not only subordinated to the employer's demand but also to her number of years of residence in France (three years minimum are required). Hence, in general, access to employment is extremely low for



a UMW unless seeking jobs categorised as “under pressure” for which the above mentioned justification is not a requirement. It is noteworthy, however, that under the French labour code, while hiring a migrant with no work permit is expressly prohibited, the labour rights of such an employee in breach of this prohibition are fully protected, e.g., working hours, days off and holidays, compliance with health and safety rules, the right to a fair wage, etc. Nonetheless, practical barriers such as the proof of subordinate relationship without material evidence (such as a payslip) usually hinder the exercise of these rights in reality.

Generally speaking, an UMW under French law is not entitled to social security schemes since regularity of residence is a condition of receipt of social benefits. Hence, only in limited areas, may a UMW benefit from social benefits irrespective of her residence status. These areas include compensations relating to accidents at work and occupational diseases; child welfare benefits and social assistance in accommodation and social rehabilitation centres; medical assistance in public hospital services and home medical assistance sub-

ject to an uninterrupted residence in metropolitan France for at least three years; and social allowances for the elderly and the infirm, provided they have resided in France continuously for at least 15 years before the age of 70. However, even these limited rights mostly remain unexercised due to the fear of being identified and detained.

The right to education of minors is protected under French law as every child aged three years or older may attend school regardless of his/ her or the parents’ legal status. A residence check is only authorised for those above the majority age (18 years); hence an undocumented migrant girl is entitled to register for school as well as vocational training and internships within the context of her studies without a residence card check.

With respect to banking services: although under the French financial code, the choice of opening a bank account is not subject to the validity and regularity of the client’s legal status, human rights NGOs have identified that some banks still refuse to open an account for undocumented migrants, which is inconsistent with the French Constitution and the French monetary and financial code.

## Protection for Groups at Risk

The French legal system, in some cases, provides protection for UMW or vulnerable groups of migrant women who are at risk of being pushed into an undocumented status.

### ► Domestic and Care Workers

Under French law, domestic and care work falls within the scope of the universal service employment voucher (CESU), a scheme that is designed to prevent undeclared work, to permit the regularization of undocumented workers, and to entitle workers to specific labour rights e.g. minimum wage and access to social security services such as health insurance, pension and -in some cases- unemployment benefit.

As a general rule, migrant domestic and care workers can apply for legal status under certain conditions such as residency of more than five years, including two years of work history.

In principle, migrant workers wishing to receive unemployment benefits must hold a residence card or permit authenticating their legal status. Hence, an undocumented domestic worker, in principle, is not eligible for an unemployment benefit.

The termination of an employment relationship (except for when the residence permit is based on any other basis than employment) may result in the irregularity of the migrant worker. Even though, in any case, the dismissed worker is entitled to the right to a termination indemnity, if the residence permit is on the basis of employment, after the termination of the working relationship, the migrant woman only has 30 days to leave the country, or she will be pushed into an undocumented situation/ status.

### ► Victims of Human Trafficking, Prostitution, and Other Forms of Sexual Exploitation

In accordance with the EU Anti Trafficking Directive mentioned above, the French law grants a temporary residence permit for the victims of human trafficking who cooperate with the authorities to prosecute those

responsible for the trafficking. These residence rights are renewable for the duration of the criminal proceeding. However, the issuing of a 10-year residence card is conditioned on the conviction of those standing accused. If the proceeding does not lead to a conviction, the right to a legal status may still be maintained by the authorities by renewing the victim's temporary residence permit or the issuance of a residence permit for exceptional or humanitarian reasons. However, the issuance of such residence permits is subject to a proven willingness to cooperate with the authority, reintegrate into society, and lose all ties with the trafficking network, group, family, or person who exploited the victim.

Under French law, women in prostitution are not criminalised. Protection and exit programs are available to those who want them. These are two-year programs, renewable every 6 months by a local committee in charge of the combating trafficking in human beings, pimping and prostitution. They include a temporary residence permit for a period of six months, renewable for a maximum duration of two years; a monthly allowance; assistance in accessing social housing or a place in a hostel, medical support (physical and mental health), and socio-professional support such as French courses. After she completes the two years of the program, the woman is delivered a residence permit in accordance with her personal situation.

On the other hand, buying sexual acts and pimping are considered unlawful. Buyers can be subjected to fines and mandatory awareness-raising courses, and pimping is a crime that can result in up to seven years of imprisonment and a fine of €150,000.

Within the context of the Covid-19 crisis, no specific protections and measures to address women in prostitution were taken in France. Women in prostitution faced catastrophic circumstances, including loss of housing and the suspension of exit programs and support services. Some of them, exploited in the streets by pimps, were arrested for violation of the lockdowns and had to face fines as well as indictments.

### ► Asylum-seeking Women

Asylum-seeking women, while waiting for their application to be processed, are legally entitled to a wide range of fundamental rights, including shelter, access to healthcare services, and education for their children. After six months, the asylum-seeker can apply for a temporary work permit.

Under French law, with regard to the recognised forms of persecution, sex and sexual orientation are supposed to be taken into consideration when determining affiliation to a certain social group.

Under this notion of certain social groups, asylum-seeking women who are subject to specific forms of gender-related persecution may be entitled to refugee status. An important example in point is the risk of Female Genital Mutilation (FGM), which under certain conditions constitute persecution within the meaning of the Geneva convention. In addition to this, rape or sexual violence, forced marriage, exposure to so-called "honor crimes", human trafficking and sexual exploitation

may also be considered persecution, leading to legal status in case of recurrence or systematism.

In addition to the above, in the event of a rejection of a refugee application, an UMW might be regularised after five years of living in France, and a working history of eight months, or by having a child who has been in French schools for three years.

### ► Victims of Male Violence in the Home

Under French law, an independent legal status (under the notion of family and private life) may be granted, through a protection order from the court, to a migrant woman whose legal status is dependent on her abusive partner or family member, even if the marriage is ended. Such a protection order can also be requested when an adult is threatened with forced marriage.

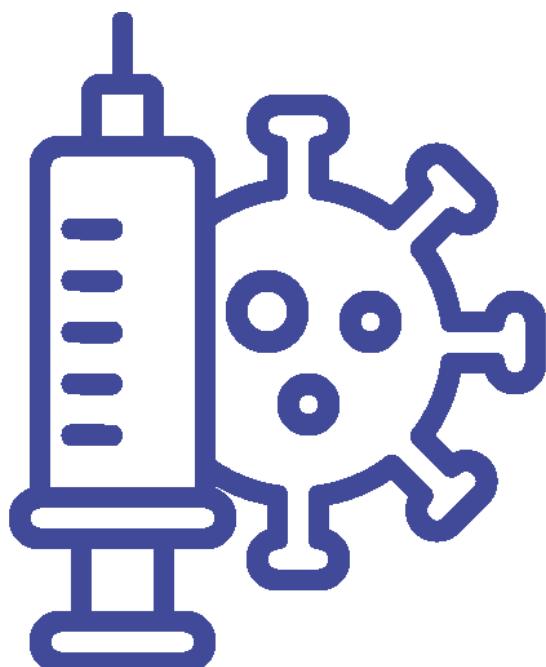
However, there is no obligation on the authorities or the social workers to inform women of their rights in this regard. Moreover, domestic violence is not considered one of the grounds for non-enforcement of the expulsion order.

## Covid-specific Measures

Since the outbreak of Covid-19, the French government has expanded the health insurance coverage to the Covid-19 PCR test, i.e., undocumented migrants, like regular migrants, are entitled to benefit from free Covid-19 screening as part of their health insurance.

Moreover, to protect refugees and asylum seekers, the government extended the validity of legal status or application receipts expiring within the period of 16th March and 15th June 2020 up to 180 days. However, those whose documents expired before this period could not benefit from this measures and became undocumented.

The French government took no specific measure for UMW, e.g., financial assistance, automatic regularization or facilitation to obtain legal status during the crisis.



## Concluding Remarks

To conclude, the French fundamental rights system, in addition to the implementation of core international human rights conventions and regional human rights instruments, e.g., CE-DAW, the Istanbul Convention, the Council of Europe Convention on Action against Trafficking in Human Beings, provides the UMW with protection of their basic human rights such as the right to access to healthcare, maternal and child protection, shelter and postal or administrative domicile, access to justice, some labour rights and social benefits, education for minors, banking services and marriage.

It also provides protection for risk-groups by granting temporary residence permits for severely ill migrants and victims of human trafficking and sexual exploitation, in exchange for cooperation with French authorities in apprehending those responsible. French law also offers an independent legal status to victims of certain forms of GBV under specific circumstances. However, in practice, several procedural and administrative barriers hinder the actual exercise of the right to a residence on the basis of GBV; hence the risk of being pushed into an undocumented situation remains persistent for the victims of domestic and sexual violence.

## Key Recommendations

The French government must comply with its obligations under international and European human rights law, ensuring that everyone is entitled to fundamental rights. The French government must (inter alia) take necessary legislative or other measures to ensure that:

- the right to access healthcare as a basic human right is not limited and hampered by extensive requirements of proof of residency and a history of financial contribution;
- undocumented victims of male violence in the home enjoy a right to be informed of their rights and entitlements arising from the victim's status; and
- victims of male violence in the home are entitled to a suspension of an expulsion order in order to be able to apply for independent status in accordance with Article 59 of the Istanbul Convention.

## 2.3. GERMAN LAW



Similar to most EU countries, within the German jurisdiction, an UMW enjoys certain rights and protection in accordance with international and regional human rights conventions to which Germany is a state party. In addition to core international human rights instruments, e.g., CEDAW, Germany is also bound by the Istanbul Convention and Council of Europe's Human Trafficking Convention.

Among national legislation, no specific provision addresses the fundamental rights of UMW; however, anyone within the territory of Germany enjoys a set of fundamental rights according to the German Constitution, which also includes UMW.

### Domestic Legal Framework: General Protection for UMW

As a matter of principle, under German law, only regularised migrants who possess residence permits are entitled to most rights protected under German law. However, as a matter of principle, undocumented migrants may also enjoy basic human rights ensured in the German Constitution, including the right to medical treatment, some labourrights such as payment (although only protected as a civil debt), education for minors, access to justice and effective legal remediation.

The right to medical treatment is protected under the German Constitution for everyone residing within the territory of Germany. However, persons without health insurance must apply to the Social Welfare Office (Sozialamt) for medical treatment. If the Social Welfare Office becomes aware of the illegal status of the migrant, it is obliged to report this to the Immigration Authority. The only exception occurs when an emergency treatment with a hospital or a doctor is arranged and where the so-called "extended protection of secrecy" applies in order to protect the privacy of the migrant women. This obligation also applies within the context of the right to abortion, with a distinction between abortion due to medical reasons, which is considered an emergency situation; hence the extended protection of secrecy applies. Non-medical abortions may lead to such a report and may entail legal consequences for UMW.

With respect to labour rights, under German law, a residence permit is not always accompanied by a work permit. In fact, the "temporary toleration permit"

(Duldung) does not entitle the possessor to a work permit. In principle, only those possessing a valid permit to work in Germany are protected by labour law. Although migrants with no work permit may be subject to up to 5,000 Euro fines in case of employment, once the employment contract is concluded, the employee's right to be paid is protected under civil law. Moreover, the employee's right to medical treatment of work-related injuries is also preserved.

The right to education is protected for minors under German law regardless of their residence status; i.e., depending on the state of residence, every child below the age of majority has the right to go to school for nine or ten years. In addition to this, undocumented migrants- including those with a toleration residence permit-, are under specific conditions and where free places are available,entitled to integration and language courses.

The right to access justice and effective remediation is protected for everyone, including UMW in Germany. In other words, all decisions made by public authorities may be subject to judicial review and appeal, and the suspensive effect of this right means the administrative act remains without effect until a final decision on the substance of the matter has been issued. However, despite the general scope of this right, specific decisions made by migration authorities, including the deportation or removal warrant, cannot be subject to appeal; hence no suspension of the decision could be effected as a result of legal proceedings by UMW.

## Protection for Groups at Risk

In some cases, although with some deviation from its obligations under international law and EU law, the German law provides protection for migrant women at risk of being pushed into an undocumented status.

### ► Domestic and Care Workers

German law does not have a specific definition of domestic work nor specific legislation for domestic workers, but the general labour law, as well as ILO conventions regarding domestic work, apply. Broadly speaking, for the matters of social security, the general scheme of social security applies, which covers health care, sickness benefit, unemployment benefit, employment injury benefits, maternity benefits, and old-age benefits, through social insurance institutions. Moreover, under the so-called "mini-jobs" system of Hertz Law of 2003, domestic workers whose yearly income does not exceed 5,400 Euro, can enjoy lower social contributions and tax deductions or exemptions.

Under the German legal system, there is no specific piece of legislation addressing migrant domestic workers, and laws do not provide for the option to get a residence permit based on domestic work; hence, a large number of migrant domestic workers lack legal status. However, as long as foreign domestic workers have work permits, they enjoy the same rights as nationals, including vacations, days off, annual bonus (thirteenth month), weekly rest, extra hours, notice periods, compensation based on seniority, and compensation in case of death of the employee. Undocumented migrant workers thus enjoy some labour rights such as payment, paid sick leave, and paid holidays.

### ► Victims of Human Trafficking, Prostitution, and Other Forms of Sexual Exploitation

Under the German Criminal Code, Human trafficking and sexual exploitation refer to any form of recruitment, transportation, etc., of persons for the purpose of exploitation, and -as of October 2016- the individual forms of exploitation have been con-

sidered a separate criminal offence in the German Criminal Code.

Victims of human trafficking have the right to counseling and support from a specialised counseling center. Counselling must be free, anonymous, and independent of authorities or other state institutions. In addition to this, and similar to other European jurisdictions, victims of human trafficking, in case of cooperation with the public prosecution, will be granted a renewable and extendable residence permit under the German Residence Act of 2007. In any case, the victim will be given a three-month residence permit, during which she can decide whether she is willing to bring legal action or not. Victims of trafficking also enjoy a right to social benefits under the Asylum Seekers Benefits Act, as well as a right to an effective remedy for victims of violent crimes in accordance with the Crime Victims Compensation Act.

Since the adoption of the federal "Prostitution Act" in 2002, prostitution and all related activities like pimping and brothel keeping have been assimilated as economic activities in Germany. In 2017 the law was supplemented by the "Prostitutes' Protection Act" which introduced further regulations on prostitution. Hence, although human trafficking for the purpose of sexual exploitation or prostitution is criminalised under the German criminal code, prostitution continues to be permitted and not recognised as either a violation of fundamental rights or a specific form of violence against women in Germany. In principle, protections afforded under the German labour laws are applicable to any woman engaged in prostitution so long as she has an "employment contract". Additionally, registration is mandatory for any person who is in prostitution. It requires valid ID documents, yearly health counselling (for those between 18-21 y.o. every six months), and registration at a municipal level. Furthermore, the registration needs to be renewed every two years (for those between 18-21 y.o. it is every year).

In practice, only a very small minority of women in prostitution have undertaken such registration and, consequently, the large majority of women in this sector in Germany can neither enjoy the protection of laws provided for sexual exploitation, nor any labour laws protecting workers. Furthermore, it is not clear how the laws protecting women from sex discrimination, sexual or moral harassment, bullying, etc. in the work-place, are enacted in the environment of prostitution. There exists no statutory mechanism or standards outlining support and services for women wishing to exit prostitution. For women without a valid residence and/or work permit in prostitution there are no available means of protection.

### ► Asylum-seeking Women

Considering Germany's special situation concerning political asylum, the German Constitution has recognised the right to political asylum as a fundamental right for individuals. Those who are granted refugee status receive a temporary residence permit that entitles them to social welfare, child benefits, integration allowances, language courses, and other forms of integration assistance.

It is noteworthy that under the German Asylum Act, all asylum-seekers are legally supposed to be provided with information on the process of asylum procedure as well as return opportunities in group discussions prior to filing their application. At the second stage, all asylum-seekers should receive individual asylum counselling. In theory, this should prevent the risk of being pushed into an undocumented situation as a result of disinformation or misinformation.

In case of rejection of the application, a deportation or removal warrant is issued. However, if the return to the country of origin puts the applicant at the risk of violation of the right to life or exposure to torture, inhumane or degrading treatment, according to the ECHR and ECtHR case law, the migration authorities are obliged not to deport the applicant. Moreover, considering Germany's ratification of the Istanbul Convention, the obligation to the gender-sensitive

interpretation of grounds of persecution examining asylum is also applicable to Germany.

### ► Victims of Male Violence in the Home

Victims of male violence in the home are legally protected under German law irrespective of their residence or legal status. Victims are entitled to shelter, counselling and an independent residence permit in case their marriage has been legally established in Germany for at least three years. However, under the German Residence Act, in case of particular hardship pertaining to life-challenges, or the health and freedom of the victim (such as severe physical, sexual, or psychological abuse), the three-years requirement should not apply. The right to a residence permit or toleration order (Duldung) may also arise from several humanitarian grounds under the Residence Acts, for instance, for the victims of specific criminal offences under certain conditions.

However, this is only and exclusively an extension of an existing family residence title, so a large number of other residence situations are not covered. The Federal Government explicitly rejects a residence title for persons affected by violence as defined in Article 59 par. 3 of the Istanbul Convention on the grounds that personal reasons are too vague and that, in principle, the toleration order is only granted in the case of the existence of investigations or criminal proceedings. As a result, women affected by violence including domestic violence, mostly do not have an independent humanitarian residence permit.

The threat of domestic or family violence also constitutes a relevant reason for persecution according to Section 3 of the Asylum Act. In many cases, particularly with regard to women affected by violence from "safe countries of origin" (e.g., the Balkans), it is assumed that the regulatory authorities grant protection in accordance with Section 3(d) of the Asylum Act or an internal possibility of protection in accordance with Section 3(e) of the Asylum Act. This often fails to adequately reflect the real conditions for protection in the countries of origin.

## Covid-specific Measures



In response to the COVID-19 pandemic, the Federal Ministry of the Interior (Bundesinnenministerium) has issued decrees temporarily exempting holders of expiring Schengen visas from the requirement of a residence permit until 30th September 2020. In addition, the decree exempts migrants from the requirement of a residence permit for entry into Germany from another Schengen state and a subsequent stay of up to three days until they travel to another state to which they are allowed entry.

However, the German migration authorities have taken no measure in order to suspend deportation or automatic regularization of undocumented migrants within the context of the Covid-19 crisis; quite the contrary, the Federal Office for Migration and Refugees had restarted the issuance of rejecting asylum decisions after suspending this process before, and resumed the deportation process in July 2020.

## Concluding Remarks

In principle, a UMW enjoys all the fundamental rights protected under the German Constitution except for those reserved for German citizens. These include (*inter alia*) the right to medical treatment, shelter, access to justice and effective remedy, education for minors, and some labour rights, e.g., payment. However, to enjoy some social benefits such as health insurance, a valid residence permit is required. In addition to a special confidentiality provision in the case of non-emergency treatments, this requirement puts UMW in a vulnerable situation. Moreover, as a general principle, undocumented migrants who lack a valid work permit are not protected by the German labour law except for entitlement to their wage as a civil debt and, surprisingly, illegal work may also lead to a fine of up to 5,000 Euro under the German law.

## Key Recommendations

The German state must take necessary legislative and other measures, in accordance with its obligations under international and European human rights law, to ensure that:

- access to healthcare as a basic human right is not limited to emergency treatment for undocumented migrants and is not hampered in other situations by the obligation on treatment staff to report the irregular status of patients, including those accessing sexual and reproductive health services, to the migration authorities;
- the right to independent legal status for victims of male violence in the home, in conformity with Article 59 of the Istanbul Convention, is granted irrespective of the length of the marriage and the existence of a prior investigation or criminal proceeding; and the federal “Prostitutes’ Protection Act” is reviewed and/or repealed with new legislation
- introduced that recognises the entitlement of persons exploited in prostitution - including UMW - to protection, support and legal status, and criminalises buyers of sexual acts and all third parties profiting from exploitation of prostitution.

## 2.4. ITALIAN LAW

*"An undocumented Senegalese client of mine slept two nights under a bridge with her 8-month-old daughter during the pandemic because all the reception centers denied her entry as she was undocumented. If you are a woman, poor, black and migrant you have to fight to survive."*

Chiara Parolin, lawyer, Italy

Under Art.s 2 and 10 of the Italian Constitution, all foreign citizens, including undocumented migrants, benefit from the protection of fundamental human rights provided for by the national regulations and international conventions in force, e.g., the international bill of rights, CEDAW, the ECHR, the Istanbul Convention and principles of international law as globally recognised . Fundamental rights and freedoms which are envisaged in the Italian Constitution and specific pieces of domestic legislation are mostly guaranteed

### Domestic Legal Framework: General Protection for UMW

Generally speaking, the Italian Constitution and the Legislative Decree n. 286/1998 (the "Immigration Act"), which is the most relevant piece of legislation for the purpose of this report, lays down the framework for the protection of the fundamental rights of migrants, including UMW. The consolidated Immigration Act establishes rules concerning the employment of migrants, families and for minors' protection, as well as measures for the protection of health, social integration and participation in public life. Under Italian law, an UMW may enjoy (*inter alia*) the right to health, shelter, access to justice, effective legal protection, and education for minors.

No distinction is allowed based on legal and residence status, particularly in accessing healthcare and compulsory schooling. According to the Immigration Act, outpatient, emergency and essential care are guaranteed to undocumented migrants. This includes, among other things, pregnancy and maternity care, minors' healthcare, and vaccinations according to regulations and within the scope of interventions of the collective prevention campaigns as authorised by the regions. However, the law does not specify what qualifies as essential care and each hospital interprets the law with great discretion, which leads to discre-

pancies in UMW's access to health. Furthermore, both in hospitals and in police offices, the lack of interpreters makes it difficult for foreigners to fully access healthcare and justice.

Despite there existing no specific provision prohibiting discrimination against UMW, the Immigration Act prohibits the expulsion of third-country nationals who may face persecution in the country of origin on the grounds of sex, race and on other grounds. Additionally, the Act states that any "distinction, exclusion, restriction or preference based on race, colour, ancestors or national or ethnic origins, religious beliefs or practices, that have the aim or effect of destroying or compromising the recognition, benefitting or exercise, in conditions of equality, of human rights and fundamental freedoms in political, economic, social and cultural sectors and every other sector of public life is prohibited." At the same time, the Italian Constitution guarantees protection of dignity and equality before law without distinction of sex, race, language, religion, etc. It explicitly protects equal working rights and wages among men and women; hence, specific pieces of legislation prohibit discrimination in employment matters in particular based on sex, racial and ethnic origins.

## Protection for Groups at Risk

By and large, Italian legislation taking into account the risk for vulnerable groups of migrants of being pushed into an undocumented status, offers some protection to prevent an undocumented situation as follows:

### ► Domestic and Care Workers

Italy has a significant record of international instruments regulating migrant workers, having ratified many ILO Conventions, including the Migrant Workers Convention No.s 97 and 143 and the Domestic Workers Convention No. 189. The provisions of these conventions are, to a large extent, reflected in the domestic specific labour legislation and collective agreements.

Considering the fact that illegal migration is criminalised under the Italian criminal code, other pieces of legislation provide ways to regularise the status of domestic and care workers. According to Law n. 189/2002 (also known as "Legge Bossi-Fini"), irregular migrants who are employed by families as domestic workers (Colf), caregivers, and assistants for people with disabilities may apply for regularisation of their status. Domestic workers may also be entitled to an unemployment benefit by the Italian National Institute for Social Security should the employment relationship end. In this case, they may also enjoy a one-year residence permit, registered as unemployed. Specific collective agreements consider the particular needs of working mothers and pregnant workers in the employment relationship.

### ► Victims of Human Trafficking, Prostitution and Other Forms of Sexual Exploitation

According to the Italian Immigration Act that explicitly prohibits the recruitment and transportation of third country nationals destined for prostitution in Italy, and according to the Anti-Trafficking National Plan, victims of human trafficking are eligible to submit an asylum application. They enjoy a special residence permit (under the notions of "special cases") for matters of social protection, which entitles them to a right to adequate accommodation (e.g., protected shelters), specific psychological assistance and healthcare, an effective remedy, access to welfare services, study, registration in employment lists and the right to carry out subordinate work. In addition, (i) if at the expiry of the permit the woman has an ongoing employment relationship, it may be converted into a residence permit for employment purposes, and (ii) if she is enrolled in a regular course of study, the permit may be converted into a residence permit for study purposes.

Prostitution in itself is not illegal in Italy. The Italian law no. 75, known as the Merlin law, was passed in 1958 making brothels illegal in Italy, decriminalising women in prostitution and making the exploitation of prostitution illegal. Thus, pimping, brothel-keeping and all forms of exploitation of persons in prostitution is criminalised in Italy. Furthermore, in 2019 the Merlin law was consolidated at the constitutional level through the constitutional court case 141/2019 that defined prostitution as contrary to human dignity and, even when conducted 'voluntarily, reducing the most intimate sphere of corporeality to the level of goods available to the consumer. Despite this, women in prostitution are not entitled to specific protections unless they are identified as victims of trafficking or report abuse/violence to the police. For undocumented women wishing to report abuse at the hands of buyers or pimps, there are no legal provisions prohibiting their expulsion and its suspension.

## ► Asylum-seeking Women

The Italian State has transposed most international and European treaties on immigration law and minimum standards for applicants for international protection into national legislation.

Asylum-seeking women who have submitted their asylum applications are granted a temporary residence permit which entitles them (*inter alia*) to a right to shelter, information about their rights and application procedure, free healthcare services, education for minors, and work (after 60 days).

As a general principle, asylum-seeking procedure is individual, though not gender-sensitive, under Italian law. However, some gender-related acts of persecution are considered a ground for international protection. Victims of violence such as human trafficking, FGM, sexual abuse, as well as those persecuted in relation to sexual orientation are eligible for asylum applications. As mentioned earlier, the expulsion of asylum-seekers facing persecution on the grounds of sex, race, ethnic origin, religion or political belief is explicitly prohibited by the consolidated Immigration Act.

Moreover, it is possible to apply for other types of residence permits at the police station in certain cases to avoid undocumented status :

- A permit for medical treatment is issued in the event of particularly serious health conditions when irremediable damages would be caused in the event of a return to the home-country.
- Pregnant women have the right to a residence permit for medical treatment, which is valid until six months after the birth of their child.
- A permit for disaster is issued in the event that it is not possible to safely return to the home country due to a catastrophe such as an earthquake or flood.
- Other permits for special cases are provided in respect of (i) victims of abuse or severe exploitation, (ii) victims of domestic abuse, or (iii) victims of labour exploitation.

## ► Victims of Male Violence in the Home

According to Article 18-bis of the Immigration Act, "Domestic Violence" is defined as serious and "non-occasional" acts of physical, sexual, psychological, or economic violence occurring within the family or household or between persons currently or in the past linked by marriage or intimate relationship, regardless of whether the perpetrator of such acts shares, or has shared, the same residence with the victim.

As discussed earlier, victims of such violence are entitled to receive detailed information concerning their rights; assistance for bringing legal action, and security services to avoid further harm, as well as independent legal status and a residence permit for one year.

Moreover, in the absence of the denunciation from the victim of Domestic Violence, the Italian Criminal Code (in the application of Article 55 of the Istanbul Convention) provides for an *ex officio* prosecution of almost all forms of violence. This provision allows the judicial authorities to intervene and ensure for the victim the special residence permit for humanitarian reasons outlined in Article 18-bis of the Immigration Act in order to avoid undocumented status or the risk of detention and expulsion.

However, the condition of non-occasionality in the definition of domestic violence has made the protection of the law ineffective in practice. In cases where the victim has demonstrated to resist and react to violence, the situation has been reduced by courts to a situation of conflict. GREVIO has reported the spread of similar cases, expressing serious concerns about the possibility of not classifying certain violent scenarios as Domestic Violence just according to the victim's ability to "tolerate" the violence, enduring a violent relationship for years without filing a complaint.

## Covid-specific Measures

Following the outbreak of the Covid-19 crisis, the Italian government has taken several responsive measures, under which migrants might stay in hosting centres until the end of a state of emergency. This includes minor asylum-seekers who have reached their majority, as well as applicants of international protection and holders of humanitarian protection.

Socio-economic responses also included measures from which migrants -and in particular undocumented migrants- could benefit, such as the extension of the statutory deadline for the regularisation of the status of irregular workers. This could be implemented by means of confirming the pre-existing employment relationship by the employer or concluding a new agreement. Domestic and care workers and those being active in the field of agriculture and fishing could also benefit from this opportunity.

UMW were heavily penalised both at the beginning of the pandemic and during the vaccination phase. The access to reception facilities was limited because of the requirement of acquisition of a Covid test in a hospital. The undocumented women did not have a health card and did not know where to take the test thus were not able to find shelter, as a result, they received many penalties during the lockdown. During the vaccination phase the same problem arose as UMW did not possess the necessary health card to register and get the vaccine.



## Concluding Remarks

As discussed, Italian law guarantees the fundamental rights of UMW to some extent by ensuring their access to emergency healthcare services, education for minors, shelter, access to justice and effective legal remediation. Moreover, some level of protection is provided for those at risk of being pushed into an undocumented status. Domestic and care workers are entitled to apply for a residence permit for the purposes of employment; this is also available to victims of human trafficking, sexual exploitation and abuse. Victims of intimate partner and domestic violence may be granted legal status and a residence permit. However, as reported by the GREVIO committee, under Italian law only non-occasional acts of violence are considered as domestic violence. In general, beyond the situation created by the pandemic, the main problems that a migrant woman encounters in Italy concern obtaining a residence permit, due to the lengthy administration times, access to medical care in the absence of a residence permit, and barriers to reporting for victims of trafficking. The police do not have the necessary skills to receive reports of sexual exploitation and even dissuade the victim from reporting.

## Key Recommendations

The Italian State must comply with its obligations under international and European human rights law by taking necessary legislative and other measures to ensure that:

- the protection for victims of male violence in the home is not hindered by the limitation of the definition of domestic violence to non-occasional acts of violence;
- the design and implementation of regularisation plans take a human rights-based approach rather than a mere being informed by an economic strategy and, hence, is extended beyond workers in the agri-food, health and domestic work sector; and
- the Merlin Law on prostitution is amended to criminalise buyers of sexual acts and ensure all persons in prostitution, including UMW, are entitled to protection, support and regular legal status as victims of sexual exploitation.

## 2.5. PORTUGUESE LAW



**A**s a general principle, everyone residing within the Portuguese territory is entitled to the rights protected by the Portuguese Constitution (CRP) and international and regional conventions to which Portugal is a state party, e.g., the international bill of rights, CEDAW, ECHR, and the Istanbul Convention.

### Domestic Legal Framework: General Protection for UMW

As a general principle, fundamental rights are protected under the Portuguese Constitution without any distinction on the basis of sex, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances, or sexual orientation. However, undocumented migrants do not enjoy the same rights as Portuguese citizens or regular migrants. They are entitled to the basic human rights pertaining to human dignity, including the right to life, physical and mental integrity and access to healthcare.

Additionally, discrimination on the basis of sex

is prohibited by the Portuguese Constitution as well as international treaties to which the Portuguese State is a party, in particular CEDAW. Moreover, specific action plans and legislation, (e.g., Resolution of the Council of Ministers no. 12-B/2015) establishing a legal obligation to consider equality between men and women in all priority aspects, in particular for the protection of migrant women, are of great importance. Under this legislation, migrant workers should be informed of their rights, including gender equality in pay, parenting rights and duties, work-life balance, and protection against harassment.



REUTERS/ Elias Marcou

## Protection for Groups at Risk

Generally speaking, no piece of legislation under Portugal's jurisdiction specifically addresses UMW. However, legislation for the general protection of victims of certain crimes or special situations to which UMW may be particularly exposed are also applicable to UMW.

### ► Domestic and Care Workers

Under the Portuguese legal system, labour rights of domestic care workers (e.g., Christmas and holiday allowances, work hours, scheduling of holidays, minimum wage, safety and health at work and equal pay for men and women) are protected and regulated by specific legislation which also reflects relevant international conventions to which the Portuguese State is a party, such as the ILO Convention no.189, no. 97 and no. 143.

Guaranteed rights for the domestic and care workers include (*inter alia*) the right to a written employment agreement, through which they are entitled to a residence permit for professional activities, and to be registered by the employer in the social security system which enables them to enjoy social protection in the event of illness, parenthood, occupational diseases, invalidity, old age and unemployment (conditioned to the special amount of taxable wage).

Within the context of the Covid-19 crisis, documented domestic and care workers could apply for financial support or an unemployment benefit. However, in practice, given that the duty of registration of the employment relationship is not fulfilled in most cases by the employers, a large number of migrant domestic workers do not possess a residence permit or a proof of application for residence; hence, they were -in reality - mostly excluded from the state's financial support.

### ► Victims of Human Trafficking, Prostitution and Other Forms of Sexual Exploitation

Victims of crimes related to human trafficking or actions of illegal migration and violent crimes are en-

titled to a residence permit of one-year, renewable if the risk situation persists, under Art. 109 of Law 23/2007 of 4th July.

Any victim of such a crime is entitled to translation and interpretation, the shelter of safety measures, emergency medical treatment (including psychological assistance) as well as the right to effective remediation followed by a criminal proceeding. In addition to this, following the issue of the residence permit, migrants are legally entitled to access to programmes which support integration, such as professional training, etc.

Under Portuguese law, prostitution is not considered a crime, nor is it regulated as an economic occupation. However, Article 169 of the Penal Code criminalises the engagement of third parties in the organisation and profiting from prostitution and provides in subsection 2 that:

"If the agent uses violence, serious threat, deception, fraud, abuse of authority resulting from a hierarchical relationship of economic or work dependence, or takes advantage of mental incapacity of the victim or any other situation of particular vulnerability, they shall be punished with imprisonment of 1 to 8 years." Hence, women in prostitution may be considered, under certain circumstances, victims of sexual exploitation. Paying for sexual acts with minors under 18 y.o., committed by adults, constitutes a crime under Art. 174 of the Portuguese Criminal Code.

### ► Asylum-seeking Women

Under the Law 27/2008 of 30th June on the conditions and procedures for granting asylum and subsidiary protection and the statuses of asylum applicants, refugee and subsidiary protection, an asylum applicant's right to access national health service, as well as professional courses and vocational training, is guaranteed.

More importantly, UMW are legally entitled to be informed of rights and obligations relating

to accommodation, dates and means for rendering relevant elements for the application assessment, procedure, organisations or groups of persons which provide specific legal assistance, and organisations that might be able to help or inform the applicant about the available reception conditions, medical care; and consequences of the non-compliance, with its legal duties as an asylum applicant. The obligation to provide this information helps the migrant submit their application correctly to avoid undocumented status.

As a general principle, Law 27/2008 on grounds for asylum and international protection, transposing the EU Directives 2004/83/EC and 2005/85/EC, as well as, indirectly, CEDAW provisions on ‘gender-related persecution’, recognises several acts of persecution against women as grounds for asylum. These include the threat of female genital mutilation, forced and/ or early marriage, the threat of violence and so-called “honor crimes” (i.e., death as a punishment), trafficking in women, acid attacks, rape and other forms of sexual assault, severe forms of domestic violence, imposition of the death penalty or other physical punishments present in discriminatory justice sys-

tems, and forced sterilisation.

It is noteworthy that the violation of the right to information can be claimed in court. Moreover, in case of the rejection of the application, the decision is challengeable in the Portuguese Administrative Court.

### ► Victims of Male Violence in the Home

Law 112/2009 establishes the legal framework for domestic violence protection and ensures victim status for all victims of domestic violence for legal purposes. Even though the law does not exclude undocumented migrants from the protection provided, the lack of any obligation under the national law not to deport victims of male violence in the home and the risk for victim of disclosing their irregular status to the authorities, prevents them from bringing legal action. Although, under the Portuguese law, victims of domestic violence whose resident status depends on the perpetrator's are entitled to an autonomous legal status in accordance with the Istanbul Convention, GREVIO observes that the applicable law does not appear to have been effectively applied since there is no case recorded that benefitted anyone under this law, let alone among undocumented migrant women.

## Covid-specific Measures

In response to the Covid-19 crisis, the Portuguese government took measures that were of great importance in protecting the fundamental rights of undocumented migrants or those at risk of being pushed into an undocumented status.

According to Order 3863-B/2020, all migrants with pending residence permit applications pending at the Portuguese Aliens and Borders Office (SEF) or pending asylum applications were granted a temporary residence permit with which they were entitled access to the healthcare system and social support services. Moreover, public authorities were obliged to consider legal documents in need of renewal or subject to expiry, as valid from March 2020 until the end of October 2020. The national centres for integrating migrants continued working by appointment during the pandemic.

Nevertheless, it is noteworthy that those undocumented migrants who had no proof of application for residency or asylum were not helped by this policy, as they faced increasingly vulnerable situations regarding employment, income loss and poverty.





REUTERS/ Yara Nardi

## Concluding Remarks

Recently, specific action plans and good practices have been adopted by the Portuguese government to ensure gender equality, which pay special regard to women migrant workers and the protection of their labour rights in work-related matters.

Domestic legislation provides for the protection of risk-groups in our studies - in particular for domestic workers, victims of human trafficking as well as victims of male violence in the home - to obtain a resident permit and avoid undocumented status. Nevertheless, in practice, statutory requirements such as employment contracts for domestic workers, or proof of victim status for victims of human trafficking for sexual exploitation redirect women in those situations to undocumented status and consequently lower access to fundamental rights, and a higher levels of violence and discrimination.

## Key Recommendations

The Portuguese State must take necessary legislative and other measures to guarantee that:

- domestic and care workers' labour rights and access to social security is protected through a monitoring system for the obligation to conclude an employment contract which enables access to unemployment benefit and reduces the risk of migrant workers being pushed into an undocumented status;
- victims of human trafficking for sexual exploitation are adequately protected so that they enjoy their right to residency as a victim and avoid being pushed into prostitution as undocumented migrants; and
- all persons exploited in prostitution, regardless of their legal status, are provided support and a regularised status, and all buyers of sexual acts are criminalised.

## 2.6. HUNGARIAN LAW



*"The same way Hungarian authorities don't believe Hungarian women, they don't believe migrant and refugee women."*

Dr Noa Nogradi, member of PATENT and NANE, Hungary

Hungary is a signatory to most core human rights treaties and regional conventions; e.g., the International Bill of Rights, CEDAW, the Refugee Convention, and the ECHR; however, unlike most European countries, it has not ratified the Istanbul Convention. However, violence against women is still criminalised under the Hungarian criminal code.

As a matter of principle, considering the recent anti-immigration attitude and measures taken by the Hungarian State (e.g., the bill on the criminalisation of providing aid to undocumented migrants in 2018) the level of protection for the fundamental rights of undocumented migrants is very low.

### Domestic Legal Framework: General Protection for UMW

In principle, there is no specific provision at the domestic level addressing UMW in Hungary; however, the Hungarian Fundamental Law (the Constitution) sets out rights and freedoms that everyone enjoys within the territory of Hungary. This protection also covers migrants, yet undocumented migrants are much less protected in terms of fundamental rights.

According to the Hungarian Constitution, most fundamental human rights -such as the right to life and human dignity, health, and assistance in the case of becoming a victim of a crime -are broadly guaranteed for undocumented migrants. Furthermore, according to Act CLIV of 1997 on healthcare (the "Healthcare Act"), emergency, ambulance and certain epidemiological care is available and pro-

vided for everyone, regardless of their legal status; however, within the context of Covid-19, access to vaccines for undocumented migrants was hindered by the requirement of a residence address and social security number.

In principle, socio-economic rights (e.g., labour rights, right to social security, right to education and the right to effective legal protection under the Hungarian legal system) are limited to citizens and migrants with a valid residence permit. However, in specific circumstances, undocumented migrants may also enjoy a limited number of these rights, as discussed further on.

There is not a significant amount of migration to Hungary of undocumented non-EU and non-neighbour-country nationals. The likely places female undocumented migrant women work are: at diplomats' households, or massage parlors (which are often a front for brothels).

A highly relevant category (especially in the current context) is *beneficiary of temporary protection*. This status was granted to Ukrainian women after the invasion of Ukraine by the Russian Federation in February 2022.

## Protection for Groups at Risk

### ► Domestic and Care Workers

Under Hungarian law, no definition of domestic work nor domestic worker is presented. However, an employer is obliged to declare and register the existence of an employment relationship with a domestic or care worker for tax-related matters and access to social security benefits, which is only possible for migrants with valid legal status.

Through an employment contract, domestic workers can apply for a residence permit for the purpose of employment, enabling them to access social protection benefits, including unemployment benefits, or emergency state aids such as tax relief within the context of the Covid-19 crisis.

The domestic and care work sectors operate primarily on the black market. Typically, no domestic workers are registered legally: neither Hungarians, nor Hungarian-foreign dual nationals, nor migrant citizen workers (the second category being highly prevalent, as domestic workers are often members of Hungarian-speaking regional minorities from neighbouring countries' rural areas).

### ► Victims of Human Trafficking, Prostitution and Other Forms of Sexual Exploitation

According to Act CXXXV of 2005 on Assistance to Victims of Crime and State Compensation (the "Assistance to Victims Act"), Hungary recognizes persons subjected to human trafficking as victims. Victims of such crimes are entitled to services (such as information, legal advice, immediate financial assistance, proof of victim status, witness care, and shelter) based on an assessment of their needs. A victim support service covers immediate financial assistance for the victim's expenses related to housing, clothing, food and travel, as well as medical and religious services.

Moreover, the victim under Hungarian law has a one-month statutory time limit to decide whether to cooperate with the authorities in criminal

investigations and is entitled to a certificate of temporary residence for the duration of this period, and to a residence permit for the duration of the cooperation with the authorities. Victims are entitled to work during the validity period of this residence permit.

Women in prostitution are not considered victims of violence against women; rather, prostitution (with the exception of procurement and brothel owning) is considered as a professional economic activity that is lawful as long as the persons engaged in prostitution are registered and pay taxes. Hence, there is no legal obligation for the State to provide any compensation or protection for women in prostitution. Girls (and boys) under 18 y.o. are considered victims; buying sexual acts from minors constitutes a crime (infrequently prosecuted).

Under Hungarian law, specific areas are defined as "tolerance zones" in which prostitution can be lawfully exercised. Prostitution outside the tolerance zone is classified as a misdemeanor. Most local authorities have failed to define legal working areas (tolerance zones) for prostitution, which results in frequent arbitrary arrests and fines.

### ► Asylum-seeking Women

In principle, asylum-seeking women whose application is underway enjoy a wide range of rights protected under the Fundamental Law of Hungary e.g. the right to access healthcare services including access to abortion, accommodation, education, monthly stipend, legal assistance and information on their procedural rights and obligation. The main piece of legislation addressing the fundamental rights of asylum-seekers is the Act LXXX of 2007 on asylum (the "Asylum Act"). Under the Asylum Act, specific groups are eligible for preferential treatment, including pregnant women, single parents with minor children and victims of torture, rape, or other serious forms of psycholo-

gical, physical, or sexual violence. In general, the provisions of the Asylum Act shall apply with respect to persons eligible for preferential treatment taking due account of special needs arising from their specific situation.

In practice, there are no guidelines in Hungary for identifying vulnerable asylum-seekers and there is a lack of specialised medical services. Hungary has no specific reception facility for vulnerable asylum-seekers, except for unaccompanied children. Single women, female-headed families, and victims of torture and rape are accommodated in the same facilities as others, with no specific attention, and there are no protected corridors or houses. Hungary has been heavily criticised for being rejective towards asylum-seekers, restricting the right to asylum in general, and for criminalising support for asylum-seekers.

Women in refugee status determination procedures often face barriers (e.g. male interpreters, lack of information, lack of safe space, etc.) which disables them from telling their story, with the result that their application is rejected (considered manifestly ill founded) on credibility grounds.

### ► Victims of Male Violence in the Home

Under the Hungarian legal system, no specific piece of legislation exists that protects women victims of male violence in the home; however, domestic violence is criminalised and perpetrators may be subject to punishment under the Criminal Code of 2012. Victims may be protected through a restraining order issued under Act XIX of 1998 on Criminal Proceedings. Although the right to shelter for victims of domestic violence is guaranteed under Hungarian law, it is notably reserved for Hungarian citizens and migrants with a valid legal status and residence permits; hence, UMW cannot access these shelters.

Under Hungarian law, no right to an autonomous legal status is protected for victims of domestic violence whose status depends on their spouse or family member who commits the acts of violence. Although the Hungarian state has signed the Istanbul Convention in 2014, it has not ratified it yet, claiming that the protection provided in the convention for migrant women would promote illegal migration to Hungary.



### Covid-specific Measures

Within the context of the Covid-19 crisis, although the validity of residence permits was extended until the end of the state of emergency by the Hungarian government, no large-scale measure of regularisation was taken in favor of undocumented migrants. On the contrary, even their access to healthcare services (and vaccination in particular) was hampered by the requirement of a home address, and social security number provision.

## Concluding Remarks

Generally speaking, UMW are the least protected group of migrants in terms of fundamental rights as a consequence of the Hungarian state's recent anti-migration policies. In principle, the right to life and human dignity, health, and assistance in the case of becoming a victim of a crime are protected for everyone irrespective of their legal status. However, in practice, within the context of Covid-19, access to vaccines for undocumented migrants was hindered by the requirement of a residence address and social security number.

Among the risk-groups, domestic and care workers may be granted a residence permit for employment matters through an existing employment relationship which also enables them to access social protection. Victims of human trafficking are also entitled to a temporary residence permit in cases of cooperation in criminal proceedings. Undocumented victims of male violence in the home - or those whose legal status depends on their abusive partner -have the most precarious situation given statutory exclusions from protection and non-ratification of the Istanbul convention.

The Hungarian state and its government defies any international pressure or attempts at advocacy, especially if it references or promotes the Istanbul Convention, which was rejected partly in reference to migration issues: the clauses on protecting asylum-seeker, refugee and migrant women from violence as well as protecting Hungarian nationals were interpreted as tools to "facilitate illegal migration into Hungary". As long as the convention is not ratified, references to other, older, and more general conventions and directives that Hungary has adopted that also enshrine the rights of migrant women and girls (regardless of status) could be somewhat more useful – e.g., the EU Victims Rights Directive.

## Key Recommendations

The Hungarian State must comply with its obligations under international and European human rights law and (inter alia) take legislative and other measures to:

- ratify the Istanbul Convention, signed in 2014, to provide adequate protection for the victim of violence against women and domestic violence, in particular, migrant victims with precarious legal status;
- protect women exploited in prostitution, including those in precarious situations, from arbitrary arrests and fines, and penalise all parties engaged in sexual exploitation of women, beyond procuring and brothel keeping only; and
- facilitate UMW's access to the healthcare system and to shelter by eliminating statutory and policy barriers such as the requirement of a social security number.

## 2.7. SPANISH LAW



The Spanish State is a party to most international human rights treaties, e.g., the international bill of rights, CEDAW, some of the ILO conventions, as well as regional conventions that protect fundamental human rights such as the ECHR and the Istanbul Convention.

In addition to those mentioned above, the protection of fundamental rights in Spain is based on a multi-layered legal system that reflects its decentralised government. Apart from the Spanish Constitution that guarantees fundamental rights of everyone residing within the territory of Spain, certain legislation at the regional and local level provides for a detailed way of exercising the rights enshrined in the Constitution.

### Domestic Legal Framework: General Protection for UMW

Apart from the rights which are principally reserved for the Spanish citizens (such as the right to work and adequate housing) other fundamental rights enshrined in the Spanish Constitution are also guaranteed for migrants, regardless of their legal status. The way such rights (in particular, undocumented migrants' access to social services) can be exercised is further developed by subordinate national legislation and conferred to regional legislation. This has caused disparities among different regions regarding, in particular, irregular migrants' access to basic social services.

These rights and freedoms, amongst others, include the right to access healthcare services (including maternity care and abortion service) effective judicial protection, free legal assistance, education for minors, and the right to freedom and security (not to be detained and -in case of detention- detention of no more than 72 hours). The protection of these rights must, in principle, cover all migrants without discrimination on the

basis of sex and provide for the special situations of women who are particularly vulnerable, e.g., migrant women and victims of male violence. Previously, undocumented migrants were excluded from accessing the National Health System by the Royal Decree of 16/2012, linking eligibility for care to social security contributions- a practice directly tied to formal employment. The new Royal Decree 7/2018 eliminates the social security contribution requirement, and restores access to the National Health System as it was before 2012. The new law ensures that all migrants in Spain have the right to healthcare under the same conditions as Spanish nationals.

Concerning the right to work, the Organic Act 4/2000, on rights and freedoms of migrants in Spain, clearly excludes undocumented migrants from the right to work and imposes fines of 501 to 10,000 Euro for any infringement of this rule. However, the contractual rights and obligations of the worker are protected and enforceable in all cases.

## Protection for Groups at Risk

The Spanish organic legislation offers some special protection in order to maintain the rights of migrant women who are undocumented or at risk of being pushed into undocumented status.

### ► Domestic and Care Workers

As a general rule, migrant domestic workers are under the protection of the Organic Act 4/2000 on the rights and freedoms of migrants as long as they legally reside in the territory of Spain. This gives them a right to access the Spanish social security system and its benefits, as described, under a special regime for domestic workers, including (i) health care; (ii) sickness benefits; (iii) old-age benefits; (iv) employment injury benefits; (v) family benefits; (vi) maternity benefits; (vii) invalidity benefits; (viii) survivors' benefits.

Nevertheless, concerning unemployment benefits under the special regime of domestic work relationships, domestic workers are not entitled to an unemployment benefit unless they have been working for six years and have contributed to the General Regime of Social Security for at least 360 days. However, it is worth noting that the CJEU in its judgment of February 24th, 2022, held that the exclusion of domestic workers from unemployment benefits- given that 95% of the workers in this sector are women- constitutes indirect discrimination on the basis of sex and contradicts the EU directive on the principle of equal treatment for men and women in social security matters. In its decision, the CJEU states that Spanish legislation appears to go beyond what is necessary to achieve objectives claimed by the Spanish states.

Undocumented domestic workers are entitled to apply for a residence permit through their job conditioned to their residency of more than three years in the Spanish territory; a working history of over six months, and an employment contract of at least one year. This residence permit is granted under the notion of "exceptional circumstances" under which the migrant must demonstrate social ties and integration within Spanish

society. Nevertheless, under recent labour law changes, a short-term contract cannot be concluded for more than six months, and a one-year contract is considered permanent. Practically speaking domestic workers usually do not receive a permanent contract (or a contract of one year or more); hence, they do not meet the requirements for the residence permit in most cases.

Accumulation of these conditions puts migrant domestic workers in a vulnerable situation and at serious risk of falling into undocumented status.

### ► Victims of Human Trafficking, Prostitution and Other Forms of Sexual Exploitation

Similar to most European countries, victims of human trafficking are entitled to a temporary residence permit while they decide whether to bring a criminal proceeding. Under Spanish law, this period is 30 days and following a decision to cooperate with police authorities, they will be given legal status with a work permit. In addition to the compensation that they might obtain from the relevant civil and judicial proceeding), the Act 35/1995, on aid and assistance to victims of violent crimes and crimes against sexual freedom, envisages an economic compensation for direct or indirect victims of painful and violent crimes committed in Spain, resulting in death, serious injury, or serious harm to physical or mental health. According to Article 2, migrant women who are victims of gender-based violence may be beneficiaries of this compensation, independently of their legal status. Moreover, victims of human trafficking, sexual exploitation and gender-based violence are eligible for the Minimum Vital Income paid by the Spanish government if they can prove that they are a victim.

Women exploited in prostitution are not recognised as victims of men's violence against women; however, the Spanish Criminal Code expressly states that forcing another individual into the exercise of prostitution is a crime. Prostitution is not regulated under Spanish law; hence the protection of laws

against violence against women through granting legal status, or providing compensation, does not cover women in prostitution.

### ► Asylum-seeking Women

Generally speaking, under Spanish law, asylum applications are made on an individual basis. Thus, a woman at risk of persecution may make her asylum application individually. Under Spanish legislation and case law, gender-based persecution is considered grounds for asylum with particular regard to forced marriage and FGM. Victims of GBV are also entitled to refugee status in case there is -or has been- a well-founded fear of being a victim of GBV by spouse or partner. In such cases, asylum will not be extended to the spouse for the sake of preserving the family unit.

While the application is pending, an asylum-seeking woman is legally granted the right to shelter, food, the right to access healthcare (including maternity care and abortion services), free legal assistance and free movement within the Spanish territory.

It is noteworthy that although the right to free movement within the Spanish territory is affirmed by the supreme court as a fundamental right for asylum-seekers with a pending application under the Spanish law in the judgement of 29th July 2020, at the level of ordinary procedural law, procedural regulations addressing entities offering social integration programs to beneficiaries of international protection are clearly inconsistent and in breach of this right.

The International Protection Pathway Management Procedure (2021) proclaims that, during the participation in the 'pathway' - while staying in a reception facility in the first phase or in the home in which they are residing during the 2nd phase - the person seeking international protection may not leave the facility without prior authorisation from the centre or entity that is receiving them. In any case, the centre or entity may authorise the absence of the person concerned occasionally, due to exceptional circumstances, not shared by the rest of the beneficiaries of the Reception System for a maximum of seven calendar

days (single or continuous) during the entire itinerary, which takes 18 months. Absence of more than 24 hours without authorisation from the centre/ entity may result in the activation of the "Abandonment of the International Protection System Itinerary".

In the case of rejection of the asylum application, an UMW still enjoys basic human rights, including access to healthcare and effective judicial protection if she becomes a victim of a crime. She is also entitled to challenge the decision of migration authorities in an administrative court in which case, she may also benefit from free legal assistance.

If she does not meet the requirements for refugee status, the UMW may still be granted "subsidiary protection" when it is considered that going back to her country of origin will risk her physical/ mental integrity and freedom. This is the case for migrants who would face the death penalty, torture, or inhuman treatment if they returned to their country of origin. It also applies to UMW who fled a war zone. Under certain circumstances, pregnant women, permanently disabled people, and victims of human trafficking cannot be expelled from Spain, even if they not meet the requirement to access legal status.

### ► Victims of Male Violence in the Home

As a general principle, victims of male violence in the home, if they are legally residing in Spain within the context of a family reunion, will be granted an independent legal status. As soon as they report the violence, they will be granted a temporary residence and work permit until the final decision is issued by a court.

Women who are victims of male violence in the home are granted a right to immediate information regarding their rights and the procedure for reporting the violence, as well as free legal assistance, regardless of their legal status.

If the request for legal status is rejected, the decision could be challenged in a court in accordance with Regulation on Act 4/2000 on the rights and freedoms of migrants in Spain. Moreover, such victims cannot be expelled until the final judicial decision is taken.

## Covid-specific Measures

Following the outbreak of Covid-19, the Spanish government took socio-economic measures to mitigate the impacts of the crisis on its society. Responses included the extension of residence authorisations in the context of Covid-19, which established the automatic extension for a period of six months of all residence and work permits in Spain that expired during the State of emergency, or 90 days before its declaration. Socio-economic measures also provided for a special subsidy for domestic workers, independent of their nationality, who had temporarily stopped providing services, or whose contract had come to an end due to the Covid-19 crisis, as long as they were part of the Social Security system; hence only documented migrants were eligible for these measures.

Apart from the measures mentioned above, no specific action addressing UMW or those at risk of undocumented status was taken by the Spanish government within the context of the Covid-19 pandemic.

The situation was even more devastating for seasonal workers working in the agriculture sector. Each year, thousands of Moroccan women are hired to assist with harvesting strawberry crops in southern Spain. During the pandemic, despite the classification of agricultural workers as “essential workers” by the Spanish Government due to the border closure, the number of women who were able to have access to employment, decreased significantly. Those who were hired, experienced a higher level of exploitation, multiple discrimination and human rights violations than before. They not only faced significantly unfair working conditions, with no access to protection of labourrights, but also they frequently encountered barriers or lack of access to essential services such as healthcare. In January 2020, the UN Special Rapporteur on Extreme Poverty, on visiting Spain, reported that the living conditions there rival the worst informal settlements in the world, lacking direct access to water, electricity or adequate sanitation. Increasingly poor living conditions during the pandemic, resulting in a lack of access to adequate healthcare put women migrant workers at serious risk of infection.



European Network of Migrant Women (ENoMW). Photo: Adriana S.Thiago

## Concluding Remarks

Under the Spanish Constitution, migrants -regardless of their legal status- enjoy the same fundamental rights as Spanish citizens, except for the right to work and the right to adequate housing, which is reserved for Spanish citizens. However, since the way these rights are exercised, is conferred by regional legislation, there are several disparities in migrants' access to fundamental rights- in particular access to healthcare and maternity services. Due to these disparities, there are several judicial cases in which migrant women were denied and deprived of access to abortion services, due to their migrant legal status.

Among the risk-groups, documented migrant domestic workers enjoy a wide range of rights. However, to enjoy these rights, undocumented migrant workers can only regularise their status under the notion of "Special Circumstances" conditioned to at least three years of residence and six months of work, which -in practice- makes the enjoyment of the rights difficult to achieve.

For victims of domestic violence - although protected by a right to an autonomous residence permit - the conditionality to incitation of police investigation in most cases, makes the law ineffective and the majority of the women in such a situation receive an expulsion order.

## Key Recommendations

The Spanish State must undertake necessary legislative and other measures to ensure that:

- access to basic social services, in particular access to healthcare, is inclusive by a harmonised definition and that no one, including UMW, is left behind due to the Spanish multi-layered system of fundamental rights protection;
- the statutory requirements of the length of residency and contribution for access to the social protection system are limited through a human rights-based approach in favour of migrant workers, in particular domestic workers;
- the ordinary procedural laws regarding the beneficiaries of the international protection are harmonised and conform to the Spanish Constitution and obligations of the Spanish state under international law;
- the enjoyment of the right to an autonomous residence permit for the victims of male violence in the home is not restricted by the requirement of a police investigation or other disproportionate requirements; and
- women exploited in prostitution, regardless of their legal status, are guaranteed the full set of protections as victims of male violence and sexual exploitation by the legislative means that also criminalise the buyers of acts of sexual exploitation.

## 2.8. SWEDISH LAW



*"Undocumented women in Sweden don't have full access to care and other welfare services and the same rights to work and at work. Sweden is one of the most gender equal countries in the world, but only if you have a personal identification number."*

Clara Berglund, Swedish Women's Lobby

As is the case for most European countries, no specific piece of legislation addresses undocumented migrant women under the Swedish system. However, some level of protection of fundamental rights of the migrant is offered under the Swedish Constitution and other domestic legislation, as well as relevant international and regional treaties to which Sweden is a state party, *inter alia*, the international bill of rights, CEDAW, ECHR, Istanbul Convention, etc. Moreover, laws protecting women's rights are, in most cases, equally applicable to migrant women.

### Domestic Legal Framework: General Protection for UMW

The rights and freedoms of migrants in general fall within the scope of the Aliens Act of 2005. Following high levels of migration to the EU in 2015, the Swedish Government issued the Limitations Act in July 2016. This act restricted the possibility of obtaining a residence permit by erasing some of the protection grounds, and residence permits, as a general rule, became temporary, which significantly increased the risk of becoming undocumented or receiving an expulsion order. This temporary law remained in effect until 2021.

In principle, everyone residing within the territory of the Swedish government needs a unique ten-digit personal ID number to access basic services and the welfare system, which undocumented migrants lack. However, under the Aliens Healthcare Act, migrants have the right to healthcare that "cannot be postponed" regardless of their status. This entitles them to maternal care, abortion-related care, contraceptive advice, necessary health examinations and medications, as well as dental care for minors.

Moreover, minors aged between 6 and 18 years old are equally entitled to a right to education as regular migrants and Swedish citizens. If an asylum-seeker engaged in the Swedish school system turns 18, he or she has the right to complete her or his studies.

## Protection for Groups at Risk

Despite the Swedish limitation law and policy concerning the eligible grounds and length of residence permit for migrants, Swedish law in certain areas offers protection for migrants who are at risk of being pushed into an undocumented status. Vulnerable groups of undocumented migrants are also equally protected in specific areas.

### ► Domestic and Care workers

As a general rule, under Swedish immigration law, it is possible to obtain a work and residence permit through a job offer of domestic or care work. However, the offer must exist before entry into the territory of Sweden. A migrant worker who has worked for at least four years in the duration of seven years of residency in Sweden is eligible to obtain a permanent residence permit, provided other criteria are met such as being able to financially sustain themselves.

As a general principle, under the Employment Protection Act, domestic workers are not considered employees. Hence, the Discrimination Act, which prohibits discrimination on several grounds, including sex, is hardly applicable to domestic workers.

Nevertheless, there are specific laws protecting the labour rights of domestic workers such as the Annual Leave Act, Work Environment Act and in particular, Domestic Work Act; hence domestic and care workers are entitled to social protection, including unemployment benefits.

It must be borne in mind that although working without a work permit is illegal and may be subject to sanctions for the employer under the Swedish law, the unlawfulness of such a relationship does not legally deprive the undocumented worker of her labourrights and, in particular, in all cases, an undocumented migrant worker is entitled to payment. In practice, illegal agreements, *pactum turpe*, can not be taken into court so it is hard to make this right effective.

### ► Victims of Trafficking, Prostitution and Other Forms of Sexual Exploitation

The sole fact that a woman has been exploited in prostitution after arriving to Sweden does not automatically entitle her to a legal status. However, under Swedish law, the purchase of sexual services and trafficking for the purpose of sexual exploitation are criminalised and considered as forms of male violence against women. Hence, victims of human trafficking for prostitution and other forms of sexual exploitation may be entitled to financial compensation, either from the perpetrator or the Swedish criminal authorities, depending on the location of the crime and the traffickers' tie with the Swedish government. Moreover, under several civil society action plans, undocumented victims of human trafficking for exploitation in prostitution are offered free legal assistance in order to receive legal status.

### ► Asylum-seeking women

An asylum-seeking woman with a pending asylum application is entitled to most fundamental rights that are protected under Swedish law, such as the right to access healthcare services, education, legal assistance, access to justice, and financial support from the migration agency in case of economic difficulties.

However, as soon as an application is rejected, the applicant becomes an undocumented migrant, which puts her in a vulnerable situation in terms of the protection of her fundamental rights. In such a case, the person is still entitled to access healthcare services, including maternity care, abortion-related care, contraceptive advice, necessary health examinations and medications related to the provided healthcare. The person can also enjoy a right to judicial protection; nevertheless, in practice, the exercise of this right may lead to deportation.

A woman at risk of gender-based persecution may be entitled to individual asylum. This refers, for instance, to FGM, forced sterilisation, forced abortion and rape which are recognised under the Swedish Aliens'Act. In all cases, the decision of the migration agency can be subject to appeal in the Migration Court.

## ► Victims of Male Violence in the Home

Given that Sweden is a signatory of the Istanbul Convention, as a general rule, a woman victim of male violence in the home may be entitled to independent legal status. Under the Swedish Aliens' Act, migrant women, or their children, who are victims of male violence in the home (proven by a police report or medical certificate) may apply for a residence permit if the relationship is ended.

## Covid-specific Measures

In general, the Swedish government did not take any specific measures for undocumented migrants in the context of Covid-19, e.g., large scale regularization, to improve the situation of undocumented migrants or those at risk of being pushed to undocumented status during the Covid-19 outbreak. In practice, even access to vaccination for most undocumented migrants was hindered by the lack of a personal ID number required to make an appointment to receive the vaccination.

Nonetheless, with respect to employment, the Swedish government has taken several legal and economic recovery measures as a response to Covid-19, among which is the financial support for workers at risk of exposure to Covid-19, including domestic and care workers.

## Concluding Remarks

Although laws protecting migrants are generally gender-neutral in Sweden, some considerations specific to women are taken into account, among which the deliverance of independent legal status for women victims of male violence in the home, or victims of human trafficking (provided a legal proceeding is launched). Apart from the applicable principle of individuality of asylum application, gender-based persecution under the Swedish Aliens Act is considered grounds for asylum; and women with a pending asylum application are legally granted a wide range of fundamental rights: e.g., right to shelter, access to healthcare, education, legal assistance, access to justice, and financial support from the migration agency in case of economic difficulties.

## Key Recommendations

The Swedish State must undertake legislative and other measures in compliance with its obligation under international human rights law, to guarantee that:

- the human right to seek asylum is not disproportionately restricted by limiting laws and policies;
- discrimination on the basis of sex is prohibited in the area of domestic and care work, similar to other employment types;
- statutory barriers impeding the right of victims of male violence in the home to an independent legal status are eliminated; and
- migrant women in prostitution, including those in undocumented situations, are granted a regular legal status and equal protections afforded to other persons exploited in prostitution.

## 2.9. GREEK LAW



**A**s a matter of principle, the fundamental rights of everyone residing in Greece are protected under international treaties to which the Greek state is a signatory; EU law, as well as the Greek Constitution and domestic legislation regulating migrants of different status' rights and freedoms. Greece has ratified many international treaties; *inter alia*, the international bill of rights, CEDAW, Geneva Convention on the Status of Refugees, the Istanbul Convention and ECHR.

Article 28 of the Greek Constitution, and international agreements ratified by Greece, constitute an integral part of the Greek legal order and are superior to any legal provision contravening them.

### Domestic Legal Framework: General Protection for UMW

In Greece, the rights and freedoms of migrants are governed by the Migration Code of 2014 (amended in 2020), Asylum Law of 2016 (amended in 2020), Return Law of 2012 (amended in 2020) as well as regional and international treaties.

According to these legislations, migrants, in general, have access to certain fundamental rights - e.g., access to the public healthcare system and medication, access to psychological counselling and support, access to education and vocational training, access to certain types of labour, right to legal representation and interpretation, shelter and practical assistance in their daily life and a stipend covering their basic needs, access to justice, as well as the right to access other public services. Nevertheless, since the exercise of these rights is subject to the validity of a residence permit, undocumented migrants cannot benefit from any of them unless they possess provisional social security and healthcare numbers. These numbers are given to beneficiaries of international protection; in general, victims of human trafficking and violent crimes, to grant access to public services for as long as their application is under process, or their appeal to a migration authority decision is pending.



## Protection for Groups at Risk

Under Greek law, access to fundamental rights is ensured for specific groups of undocumented migrants.

### ► Domestic and Care workers

Although no specific piece of legislation under the Greek law addresses migrant domestic and care workers specifically, they may be protected under the notion of “dependent employment” within the context of migration law or the general labour law

of Greece, which ensures their rights are equal to those of Greek citizens.

A matter of great importance for the purpose of our study is the fact that, in general, under Greek law, a migrant with a job offer as a domestic or care worker is not entitled to be granted a residence permit through her job; unless they have lived and worked in Greece for over seven consecutive years or if they have worked under particularly abusive employment terms.

Particularly abusive employment terms are ones which have severe consequences for the health and safety of the workers, discriminate on the basis of sex, or comprise acts against or undermining the humanity of the worker. Such a residence permit may be granted on the condition that previous employment has been lawful; hence in practice, this possibility is limited to those migrants who initially possessed a valid residence permit.

For the matter of unemployment benefits, labour law considers domestic and care workers eligible only if they have lived in the same property as their employer; hence, a large group of domestic and care workers cannot enjoy benefits in case of unemployment. It is noteworthy that within the context of Covid-19, domestic and care workers were excluded from the state financial support provided for specific groups of employees.

### ► Asylum-seeking Women

Asylum-seeking women, as long as they apply for international protection, are the most protected group of UMW. While their application is pending, they enjoy access to education and vocational training, access to healthcare and social security through a provisional number that is granted to them. They also get a conditioned access to the labour market, and the right to adequate material and living conditions.

Although asylum-seeking people are legally



European Network of Migrant Women

entitled to be informed of their right to asylum and the procedure for asylum application, there is no explicit ground for challenging a situation of deliberate misinformation or lack of information on the part of the authorities. However, in case of rejection of the application -or if such misinformation results in the person being deprived of her right to international or subsidiary protection- the decision may be challenged under the notion of the right to defence.

### ► Victims of Human Trafficking, Prostitution and Other Forms of Sexual Exploitation

As a general principle, third-country national victims of human trafficking are entitled, under the Greek criminal code, to a provisional residence permit as long as criminal proceeding is under process. Initially, a three-month period is granted to them to decide on their cooperation with authorities, during which the victim is entitled to access healthcare services.

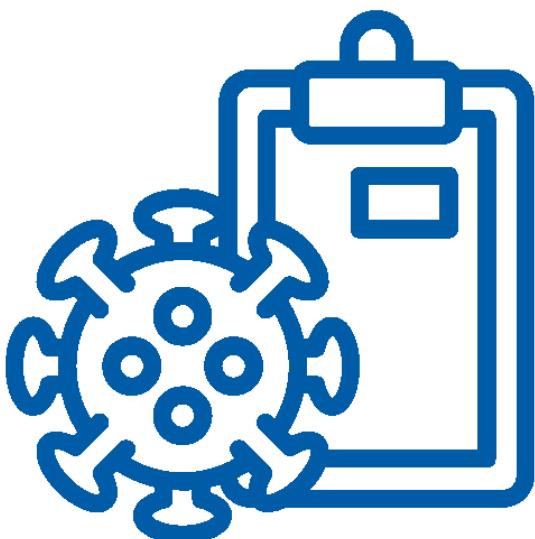
Women exploited in prostitution are not considered victims of violence against women in general; however, under The Violence Compensation Law, victims of violent crimes (e.g., heavy bodily injury, lethal bodily injury, kidnapping, human trafficking, rape, abuse in indecency, and human trafficking) are entitled to compensation from the Greek state. Moreover, women exploited in prostitution may also apply for a residence permit under the notion of being subjected to the abusive terms as described above.

Within the context of the Covid-19 crisis, women in prostitution registered as self-employed were eligible to apply for the financial support allocated to businesses whose operations were suspended due to the crisis. However, due to the fact that the overwhelming majority of women exploited in prostitution in Greece have no such registration and are migrants, including many undocumented women, practically none of them could avail of this measure.

### ► Victims of Male Violence in the Home

The rights and entitlements of victims of male violence in the home are governed by the Domestic Violence Act of Greece. Migrant adults and minors who are victims of such violence are entitled to a residence permit under the notion of humanitarian reasons as described in the Greek migration code. Victims and their children are entitled to shelter and protection. Separation of mothers and minor children is considered lawful only if it is considered to be in the best interest of the children.

In addition to this, family members whose residency has been granted on the basis of family reunification are entitled to apply for an independent residence for the duration of one year in case of a divorce, void marriage, or proven termination of cohabitation in marriage. The rejection of such a request is challengeable in an administrative court under the notion of a Cancellation Request. However, the Migration Code does not provide for an explicit obligation to inform migrant women of their right to apply for independent legal status as victims of male violence in the home.



## Covid-specific Measures

Although Greece has extended the validity of residence permits and applications for international protection within the context of Covid-19, no other specific measure or socio-economic benefit was extended to undocumented migrants or those at risk of being pushed into undocumented status. Among the risk-groups addressed in this report, state financial support was accessible only to the persons with a registered employment status only, excluding domestic workers as well as the overwhelming majority of women in prostitution.

## Concluding Remarks

In principle, asylum-seekers whose application is under review are considerably more protected in terms of their fundamental rights in comparison to other groups of migrants. However, in practice, the Greek state has been exercising the extrajudicial detention of asylum seekers and deprivation of their basic human rights in practice. Additionally, victims of male violence in the home, while being entitled to an independent residence permit in case of legal dependency on a spouse are rarely informed of such right. Women exploited in prostitution are not protected from the harms inherent to sexual exploitation unless they report grave violations such as severe bodily harm.

## Key Recommendations

The Greek State must comply with its obligations under international and European human rights law, and undertake legislative and other measures, to ensure that:

- the right to seek asylum is not restricted through arbitrary detentions and unlawful expulsion orders;
- migrant women victims of male violence are informed about their rights and available protection under the law
- the legislation regulating prostitution is reviewed in view of adopting model respecting fundamental human rights, providing comprehensive protection and support to all exploited in prostitution, including undocumented women, and penalising all parties profiting from and committing acts of sexual exploitation; and
- the statutory requirements for the residency and access to unemployment benefit of migrant domestic and care workers as a group at risk are facilitated, and women-specific considerations are being properly taken into account in employment and social security matters.



# ANNEX 1

## RECOMMENDATIONS FOR THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE

1. To include in Article 13 (*Aggravating circumstances*) of Chapter 2 (OFFENCES CONCERNING SEXUAL EXPLOITATION OF WOMEN AND CHILDREN AND COMPUTER CRIME) 'undocumented' and 'refugee' status (including those seeking asylum, international or temporary protection);
2. to Specify in Article 27 (*Specialist support to victims*) that all specialist support "shall be available to victims regardless of their nationality, citizenship, place of residence or residence status," as is specified in Article 32 (*Shelters and other interim accommodations*);
3. to include in Article 36 (*Preventive measures*) of Chapter 5 (PREVENTION) migrant and refugee women in the 'groups at risk';
4. to specify in the definition of 'sexual harassment at work' of Article 4 (Definitions) of Chapter 1 (GENERAL PROVISIONS) that the scope of the definition extends to undocumented women in situations of employment which are informal and undocumented, such as domestic and care work;
5. pursuant to Article 83 of the TFEU and the Article 6 of the CEDAW and its General Recommendations N12, N35, N38:
  - a. to include in Chapter 2 (OFFENCES CONCERNING SEXUAL EXPLOITATION OF WOMEN AND CHILDREN AND COMPUTER CRIME) a definition of the crime of 'exploitation of women in prostitution.'
  - b. to include exit programmes, trauma-informed assistance, rehabilitation, and socio-economic integration, including access to documented status, for victims of sexual exploitation and exploitation in prostitution, in Articles 27 (*Specialist support to victims*) and 28 (*Specialist support for victims of sexual violence*) of Chapter 4 (VICTIM SUPPORT).
  - c. to include in Article 36 (*Preventive measures*) of Chapter 5 (PREVENTION) measures discouraging demand for sexual exploitation/ exploitation in prostitution, by adopting an "End Demand" approach based on the Equality Model (Nordic Model) whereby buyers of sexual acts are criminalised.



Brando Bell



THOMSON REUTERS  
FOUNDATION

**TrustLaw**  
A THOMSON REUTERS FOUNDATION SERVICE



EUROPEAN NETWORK  
OF MIGRANT WOMEN