

Vanishing safety nets, the citizenship illusion, and the worker that isn't: a case study of EU migrant atypical workers' rights in the UK

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Abstract

EU Citizenship has been under a critical microscope for nearly thirty years – and has been found wanting; wanting in compassion, wanting in solidarity and wanting in true social rights. While scholars may be divided on whether that is a problem – because it leaves so many vulnerable people out, or else a virtue, because it prevents EU competence from creeping too far into public purses, a degree of consensus has emerged around the characterising of EU Citizenship as a market citizenship, rewarding economic activity with equal treatment rights. But what if this conception of EU Citizenship is a little too generous? What if work is not the golden ticket to EU rights after all?

This thesis examines the limits of EU Citizenship and free movement through the experience of EU national atypical workers. The potential for exclusion *within* the EU concept of economic activity is scrutinised against the backdrop of the changing labour market. Where wages do not guarantee the minimum means of subsistence, and where precarity in work creates a higher risk of reliance upon welfare systems, exclusion from those national welfare systems could present a significant barrier to free movement.

Case studies from EU nationals in atypical work and applying for welfare benefits in the UK reveal the shortfalls in the EU definition of work and how it can allow Member States to exclude many atypical workers. This has a disproportionate impact on already disadvantaged demographics such as disabled workers, carers and lone parents.

Ultimately, this thesis argues that the exclusion of atypical workers entrenches inequality and ignores economic contribution to a host Member State. It therefore falls short of the promise of even a market citizenship. Atypical workers' experiences might more closely echo the model of an individual membership, subject to exclusionary subscription and etiquette requirements.

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Author's Declaration

I declare that this thesis is a presentation of original work and I am the sole author. This work has not previously been presented for an award at this, or any other, University.

All sources are acknowledged as References.

The research for this thesis has been carried out between 2016 and 2020 under an ESRC studentship.

I can confirm that this thesis is under 100,000 words (including references and abstract, excluding bibliography and figures/tables). The law in the thesis is correct as of September 2020.

Chapter 1: Introduction

Naomie is a citizen of the European Union. She is a national of the Czech Republic and has lived in the UK since 2011 with her 4-year-old son and her mother, for whom she provides full-time care. Naomie also has 2 jobs. For the last 3 years she has worked as a housekeeper for 3 and half hours each weekday. Alongside this she has worked casually, distributing mail and leaflets for the last 4 years. Although the income from this is sporadic, it is all she can find to fit around the care she provides to her mother, who is blind, and her responsibilities as a lone parent. However, in October 2016, when Naomie became homeless and sought assistance from the welfare system, her status as an EU citizen was of no avail and she was denied equal treatment with UK nationals. Her local council rejected her application for housing assistance as it wrongly assumed that she did not earn enough for her work to be genuine and effective. Moreover, the council claimed it was not possible for her to be a worker *because* of the time she spent providing care for her mother. Naomie's 5 years of residence and at least 4 years of work counted for nothing.

Naomie's case illustrates the central goal of this research – to investigate the limits of EU citizenship and free movement through the experience of EU citizens in atypical work. The atypical worker occupies an interesting place in EU law. While freedom of movement is theoretically available to all EU citizens, those who are deemed to be economically inactive have a much weaker claim to equal treatment rights and access to social welfare systems in a host Member State. The stark lines drawn between those who are entitled – the economically active – and those who are not – the economically inactive – have sometimes been rationalised as part of a trade-off in which the scope of economic activity is drawn widely, to minimise the number of migrants who fall the wrong side of the line. This thesis tests that rationale, adopting the atypical worker as the focal point - an EU citizen who occupies the position of both economically active and a potential claimant on host Member States welfare systems.

The definition of EU migrant work for the purposes of Article 45 TFEU is not limited to standard employment. The Court of Justice of the European Union (CJEU) has acknowledged that non-standard employment, in this case part-time work, 'constitutes for a large number of persons an effective means of improving their living conditions' and that the effectiveness of EU law would be jeopardised if the free movement rights

of workers were ‘reserved solely to persons engaged in full-time employment’.¹

However, the definition adopted at the EU level leaves the outer edges of worker status fuzzy, delegating its implementation and application to Member States. The UK’s MET is one such incarnation of this delegation and plays a central role in the case study adopted by this thesis.

Original Contribution

This thesis makes the case for the explicit inclusion of atypical work in the EU definition of worker. While other scholarship on the limitations of free movement typically focuses on the exclusion of those deemed to be economically inactive,² and while I position my argument in agreement with the literature that find their treatment problematic, there is little scrutiny of the exclusions *within* economic activity in this debate. How economic activity is experienced has shifted significantly away from the full-time and permanent employment that was prevalent when free movement rules were written. The narrative that characterises the rights of free movement as a reward for engagement in the internal market can be misleading as it overlooks the treatment of some work as outside the scope of ‘economic activity’. An outdated conception of work moves the goalposts for EU citizens who are required to demonstrate, not just economic activity, but *enough* of the right kind of economic activity. As work no longer automatically denotes self-sufficiency,³ depriving atypical workers of equal access to welfare benefits could prevent them, in practice, from exercising their free movement rights. Additionally, given that already disadvantaged demographics are disproportionately represented among atypical workers, a failure to adapt or update the meaning of economic activity entrenches inequality by withholding equal treatment rights from the workers who may need it most, and in turn withholding free movement from them as a means to improve living standards.

¹ Case C-53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR I-1035, para 15.

² Eleanor Spaventa, ‘Earned Citizenship – understanding Union citizenship through its scope’ in Dimitry Kochenov, *EU Citizenship and Federalism: the Role of Rights* (Cambridge University Press, 2017) 207; Niamh Nic Shuibhne, ‘Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship’ (2015) 52(4) *Common Market Law Review* 889; Daniel Thym, ‘The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens’ (2015) 52 (1) *Common Market Law Review* 17.

³ Niamh Nic Shuibhne, ‘Reconnecting free movement of workers and equal treatment in an unequal Europe’ (2018) 43(4) *European law Review* 477; Gareth Davies, ‘Migrant Union Citizens and Social Assistance: Trying to Be Reasonable About Self-Sufficiency’ (College of Europe Research Papers in Law No. 2/2016) 7.

The empirical data presented in this research provides insight into how free movement rights are experienced by atypical workers in the UK. As well as adding to evidence⁴ that the test is incompatible with EU law, it also illustrates the considerable discretion given to (or assumed by) Member States in the implementation of the EU concept of migrant work. The delegation of the construction of the outer edges of worker status to Member States allows it to be co-opted as a tool for exclusion – to reject welfare claims from the most vulnerable workers. This analysis of the impact of the MET on atypical workers and already marginalised workers challenges the logic behind limiting free movement rights to the economically active. This exclusion of economically active persons who contribute to the internal market cannot be reconciled with pure market citizenship, and neither can it be justified by the requirement of an economic nexus. It instead represents a political value judgment to ignore the plight of some economically active EU nationals and entrenches inequality to placate Member States' desires to exclude, and thereby to discriminate.

1.1 Methodology

The choice to examine the rights of atypical workers in the UK was informed by the introduction of the MET in February 2014. The test adopts a two-tier approach. The first tier consists of a strict earnings threshold and the second tier acts as a discretionary space for decision makers to apply the EU's test of 'genuine and effective' work. The MET has been critiqued for its potential to be used as a sweeping exclusionary tool to separate economically active EU migrants from their free movement rights.⁵ It therefore provides a suitable testing ground to investigate how free movement is experienced by economically active EU nationals, while atypical workers are especially likely to be subjected to the second tier of the test, so provide appropriate cases for ascertaining just how substantive and inclusionary this second tier is. Atypical work in this research is interpreted broadly to include all work that sits outside the standard conception of full-time and permanent employment contracts. This includes work that may feature one or

⁴ Charlotte O'Brien, *Unity and Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Bloomsbury, 2017).

⁵ Charlotte O'Brien, 'The pillory, the precipice and the slippery slope: the profound effects of the UK's legal reform programme targeting EU migrants' (2015) 37(1) *Journal of Social Welfare and Family Law* 111.

more of the following characteristics: part-time, temporary, fixed-term, casual, zero-hours or on-call, agency work and pay-per-gig work.

To explore atypical workers' access to welfare in the UK, this research utilises a mixed socio-legal approach.⁶ It will build a broadly socio-legal analysis of the fundamental status of EU citizenship in relation to the protection of free movement and equal treatment rights of economic actors in atypical work. This combines doctrinal and empirical work. The thesis begins with a doctrinal analysis of the law governing the rights of EU atypical migrant workers at both the EU and UK level⁷ to identify the implications for the welfare of mobile atypical workers and EU citizenship.⁸

The empirical limb consists of case studies, which analyse how the law works in action for EU migrant atypical workers attempting to access welfare benefits in the UK. These case studies are drawn from a qualitative data analysis of documents and records drawn from cases advised by the AIRE Centre.⁹ This methodological approach is necessary to gain insight into how the rights of EU Citizenship and free movement are experienced in relation to the specific hurdles faced by EU nationals in atypical work.

The AIRE Centre is a UK-based specialist legal charity which works to ensure that people enjoy their rights under European law. Among other activities, they provide advice to individuals and caseworkers from non-specialist organisations who can contact them through an advice line which operates at a nation-wide level.¹⁰ The case studies were collected in partnership with the AIRE Centre which provided access and permission to record anonymous data.

⁶ Fiona Cownie and Anthony Bradney, 'Socio-legal studies: a challenge to the doctrinal approach' in Dawn Watkins and Mandy Burton, *Research Methods in Law* (2nd edn, Routledge 2013) 36.

⁷ Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton, *Research Methods in Law* (2nd edn, Routledge 2013) 13.

⁸ Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research methods in the Built Environment* (Blackwell Publishing, 2008) 31.

⁹ Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (2010).

¹⁰ During my PhD research I spent three months as a legal caseworker at the AIRE Centre as part of the ESRC Company Internship Scheme. I was not involved in advising any of the cases used in this research.

Law at the administrative level can often be shrouded in mystery leaving barriers to justice frequently unnoticed.¹¹ Document analysis provides the best available means to examine how UK decision makers apply the relevant EU law and its interpretation to a variety of real cases involving atypical workers.¹² This method involved analysing case notes on the circumstances of the atypical workers and decision letters, revealing the reasoning of decision makers, including the law and evidence on which they relied. Using real case studies provides a better understanding of how EU law is implemented than hypothetical case studies, ‘microsimulation’, or only having sight to the cases that make it to court appeals. Case studies throw up some problems that are harder to predict, such as misunderstandings and mistakes by decision makers.

As I engaged only with cases in which individuals sought help, I could not examine the experiences of EEA workers who did not seek assistance. This means excluding those who did not require help, but also those who did not understand that they could challenge a decision - individuals may lack knowledge of national legal and administrative environments or struggle with language requirements.¹³

Even so, there was a steady demand from individuals and organisations seeking help from the AIRE Centre; the current legal advice landscape in the UK and cuts to legal aid, have created an ‘advice deficit’, resulting in increased demand for legal advice charities.¹⁴ Legal advice ‘deserts’ in specialist areas such as immigration and EU free movement law¹⁵ mean that local advice charities may rely on specialist organisations

¹¹ Vicki Lens, Astraea Ausberger, Andrea Hughes and Tina Wu, ‘Choreographing Justice: Administrative law judges and the management of welfare disputes’ (2013) 40(2) *Journal of Law and Society* 199; O’Brien (n 4).

¹² Webley (n 9).

¹³ See for example Lisa Wintersteiger, ‘Legal Needs, Legal Capability and the Role of Public Legal Education’ (Law for Life: the Foundation for Public Legal Education, 2015), Pascoe Pleasence, Nigel J. Balmer and Catrina Denvir ‘How People Understand and Interact with the Law’ (Cambridge, PPSR 2015) and ‘Cuts that hurt: The impact of legal aid cuts in England on access to justice’ (Amnesty International UK, October 2016).

¹⁴ The Law Commission, ‘Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales’ (London, Legal Action Group 2014), Debra Morris and Warren Barr, ‘The impact of cuts in legal aid funding on charities’ (2013) 35(1) *Journal of Social Welfare and Family Law* 79, James Organ and Jennifer Sigafoos, ‘The impact of LASPO on routes to justice’ (Equality and Human Rights Commission Research report 118, September 2018).

¹⁵ Natalie Byrom, ‘The State of the Sector: The impact of cuts to civil legal aid on practitioners and their clients’ (University of Warwick, April 2013), Jo Wilding, ‘Droughts and Deserts: A report on the immigration legal aid market’ (April 2019).

such as the AIRE Centre, especially in the context of welfare for EU nationals in the UK, where the accuracy of decision making has been found to be of a poor quality.¹⁶

Where errors exist at these early stages, claimants lose confidence in the system and are put-off by long drawn-out processes and appeals.¹⁷ Therefore, examining initial decisions, even when potentially corrected at a later stage, or with the intervention of specialist legal advice charities, can unveil processes, erroneous decisions and potentially systemic errors that can leave a lasting impact on how free movement rights are experienced in the UK.

Identifying cases

The AIRE Centre received a range of queries from across the country. This research aimed to identify cases where the application of EU migrants in atypical work for welfare benefits or permanent residence depended on the worker status test. Relevant search terms were adopted to draw out any cases from the AIRE Centre database that interacted with the worker status test, the minimum earnings threshold specifically, or that mentioned atypical work. These were then manually examined for more detail. From these, cases were only selected where the above search criteria were mentioned in the decision-making process. By using secondary records of cases advised by the AIRE Centre, the data collection was limited to the information recorded by the caseworker at the time. Sometimes this would mean that decision letters were missing, or specific information on income was left out. Further cases were therefore discarded where insufficient information was available concerning applicants' working conditions, the result of their application, or the reasons for a decision. Overall, fifteen cases were drawn from the AIRE Centre's work. All cases were recorded using pseudonyms and any decision letters or court documents were redacted of any identifiable information. I have also altered dates where they are given, although the duration of the relevant periods of time are kept the same. Nationalities have also been swapped with other Member States where possible.

¹⁶ O'Brien (n 4) 119; Jo Shaw, 'Between Law and Political Truth? Member State Preferences, EU Free Movement Rules and National Immigration Law' (2015) 17(1) Cambridge Yearbook of European Legal Studies 247.

¹⁷ House of Commons Work and Pensions Committee, 'Decision making and appeals in the benefits system' (HC313, February 2010) Ev 1, Sophie Howes and Kelly-Marie Jones, 'Computer says 'No!' Stage two: challenging decisions' (Child Poverty Action Group, July 2019) 29.

Due to the nature of the data collection the case studies are varied in their level of detail. However, each provides an insight into how the worker test affects the rights of a variety of EU atypical workers to access welfare benefits and permanent residence in a host Member State. The cases all concerned the rights of EU migrants who were both resident and working in the UK. The analysis in this thesis therefore focuses on the relationship between EU citizens and the State in which they exclusively work and reside.

The fifteen recorded cases provide a mixture of working conditions, demographics, application type and personal circumstances.¹⁸ A qualitative content analysis was used to draw out emerging themes and common problems from decision letters and advice notes. These themes informed and constructed the basis of the analysis as to how decision makers apply the test, including levels of compliance with and understanding of the relevant EU concepts.

1.2 Research questions and structure of thesis

This thesis is split into 6 substantive chapters which address the following research questions.

1. *What do the characteristics of EU citizenship reveal about the limitations of a market 'citizenship' for atypical workers?*

The first step is to set out the expectations of EU citizenship. Chapter 2 looks to theoretical models and political challenges of citizenship, addressing the critique in the literature that EU citizenship has not outgrown its market origins. Through this investigation, EU citizenship is understood within its market constraints and I question its capacity to protect the rights of atypical workers as EU citizens who are both economically active and potentially dependent on welfare. Atypical workers will likely have to prove their economic credentials to benefit from the status.

2. *How does the CJEU's interpretation of EU Citizenship and free movement rights impact upon atypical migrant workers' access to equal treatment?*

The terms on which mobile EU citizens can claim access to a host Member State's national welfare system are explored in chapter 3. This details the transition of these

¹⁸ See Appendix, Case data.

rights, from calls for a ‘degree of financial solidarity’ to the CJEU’s recent restrictive interpretation of Directive 2004/38 as creating a ceiling to citizenship rights, considering the political sensitivity of these free movement rights as a driver of restrictive applications.

3. *How does the rise in and precarity of atypical work present barriers to the free movement of workers?*

The next step in this enquiry is to test how well the EU’s concept of economic activity reflects the reality of work in the European labour market. Chapter 4 therefore analyses secondary data on the European labour market to highlight the growing significance of atypical work, and to shed light on the demographic features of atypical workers. The precarity linked to the atypical labour market will be explored in relation to the barriers it presents to the free movement, which further underscores the importance of access to welfare systems to off-set the social risks of atypical work.

4. *How does the EU concept of worker ensure the protection of equal treatment rights for atypical migrant workers and what are the potential gaps in this protection?*

The EU’s definition of work and its potential to be inclusive of the variety of economic activity is explored in chapter 5. The CJEU’s concept of ‘genuine and effective’ work is identified as pivotal point of contention. The appearance of inclusivity in this vague concept is tested by addressing which aspects of atypical work have been expressly included and the potential gaps in its coverage. This chapter will also address the choice of EU legislators and CJEU not to adopt more specific guidance for the definition of work, instead delegating the responsibility to Member States who are granted the ability to refine and distil the concept to the exclude atypical workers.

5. *Is the application of the worker test to EU atypical workers in the UK compatible with the EU definition of worker?*

The empirical challenge in this thesis is to examine how atypical workers experience their free movement rights in practice. Chapter 6 mixes a doctrinal analysis alongside my data to identify three main sources of incompatibility of the UK worker test with EU law. These concerns relate to the use of the earnings threshold as conclusive of worker status and the inadequacy and inaccuracy of the decision maker guidance, all of

which can steer decision makers towards identifying atypical work as marginal and ancillary.

6. *What does the UK's MET show about the availability of free movement and equal treatment rights in the changing labour market?*

Both chapters 6 and 7 draw upon my empirical evidence, to demonstrate the impact of the imprecise and broad definition when left to the discretion of Member States. The indirect discrimination faced by atypical workers, particularly when in already disadvantaged demographics, are highlighted in chapter 7. This will examine the impact of the uniform approach to worker status, and the indirect discrimination faced by workers who encounter barriers to more standard employment, such as those arising from disability, care responsibilities (disproportionately borne by women), and domestic abuse. These problems extend beyond issues of compatibility and can reflect a combination of problems with the UK's approach and the EU concept of worker.

The final chapter of this study brings these findings together, strengthening the case for the explicit inclusion of atypical workers in the scope of economic activity. The study of atypical workers' experiences of drawing on free movement rights illustrates that economic activity does not guarantee equal treatment rights in host Member States. This undermines the narrative of EU citizenship even as a market citizenship, suggesting instead a model of individual membership, subject to subscription requirements, club etiquette and manager discretion.

Chapter 2: ‘Citizens of Nowhere’?: The Limitations and Challenges of Supranational Citizenship

2.1 Introduction

The EU’s internal market and free movement are integral to the goals of an economically and politically united Europe. It is, then, perhaps not surprising that EU Citizenship has been criticised as inappropriately tied to the internal market.¹

The introduction of EU Citizenship saw the consolidation of already existing free movement rights and the extension of free movement to all nationals of the Member States by attempting to decouple it from employment status.² It was perceived that the rights entailed in Union citizenship were ‘open-ended and w[ould] grow with a passage from union towards federal statehood.’³ However the creation of this citizenship was quite unique, it is neither a national citizenship nor a replacement for national citizenship. Instead it sits additional to it, as a supranational citizenship.⁴ As Thym identifies, the establishment of a new supranational fundamental status of citizenship would be ‘no self-fulfilling prophec[y]’ and would need to be more than a ceremonial treaty change.⁵

EU Citizenship’s potential to expand EU rights to all holders of the status has garnered a lot of interest and critique concerning the nature and aims of the citizenship.

Ultimately, this has led many to consider EU Citizenship to reflect only the nature and rights expected of a ‘market’ citizenship.⁶ This chapter seeks to examine how the introduction and evolution of EU Citizenship shapes the scope of free movement rights

¹ Niamh Nic Shuibhne, ‘The Resilience of EU Market Citizenship’ (2010) 47(6) Common Market Law Review 1597.

² Willem Maas, *Creating European Citizens* (Rowman & Littlefield Publishers, 2007) 50.

³ Rainer Bauböck, ‘Why European Citizenship? Normative Approaches to Supranational Union’ (2007) 8(2) Theoretical Inquiries in Law 453, 460.

⁴ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) art 20(1).

⁵ Daniel Thym, ‘The Judicial Deconstruction of Union Citizenship’ in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the limits of free movement and solidarity in the EU* (Bloomsbury, 2017) 7.

⁶ Michelle Everson, ‘The Legacy of the Market Citizen’ in Jo Shaw and Gillian More, *New Legal Dynamics of European Union* (Oxford University Press, 1995); Charlotte O’Brien, ‘I Trade Therefore I am: Legal Personhood in the European Union’ (2013) 50(6) Common Market Law Review 1643; Nic Shuibhne (2010) (n 1).

and how it attempts to decouple from its economic routes. If it has been successful in expanding social solidarity for not just the economically active, then atypical workers may find solace in their status as an EU citizen and may not have to rely on fitting into the scope of rules protecting the free movement of workers.⁷ This chapter addresses Research question 1: what do the characteristics of EU Citizenship and its approach to equal treatment, reveal about the limitations of a market ‘citizenship’ for atypical workers?

This question engages with the theoretical expectations of citizenship in general and the literature highlighting the shortfalls of EU Citizenship to these expectations, including whether it follows a more social or market-based approach. The chapter therefore sets the current standard of expectations for EU Citizenship by taking account of the constraints of the market on available ‘rights’ and the challenges of establishing solidarity at a supranational level. The result of which is a status that can more accurately be described as a type of market membership where individuals must ‘buy-in’ to access their full free movement rights, to the exclusion of those whose personal circumstances do not meet the model market citizen. This chapter therefore highlights the need to examine EU market ‘citizenship’ within this limited remit by testing its ability to protect the free movement rights of market actors. By using the standard set out in this chapter as a starting point, this research contributes to the debate on free movement for EU citizens by investigating the limits of an EU market ‘citizenship’ in relation to atypical workers as citizens who are both engaged in the market and may be reliant on social protections.

It is first helpful to consider the circumstances under which EU Citizenship evolved. This will be discussed in section 2.2 and will highlight whether the realisation of EU Citizenship’s full potential as a fundamental status is limited by the context of its development. Next, section 2.3 will address theoretical approaches to social citizenship and contrast this to ‘market’ citizenship. The section will also conceptualise common expectations of citizenship and establish two key components that guide the following sections of the chapter: i) rights and entitlements, and ii) solidarity and participation. When applying this to EU Citizenship, section 2.4 will exam the rights and entitlements given to all EU citizens. This will address the extent to which rights and access to these rights has expanded or continues to be limited by requiring market engagement. Section

⁷ TFEU, art 45.

4.5 will then focus on the expectation of solidarity among citizens. This will explore the challenges of the EU's solidarity deficit and critique the potential to foster solidarity through identity, integration and political participation.

Through these components, EU Citizenship emerges as a hopeful concept, which attempts to transcend some of the territorial aspects of national citizenship, but one that cannot be said to have been fully realised. Two main challenges are presented in meeting the expectations of a social citizenship. Firstly, EU Citizenship is tied to a market ideology which limits the scope of rights available and secondly, the establishment of solidarity among supranational communities has proven to be something of a challenge. Failing to reflect the expectations set out in this chapter reduces the likelihood that atypical workers can rely on this citizenship status to access redistributive arrangements in host Member States.

2.2 Market origins and Union citizenship

Before tackling the expectations and components of citizenship, it is first useful to examine the foundations and origins of EU Citizenship to better understand its unique beginnings. EU Citizenship's construction from a supranational institution with the aim of creating an internal market informs how some of the potential shortcomings of Union citizenship have come to be. It is therefore important to understand the context of EU Citizenship, to better understand the development of EU law since the introduction of EU Citizenship.

Critique of EU Citizenship often stems from its origin in, and continuing strong association with, the internal market. It is often argued that market ideology has infiltrated the institution of EU Citizenship impacting negatively on many of the expectations of supranational citizenship, the values of identity and integration, the rights available and the conditions by which these rights are accessible. In 1995, Everson critiqued Union citizenship as a compromise between national and supranational interests resulting in a glorification of a market citizen's status that simply continues to provide the opportunity to be part of a European single market, if one would choose to, with little in the way of entitlements and rights.⁸ EU Citizenship would, at this time, struggle to claim that it has forged new rights based on a social citizenship model, rather a status intrinsically linked to the market. While there have

⁸ Everson (n 6) 73.

been developments in EU Citizenship as a status encompassing social rights, Everson's critique may remain a fitting descriptor and is therefore worth re-examining. The following section will look at the foundations of EU Citizenship and critique its entanglement with the focus of the market.

2.2.1 Market origins and enduring presence

While the EU presents its beginnings as a 'purely economic union'⁹ with its origins in the European Coal and Steel Community (1951) and then the European Economic Community (1958), it is said to have expanded to a political union and adopted the name 'European Union' after the Maastricht Treaty (1993). This move reflected the expansion of policy areas now covered by the EU including climate, migration, employment and social affairs. However, to refer to this as a move from purely economic concerns to political is simplistic given that the economic is political. Decisions on the objectives of the market, how the market is defined and to prioritise economic over social issues are political decisions. Additionally, the notion that the origins of the EU were entirely centred around economic issues is not accurate. Maas documents some of the historical ideas that built the EU we see today, including initial calls for the creation of an economic *and political* union in Europe including a 'continental citizenship' as early as the 1940s.¹⁰ This included the desire for a free and united federal Europe in the Ventotene Manifesto 1941, as a response to the frequent wars in Europe.¹¹ Based on this, it is worth noting the presence of more social and political desires beyond the economy in the origins of the EU, despite its initial beginnings as an economically prioritised unity.

Economic unity played an important role in achieving the more ambitious political goals of the EU. While Nic Shuibhne identifies the EU's purpose as to 'encourage, secure, engineer and develop intensive forms of transnational cooperation...', she argues that 'The market is a vitally important means through which those ideas are realized'.¹² The centrality of economic integration to the EU is something that 'almost goes without

⁹ 'The EU in brief: From economic to political union' (Europa) < https://europa.eu/european-union/about-eu/eu-in-brief_en > last accessed 18 September 2018.

¹⁰ Maas (2007) (n 2) 12.

¹¹ Luisa Passerini, 'From the Ironies of Identity to the Identity of Irony' in Anthony Pagden (ed), *The Idea of Europe: From Antiquity to the European Union* (Cambridge University Press, 2002) 191, 192.

¹² Nic Shuibhne (2010) (n 1).1608.

saying'.¹³ In fact, many of the rights given to EU citizens appear to be underpinned by the objectives of the single market.

At the emergence of the concept of EU Citizenship and its formal establishment in the Maastricht Treaty,¹⁴ the EU, by opting for this terminology, made a link to 'State-citizenship's primeval narrative of...meanings, ideologies and expectations.'¹⁵ Many of these expectations looked for EU Citizenship to 'help the Union out of an internal market *impasse*' and begin to realise stable legal rights for all individuals holding the status.¹⁶ Academics, such as Everson, saw Union citizenship as a potential medium through which problems produced from the legacy of market citizenship could receive 'urgent attention'.¹⁷ Establishing an EU Citizenship was therefore, 'part of a desire to enhance the legitimacy of the European project and to bring the European Community closer to the nationals of the Member States.'¹⁸

However, as highlighted by Nic Shuibhne, Union citizenship appears to have, perhaps inevitably, continued to orientate itself around the internal market given the EU's disproportionate weighting to its economic function compared to that of states. She argues that the main component of the EU that makes it 'citizenship-able' is in its role as a 'polity' rather than an 'organisation'.¹⁹ This determination is rooted in the acceptance that '[a] polity is... a formalized and recognized unit having political, constitutional and economic elements...' rather than the EU's reverse order of

¹³ Stephanie Reynolds, 'Explaining the constitutional drivers behind the perceived judicial preference for free movement over fundamental rights' (2016) 53(3) Common Market Law Review 643, 646.

¹⁴ Consolidated Version of the Treaty on European Union [1992] OJ C 325/5 Article 8 (Maastricht Treaty).

¹⁵ Nic Shuibhne (2010) (n 1) 1600.

¹⁶ Dimitry Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in Dimitry Kochenov, *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017) 3-4.

¹⁷ Everson (n 6) 74.

¹⁸ Samantha Currie, 'The Transformation of Union Citizenship' in Michael Dougan and Samantha Currie (eds), *50 years of the European treaties: looking back and thinking forward* (Hart Publishing, 2009) 365, 366.

¹⁹ Under O'Leary's definition of citizenship as 'a juridical condition which describes membership of and participation in a defined community or State [carrying] with it a number of rights and duties which are, in themselves, an expression of the political and legal link between the State and the individual.' Siofra O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship*, (Kluwer Law International, 1996).

importance bestowed on economic, constitutional and then political elements.²⁰ The result of this prioritisation can be witnessed in the EU's balancing of economic aims over fundamental rights or matters of equal treatment.²¹ The structural difference provides for a market bias, seen as ingrained into EU Citizenship from the outset,²² or as 'strongly suggest[ing] a market character' for EU Citizenship.²³

2.2.2 Market orientation's potential impact on EU Citizenship

Although it is often perceived that the European single market was originally guided by a moral aim of 'dealing with the heritage' of World War II and uniting the Member States, Weiler argues that over time this purpose was lost to history and from the 90s, the internal market became entirely removed from this moral purpose.²⁴ Alternatively, Davies suggests that the EU's market focus could result from more practical considerations such as the separate briefs of those concerned with the internal market compared to those with more constitutional questions. The consequence of which means that those adjudicating the internal market will 'often see it in economic and technocratic terms'.²⁵ Whether lost through history or the separation of briefs, such an approach to citizenship is likely to put the needs of the market before those of moral or social concerns.

With all this in mind, Kochenov has warned that an EU Citizenship based purely on market considerations would 'provide too thin a foundation for the development of what could aspire to becoming a 'real' citizenship'.²⁶ He argues that an ideological focus on economic integration and the internal market creates 'profoundly insufficient'

²⁰ Nic Shuibhne (2010) (n 1) 1601.

²¹ Reynolds (2016) (n 13); see chapter 3, section 3.3 Free movement of EU citizens in the CJEU

²² Dimitry Kochenov, 'The Essence of EU Citizenship Emerging From the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon' (2013) 62(1) *International and Comparative Law Quarterly* 97, 110.

²³ Nic Shuibhne (2010) (n 1) 1601; Kochenov, (2013) (n 22) 110.

²⁴ Joseph HH Weiler, 'Bread and Circus: The State of European Union' (1998) 4(2) *The Columbia Journal of European Law* 223, 228.

²⁵ Gareth Davies, 'Services, Citizenship, and the Country of Origin Principle' (Mitchell Working Paper (Edinburgh) No 2/2007) 20.

²⁶ Kochenov, (2013) (n 22) 108; Ian Harden, 'The constitution of the European Union' (1994) *Public Law* 609, 620 cited in Nic Shuibhne (2010) (n 1) 1608.

citizenship rights that lack a ‘moral essence’.²⁷ He further argues that this approach is not ‘ethically sustainable’ as a citizenship rooted in the success of the market is ‘bound to ignore problems and voices not fitting well within its pre-set understanding’.²⁸ It is certainly the case that a market approach to citizenship holds a risk for those who are not deemed useful to its economic goals, including many already marginalised groups. However, these are high standards to set for a supranational citizenship and, in some cases, it exceeds the reality of national citizenships. Additionally, for Weiler, the establishment of EU Citizenship was designed as ‘a cynical exercise in public relations’.²⁹ Rather than shifting the goal posts to an aspirational version of EU Citizenship, its potentially limited vision must be accounted for. Locating the value of EU Citizenship, even if it must be within the constraints of its market origins, is necessary to avoid negating its achievements and setting it up to fail.

While a basis in the market is flawed, it must be recognised that it does not prevent a citizenship from extending beyond this remit or seeing the marketable value in a ‘moral’ approach. Nic Shuibhne contends that, while the current market focused citizenship may prove to be a phase of transition,³⁰ we underestimate the potential of the market as a foundational principle for enhancing rights in Union citizenship.³¹ She demonstrates this through highlighting the ‘tools-in-waiting’ in the current incarnation of market citizenship to achieve further rights by drawing attention to where the treaties suggest that a consideration of purely internal situations are possible.³² Not only does Nic Shuibhne recognise potential ways that market citizenship can improve the rights currently available but also stresses that, in its current form, market citizenship has ‘come an incredibly long way’.³³ However, conceiving of citizenship rights within the

²⁷ Kochenov, (2013) (n 22) 111 and 132.

²⁸ Kochenov, (2017) (n 16) 15.

²⁹ Joseph HH Weiler, ‘European Citizenship and Human Rights’, in Alfred E. Kellermann, Bruno de Witte, Deirdre M. Curtin, and Jan A. Winter (eds.), *Reforming the Treaty on European Union: The Legal Debate* (Kluwer Law International, 1996), 68.

³⁰ Nic Shuibhne (2010) (n 1) 1628.

³¹ *ibid* 1615-6.

³² TFEU art 21(1) ‘refers to movement and residence “within” – not “across” – the territory of the States’ and art 26(2) ‘simply outlines an area “without internal frontiers”, a sufficiently ambiguous reservoir of interpretative potential’ in Nic Shuibhne (2010) (n 1) 1615.

³³ Nic Shuibhne (2010) (n 1) 1628.

boundaries of what is beneficial to the market can exacerbate inequalities.³⁴ A market approach may also create a fracture between the expectations that the concept of 'citizenship' gives to its citizens and the potential reality of EU Citizenship.

The EU and its citizenship's origin and focus on the internal market could result in a skewed take on citizenship, where priorities are placed with the market and not on equality and social rights.

The concerns discussed in this section suggest that the importance in market activity will continue to play a central role in access to citizenship rights. If this remains the case, the outer edges of the definition for economic activity will also continue to gate-keep these rights. Where ties to the internal market are too strong, rights of citizenship will likely be withheld from those deemed not to contribute enough to the market. In the context of this thesis, atypical workers' rights may be subject to their supposed value to the market. To examine these concerns, the next section will analyse theoretical frameworks of citizenship to compile some common and key expectations for the status. It will also consider where market citizenship, in contrast to social citizenship, sits within these frameworks. These expectations will then be used to inspect EU Citizenship, whether it meets many of the expectations and whether it has broken from its market origins.

2.3 Expectations for Supranational Citizenship

In understanding and critically analysing EU Citizenship, it is helpful to identify a comparative framework in which supranational citizenship can be analysed. This involves looking at a variety of citizenship theories and models to establish the expectations of a citizenship and whether this differs for supranational citizenships. While exploring the individual components and frameworks for citizenship it is necessary to examine the difference in priorities and aims of social and market citizenship. As discussed briefly above, EU Citizenship and its conception has often lead to criticisms related to its dependency on the market,³⁵ and therefore has been considered, at best, a market citizenship which has not yet progressed to the status of a

³⁴ Charlotte O'Brien, *Unity and Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Bloomsbury, 2017) 92-95.

³⁵ Bauböck, (2007) (n 3).

social citizenship.³⁶ Through untangling the expectations of a supranational citizenship, such as that of the EU, it becomes apparent that the legitimacy of a market ‘citizenship’ comes into question. Instead of embodying much of the theoretical components and expectations of a citizenship, a market focus creates a clash of opposite ideals resulting in a rather hollow status that disempowers and commodifies the citizen. As such, a market approach to EU Citizenship threatens its legitimacy and may be no more than a disguised elite membership where access to ‘rights’ and freedoms are bought.

It is important to note that national citizenships are not necessarily static models. There are many different formulations of national citizenship and they are all subject to both overhauls and tweaks which impact the rights held by holders of its status. We should also be cautious when attempting to streamline citizenship into definitive models as ‘[c]itizenship means many different things to different people.’³⁷ Therefore, there is no single definition for citizenship, as different aspects will be prioritised, emphasised or constructed depending on ‘different social and historical contexts, or to fit different ideological or philosophical perspectives’.³⁸ It is also necessary to recognise that different levels of citizenship exist at sub-state, state, supra-state and non-state political communities, resulting in different formulations of a citizenship status.³⁹ However, it is equally important that we avoid the notion that EU Citizenship is so unique ‘that no analysis is possible or worthwhile’. Instead, rather than approaching EU Citizenship with an ‘unsatisfying shrug’,⁴⁰ we must hold it to external standards and measure its progress,⁴¹ and not treat it as ‘incomparable with other varieties of multilevel citizenship.’⁴² Analysing EU Citizenship in this way is an important exercise in recognising the its value to citizens, the power it gives and the vulnerability it can create if the interests of marginalised groups are ignored. Rather than ignoring EU

³⁶ Everson (n 6) 73, Nic Shuibhne (2010) (n 1) 1597.

³⁷ Everson (n 6) 81-82.

³⁸ Nic Shuibhne (2010) (n 1) 1600.

³⁹ Willem Maas, ‘Varieties of Multilevel Citizenship’ in Willem Maas ed, *Multilevel Citizenship* (Pennsylvania Press 2013).

⁴⁰ Robert Schutze, ‘On “Federal Ground”: The European Union as an (Inter)National Phenomenon’ (2009) 46(4) *Common Market Law Review* 1069, 1091.

⁴¹ Ibid.

⁴² Maas (2013) (n 39) 6.

Citizenships failing or failing to identify areas of improvement, it should be held to account against different models and expectations. Most importantly, the holders of EU Citizenship are not misled in relation to their rights and unknowingly risking their welfare and security based on an expectation of their status as an EU citizen.

This section will therefore start by considering various theoretical conceptions of citizenship and how they fit with the ideas of social and market citizenship. It will then explore the discord between the ideas of social and market citizenship in more detail, questioning whether a citizenship embedded in market credentials and performance can be a citizenship at all. Expectations and baselines of citizenship will be established which will then be discussed in relation to EU Citizenship from section 2.4.

2.3.1 Identifying key components of citizenship

To begin with, it is useful to briefly outline the core differences between social and market citizenship as the two main concepts framing the debate around expectations for EU Citizenship.

Firstly, social citizenship models view the concept of citizenship as inherently social. It requires a community to share a status that dictates how they relate to each other and are treated by governing bodies of the community. In a social citizenship, citizens' rights are not abstract, instead they are 'intricately connected to a social context'.⁴³ Marshall identified social citizenship as the equal provision of social rights to all citizens such as access to the necessary economic resources and as the essential next step after civil and political rights.⁴⁴ Social citizenship is also recognised by Gorham, as aiming to benefit a society in the following four ways

'(1) creating the economic conditions necessary for individuals to pursue their life choices and thus become freer; (2) increasing the general equality in society which helps lessen class tensions; consequently, (3) enhancing political stability; and (4) ensuring the perpetuity of a civilization, of a community to which all can become full, and proud, members.'⁴⁵

⁴³ Daniel Thym, 'The Evolution of Citizens' Rights in Light of the European Union's Constitutional Development' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the limits of free movement and solidarity in the EU* (Bloomsbury, 2017) 112.

⁴⁴ Thomas H Marshall, *Citizenship and Social Class* (first published 1949, Pluto Press 1992) 8.

⁴⁵ Eric Gorham, 'Social Citizenship and its Fetters' (1995) 28(1) *Polity* 25, 26.

Under this conception of citizenship, a collective effort towards equality and rights is achieved through the protections given by the state, such as welfare and public services. Social citizenship captures the idea that ‘citizenship is... a refuge from the market’ as rights are presented as entitlements, not as rewards or provisions for economic contribution, ‘but because they are human and members of a community that transcends the boundaries of the market.’⁴⁶

In contrast, market citizenship prioritises individual responsibility rather than relying on the state and has introduced a newfound ‘obligation to become more self-reliant’.⁴⁷

Under market citizenship government responsibility for the social rights and welfare of citizens is replaced with ‘a new political and social order in which governments are only responsible for helping citizens to help themselves’.⁴⁸ In market citizenship, individuals are also perceived differently. They are valued not as individual and equal citizens but as production factors based on the labour they provide.⁴⁹ Everson’s work on ‘market citizenship’, in relation to the EU, highlights the difference between rights and provisions. The classic rights of citizenship include ‘civil [...] rights forming the core, then political rights, and with social rights situated beyond these’. Whereas provisions are ‘options such as the qualified choice to enter the labour market or to trade’.⁵⁰ Here, Everson locates the bulk of market citizenship offerings as ‘provisions’.⁵¹ Ultimately the concept of market citizenship attempts to extract the ‘social’ aspects out of citizenship, instead making it a status focussed on individualism and the freedom of market.

With these two brands of citizenship in mind, the key theories of the components and expectations of citizenship can be examined more thoroughly by considering how they relate to or are ignored by social or market citizenship. Examining this helps to identify

⁴⁶ *ibid* 35.

⁴⁷ Janine Brodie. ‘Restructuring and the New Citizenship’ in Isabella Bakker (ed), *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press) 126, 131 cited in Judy Fudge, ‘After Industrial Citizenship: Market Citizenship Or Citizenship at Work?’ (2005) 60(40 *Industrial Relations* 631, 645.

⁴⁸ Judy Fudge, ‘After Industrial Citizenship: Market Citizenship Or Citizenship at Work?’ (2005) 60(40 *Industrial Relations* 631, 645.

⁴⁹ Anne Pieter van der Mei, *Free Movement of Persons within the European Community. Cross Border Access to Public Benefits* (Hart, 2003) 23.

⁵⁰ Everson (n 6) 83.

⁵¹ Everson (n 6) 87.

the themes, aims and priorities of citizenship in more detail, including where different models of citizenship strike the balance between rights and obligations. This also begins to disentangle the reality of a citizenship status tied up in market dependency and citizens' value as a production factor.

Components of Citizenship

Despite centuries of academic debate, citizenship remains a 'contested and normative concept' of which 'there are no authoritative definitions'.⁵² Nevertheless, patterns of identified key concepts and theories have emerged. For example, Delanty has identified four key features of modern citizenships: rights, duties, participation and identity.⁵³ This is almost mirrored in Bellamy's work which finds that contemporary citizenships feature the key components of rights, participation and solidarity.⁵⁴ In this example, 'participation' can be seen to be part of the idea of duties to be actively involved in the community and 'solidarity' can be said to reflect the notion of 'identity' highlighted by Delanty in the sense that it reflects the membership to a community. Alongside this, Bartle identifies 3 traditional notions of 'citizenship-as-rights', 'citizenship-as-belonging' and 'citizenship-as-participation'.⁵⁵ O'Leary also offers a description of citizenship as 'a juridical condition which describes membership of and participation in a defined community or State [carrying] with it a number of rights and duties which are, in themselves, an expression of the political and legal link between the State and the individual'.⁵⁶ With these in mind, just a brief look at academic work on citizenship will reveal repetitions of 3 popular ideas which I have categorised as; i) rights and duties, ii) solidarity and iii) participation.

As an alternative, Kochenov offers a different set of key components in his work specifically looking at EU Citizenship; identifying elements of justice, political participation and equality as providing 'a sound foundation for a supranational

⁵² Thomas Faist, 'Social Citizenship in the European Union: Nested Membership' (2001) 39(1) *Journal of Common Market Studies* 37, 40.

⁵³ Gerard Delanty, *Citizenship in a Global Age: Society, Culture, Politics* (Open University Press, 2010) 9.

⁵⁴ Richard Bellamy, 'Introduction: the Making of Modern Citizenship' in Richard Bellamy, Dario Castiglione and Emilio Santoro (eds), *Lineages of European Citizenship* (Palgrave Macmillan, 2004) 6.

⁵⁵ Ian Bartle, 'Political Participation and Market Citizenship in a Global Economy: The European Union in Comparative Perspective' (2006) 29(4-6) *International Journal of Public Administration* 415, 417.

⁵⁶ O'Leary (n 19).

citizenship’.⁵⁷ Some of these requirements echo the ideas noted above; justice and equality reflect much of the content in rights and solidarity and the need for inclusion is similar to political participation. However, Kochenov goes a step further by requiring citizenship to display a moral purpose in the drive of each three components. This approach is in danger of idealising the concept of citizenship beyond its exclusionary nature; citizenship is not necessarily an inherently moral construct. Where citizenship exists individuals may have more rights or opportunities depending on the citizenship they hold. Carens highlights that this can be interpreted as ‘the modern equivalent of feudal privilege – an inherited status that greatly enhances one’s life chances’.⁵⁸ The status of citizenship provides the state with an excuse to withdraw or fail to provide to resident non-citizens, while citizens themselves can be perceived to benefit from the exclusion of non-citizens through acquiring privileges. With this in mind, it seems unrealistic to expect a citizenship to hold a moral purpose, when its very nature is exclusionary.

Kochenov therefore gives us an aspirational model, which expects more from supranational citizenship than most national citizenships have yet to achieve. For example, in his discussion of equality, Kochenov argues that ‘where equality is not safeguarded, there is no citizenship’.⁵⁹ However, inequalities are present and often permitted in many forms of national citizenship. The anticipation of equality, as a measurement of a successful citizenship, may be too steep a demand. Instead, it may be more realistic to expect citizenship to aim for a formal basic level of equality or to establish provisions which address the disadvantage faced by those with certain protected characteristics. While it is understandable to set high standards for citizenships, it is not always a helpful way to examine it. Especially when looking at the EU; a supranational institution that requires the support of separate Member States who would struggle themselves to meet Kochenov’s requirements. Nic Shuibhne reminds us that unfair expectations may

⁵⁷ Kochenov, (2013) (n 22) 109.

⁵⁸ Joseph H Carens, ‘Aliens and Citizens: The Case for Open Borders’ (1987) 49(2) *The Review of Politics* 251, 252.

⁵⁹ Dimitry Kochenov, ‘Citizenship without Respect: The EU’s Troubled Equality Ideal’ (2010) Jean Monnet Working Paper (NYU Law School 08/10) 5.

lead to ‘unhelpful disappointment and a fated feeling of failure.’⁶⁰ Kochenov’s requirements, while important, can be seen to set the EU up for failure.

Instead, this research will seek to identify aspects of EU Citizenship that can relate to more traditional concepts and ideas by establishing expectations to measure its achievements and flaws whilst also recognising the practical limits of the European Union context. It is important to recognise that much of the academic debate covered here originates from and considers only the evolution of citizenship in so-called ‘western’ or advanced industrial democracies. In contrast, Chung highlights how citizenships in ‘non-western’ countries reveal how the concept is contingent.⁶¹ In this respect, the focus on literature concerning so called ‘western’ democracies is made relevant as Member States of the EU tend to subscribe to the ‘western’ formulations and theories of citizenship.

Taking the three components identified above: i) rights and duties, ii) solidarity and iii) participation, this section will next examine closely how they are perceived and what they entail. As these key concepts appear, albeit in differing terms and priorities, in various theoretical studies of citizenship it is necessary to dive a little deeper into their origins and substance. This will focus on these concepts are interpreted through liberal, communitarian and republican lenses. This will also begin to unpick how they interact with social and market citizenship.

2.3.2 Rights and Duties

In his pivotal work on citizenship in the UK, Marshall argues that citizenship is formed in stages, firstly through civil rights including ‘freedom of speech, thought and faith... to own property and ...to justice’. Then political rights with the right to political participation as a representative or as an elector. And lastly, social rights which covers ‘the right to a modicum of economic welfare and security... and to live the life of a civilised being according to the standards prevailing in the society.’⁶² This theory has not

⁶⁰ Nic Shuibhne (2010) (n 1) 1628.

⁶¹ In contrast to ‘western’ literature, Chung finds that ‘non-western’ citizenships are ‘characterised by the prioritization of collective regulation over individual rights, contingent membership over universal membership, and subnational and supranational hierarchies over national democratic principles.’ Erin Aeran Chung, ‘Citizenship in Non-Western Contexts’ in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds) *The Oxford Handbook of Citizenship* (Oxford, Open University Press, 2017).

⁶² Marshall (n 44) 8.

been free from criticism, especially as it reflects the stages that citizenship rights were earned in relation to predominantly white males in the UK, forgetting that women and ethnic minorities did not earn these rights at the same time or necessarily in the same order,⁶³ and some people have yet to earn this full assortment of rights depending on their identities, circumstances or country of residence.⁶⁴ Marshall also seeks equality for the purpose of eroding class inequality and protecting citizens from market forces, but this fails to recognise or aim to combat ‘other key axes of inequality and other mechanisms and arenas of domination’.⁶⁵ With this criticism in mind, it is still useful to consider three elements of rights linked to citizenship: civil, political and social but noting that the order of attainment is not fixed, and provision of each is not necessarily guaranteed to the same extent.

Some liberal approaches to citizenship can echo the requirements of social citizenship as a necessary means of ensuring the realisation of individual freedoms. Marshall recognises that social citizenship and the rights that it entails has a positive relationship with the autonomy necessary to enjoy civil and political rights. For Magnussen and Nilssen, it is also social rights, granted through the welfare state ‘rather than arbitrary benevolence’, that provide the requisite social justice and inclusion to ensure that individuals can actually enjoy the status of citizenship.⁶⁶ This approach, therefore favours a ‘positive’ over ‘negative’ conception of liberty⁶⁷ which recognises the importance of state intervention in ensuring that all citizens have the ‘basic level of material well-being’ necessary to pursue and enjoy their individual civil and political rights.⁶⁸

⁶³ Sylvia Walby, ‘Is Citizenship Gendered’ (1994) 28(2) *Sociology* 379.

⁶⁴ Erin Aeran Chung, ‘Citizenship in Non-Western Contexts’ in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford, Open University Press 2017) 434-435.

⁶⁵ Nancy Fraser and Linda Gordon, ‘Contract vs. Charity: Why is there no Social Citizenship in the United States,’ (1992) 22(3) *Socialist Review* 45, 49-50 cited in Kamal Sadiq, ‘Postcolonial Citizenship’ in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford, Open University Press 2017) 181.

⁶⁶ Magnussen and Nilssen (n 97) 232.

⁶⁷ On positive and negative liberty see Jean Jacques Rousseau, *Social Contract* (Wordsworth Editions 1998); Isaiah Berlin, ‘Two Concepts of Liberty’ in Henry Hardy (ed), *Liberty* (Oxford University Press, 2002) 166.

⁶⁸ Lister and Pia (n 80) 12-13.

However, stricter conceptions of liberal theories prioritise the individual rights of citizens and their freedom to pursue their individual interests in the private sphere. The only derogation from this is the expectation or obligation ‘to respect in others the rights he or she enjoys’.⁶⁹ The purpose of this is to protect individuals from the imposition of obligations from the community or state ‘that constrain or contradict his or her self-interest’.⁷⁰ Some constructions of liberal theory on citizenship can take the concept of individual freedom more seriously, where obligations to others should be kept to an absolute minimum. This is where market citizenship can link in with liberal theories, as it reflects the notions of individual responsibility to look after yourself and therefore demands reduced state interference. By valuing the freedom of individuals to enjoy their rights unhindered over any kind of collective responsibility, this approach ignores the impact on those who may be less able to access and enjoy these rights and freedoms. This strict liberal approach to citizenship is therefore where critique is often concentrated as the individual is valued over the needs of the collective.

Alternative focus is offered with communitarian and republican theories. These both approach the challenge of ensuring citizens have equal access to rights through the focus of achieving the common good, rather than what will enable individuals to live freely. In seeking the public good, communitarian theorists, such as Etzioni, recognise that an overwhelming pursuit of individual liberty can result in the concerns of a community or a common good being ignored and rights for all jeopardized.⁷¹ While individual rights are not deemed as unimportant, they can sometimes take a backseat to what is seen as good for the community. Critics of this approach are concerned with where control lies in determining what the ‘public good’ will be, whether the rights of those who disagree with these decisions are protected and finally the extent to which individual rights may be sacrificed for a perceived ‘public good’ such as public security.⁷²

The clearest conflict between theories here lies between negative conceptions of rights which prioritise individual freedoms and positive rights which takes account of the

⁶⁹ John Locke, *Two Treatises of Government* (first published 1683, Everyman 1993) cited in Lister and Pia (n 80) 10.

⁷⁰ Keith Faulks, *Citizenship* (Routledge 2000) 57 cited in Lister and Pia (n 80) 10.

⁷¹ Amitai Etzioni, *The Spirit of Community: rights, responsibilities and the communitarian agenda* (Fontana Press, 1995).

⁷² Lister and Pia (n 80) 20.

accessibility of freedoms to all citizens.⁷³ Where rights in citizenship are expressed as a negative liberty, little effort is made to ensure that the right has any value for all or even most citizens. Some citizens may struggle to pursue a freedom due to limited choices and availability and some may struggle to see the full realisation of that freedom without measures in place to support access. In the case of atypical workers and free movement, the option may exist to move to another Member State but without more positive conceptions of this right, the support necessary for many to sustain this option may be unavailable.

2.3.3 Solidarity and Participation

The other key concepts of citizenship, solidarity and participation, can be seen as mechanism by which the ‘common good’ in communitarian and republican thinking, and the social policy to support individual rights in liberalism, can be achieved.

Communitarian theory sees the goal of ensuring common good within communities as requiring and fostering a shared identity and solidarity. Solidarity is often required to ensure that social rights are secured and supported. As mentioned above, social citizenship is best achieved through the provision of social rights, most frequently institutionalized in a welfare state. The success of a welfare state relies on diffuse solidarity between members of a political community,⁷⁴ in order to ensure that there is a mutual commitment to the moral good of redistributive social policy. It should also be noted that this is considered a cyclical process, the support provided by a welfare state corresponds to the ‘moral orientations and expectations of citizens’,⁷⁵ which leads to promoted feelings of solidarity and mutual obligation,⁷⁶ resulting in ‘considerable public support’ in the legitimacy of the welfare state and social citizenship.⁷⁷ Without this

⁷³ On positive rights as necessary to be free see Rousseau (n 67); on negative rights as the liberty and positive rights as a means for advancing totalitarian ideals see Berlin (n 67).

⁷⁴ Faist (n 52) 40; Solidarity is also described as the ‘*sine qua non*’ of the welfare state in Wolfram Lamping, ‘Mission Impossible? Limits and perils of Institutionalizing Post-National Social Policy’ in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press, 2010) 49.

⁷⁵ Lamping (n 74) 48.

⁷⁶ Richard Morris Titmuss, *Commitment to Welfare* (London: Unwin University Books, 1968) cited in Lamping (n 74) 48.

⁷⁷ Bo Rothstein, *Just Institutions Matter: The Moral and Political Logic of the Universal Welfare State* (Cambridge: Cambridge University Press, 1998) cited in Lamping, (n 74) 48.

solidarity between all citizens and the beneficiaries of the welfare state, this construction of social citizenship cannot be realised. This can most easily be perceived in welfare states' territorial nature. Whereby welfare states are the same as national states and ease of access to social assistance discriminates between insiders and outsiders, or in this case nationals and non-nationals.⁷⁸ Communitarianism faces a similar criticism for regarding the duty to achieve the common good to be reliant on a type of solidarity that is formed around identity. However, a focus on identity limits the scope of this solidarity to only those who are in the community, at the exclusion of those who are not.⁷⁹ The lines drawn to determine who benefits from this common good can exclude individuals who may not conform to the duties expected of them in the community⁸⁰ or can lead to exclusion based on ethno-nationalism.⁸¹

Republicanism,⁸² while recognising the need to achieve public good and individual rights, sees participation in the public sphere as the vital component to achieving this, rather than solidarity. The need for participation is recognised as a tool to prevent relations of dominance, something which the prioritisation on individual rights in liberalism ignores.⁸³ As a component of participation, different social groups should be active in pressing for their concerns – preventing one group from dominating the other.⁸⁴ It is in this way that republicanism envisages the achievement of equality, as otherwise there is a risk that one group will be dominant and have more rights than others. Participation also has a role in the realisation of social rights in citizenships. Social rights, especially those that require high levels of redistribution and solidarity,

⁷⁸ Abram de Swaan, 'Perspectives for Transnational Social Policy' (1992) 27(1) *Government and Opposition* 33.

⁷⁹ Delanty (n 53) 27.

⁸⁰ Michael Lister and Emily Pia, *Citizenship in Contemporary Europe* (Edinburgh University Press, 2008) 8, 20.

⁸¹ See section 2.5.1 Creating a European Identity.

⁸² Is often conflated with communitarianism, while both focus on community and the public good, republicanism view legitimacy for social policy coming from political participation rather than solidarity see Maas (2013) (n 39) 5.

⁸³ Phillip Pettit, *Republicanism: a theory of freedom and government* (Oxford, Clarendon Press 1997).

⁸⁴ Quentin Skinner, 'Machiavelli on the Maintenance of Liberty' (1983) 18(2) *Politics* 3 cited in Lister and Pia (n 80) 24.

requires a legitimate and justified institution to implement them.⁸⁵ Active political participation among citizens can fill a democratic deficit and help legitimise the political institutions in social citizenship.

In contrast, liberal approaches to these ideals are compounded in the same rights and duties discussed above. It is perceived, as Marshall puts it, that citizenship is an instrument to foster membership through the granting of equal individual rights to all.⁸⁶ Equally, participation is deemed as an important political right granted to citizens. In Marshall's conception of the stages of rights in citizenship, discussed above, political rights emulate much of the requirements of participation, such as the right to act as a representative or as an elector.⁸⁷ Liberalism therefore treats the very rights and duties provided by citizenship as establishing a cause for solidarity and participation.

However, strict liberal approaches to this requires only the availability of the option to engage in participation and community solidarity. This approach reflects closely with the absence of solidarity in market citizenship. Instead, the importance of social solidarity to achieve equality among citizens is substituted for self-realisation and self-interest of individual citizens.⁸⁸ In this sense there is no need for a market citizenship to be concerned with the overall good of the community as individuals are supposed to have the freedom to pursue what is good for them. In this environment, there is little opportunity for the creation of solidarity or 'allegiance' amongst market citizens who are guided by self-interest.⁸⁹ Therefore, solidarity to facilitate effective social policy is unnecessary. Market citizenship also struggles to sit comfortably with the demand for political participation, as rather than envision citizens as 'collaborative partners' they are instead seen as 'consumers', 'clients' or as a production factor.⁹⁰ This only increases the legitimacy deficit with market citizenship.

⁸⁵ Lamping (n 74) 47.

⁸⁶ Marshall (n 44).

⁸⁷ Marshall (n 44) 8.

⁸⁸ Jack Hayward, 'From Citizen Solidarity to Self-Serving Inequality: Social Solidarity, Market Economy and Welfare Statecraft' in James Connelly and Jack Hayward (eds), *The Withering of the Welfare State* (Palgrave Macmillan, 2012) 1.

⁸⁹ Everson (n 6) 89.

⁹⁰ Bartle (n 55) 418.

2.3.4 Equality and empowerment in citizenships

Viewing these traditional ideas of citizenship through the lens of both social and market citizenship begins to unpick the shortcomings of the latter. Market ‘citizenship’ fails on many counts to interact with, effectively or at all, the key components of citizenship. Failing to integrate elements of rights for all, building solidarity for fellow citizens and encouraging political participation leads to a hollow status where differing priorities tends towards the disempowerment of its citizens.

The equal worth of citizens

Notably, the pursuit of equality appears to be one key theme that intertwines between all 3 strands of liberal, communitarian and republican contemporary citizenship theory. While the pursuit of equality is present in each, the three theories ‘advance alternative perspectives’ on the best way to realise freedom and equality among all citizens.⁹¹

Liberalism seeks equality through universal rights for individuals to pursue freedom and interests and is therefore seen to have ‘an egalitarian impulse at its heart.’⁹² While communitarianism pursues equality through ‘acting in accordance with the shared understandings of its members’⁹³ to achieve good for all through notions of solidarity and community. Republicanism attempts to establish equality through recognition of the community’s diverse citizens, where ‘solidarity may be realized less through cultural commonality than intersubjective recognition and interaction’,⁹⁴ stressing the importance of participation for all social groups.

It is widely held that the mark of a successful society can be measured by how it treats its most vulnerable members.⁹⁵ Social and economic rights for all therefore play an important role as a litmus test of a civilised country and the citizenship which that country offers. Citizenship should therefore be a vehicle through which social justice is

⁹¹ Patrick Honohan, ‘Liberal and Republican Conceptions of Citizenship’ in Contexts’ in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds) *The Oxford Handbook of Citizenship* (Oxford, Open University Press, 2017) 101.

⁹² Lister and Pia (n 80) 9.

⁹³ Michael Walzer, *Spheres of Justice* (Basic Books, 1983) cited in Lister and Pia (n 80) 20-22.

⁹⁴ Patrick Honohan, ‘Liberal and Republican Conceptions of Citizenship’ in Contexts’ in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds) *The Oxford Handbook of Citizenship* (Oxford, Open University Press, 2017) 97.

⁹⁵ This quote is often attributed to Mahatma Gandhi and is widely repeated.

achieved. In valuing the equal worth of all citizens, social rights to meet basic needs for income, shelter and living necessities should be perceived as a 'right of citizenship'.⁹⁶ From this, a key consideration for citizenships is posed; are individual rights maintained for people who are not able to 'claim' or 'earn' them through market credentials?⁹⁷ As discussed above, the anticipation of equality is not reflective of the reality often experienced by citizens. Instead, this core aspect of citizenship must be identified as a minimum of baseline provisions to address the inequalities for those with certain characteristics, who face barriers to engage with the market. Failing to account for these structural barriers will lead to citizens being actively excluded from these rights.

Market citizenship, however, falls short of this expectation, particularly in its focus on a strict liberal approach, concentrating on the freedom of individuals to pursue their own goals with little responsibility to care for others. Rather than providing support for the most vulnerable in society and respecting the equal worth of all citizens market citizenship instead awards citizens on the, often arbitrary, criteria of market engagement or wealth. An approach so absorbed in promoting individualism and self-interest results in social rights and policies, that are 'implied by citizenship',⁹⁸ not being prioritised and often being ignored.

Empowerment and de-commodification of citizens

Empowerment of citizens is a further baseline expectation of the status of citizenship. This can be understood as the power to be free from reliance on the market and therefore a goal of citizenship should be 'to de-commodify' its citizens. Esping-Anderson explains that de-commodification of citizens can be defined as when a 'person can maintain a livelihood without reliance on the market' and instead the services of citizenship are 'rendered as a matter of rights'.⁹⁹ In social citizenship, citizens can be effectively de-commodified through the mobilisation of societies, solidarity and

⁹⁶ Commission on Social Justice, *Social Justice: Strategies for National Renewal* (Vintage, 1994) 18.

⁹⁷ Anne-Mette Magnussen and Even Nilssen, 'Juridification and the Construction of Social Citizenship' (2013) 40(2) *Journal of Law and Society*, 228, 232.

⁹⁸ Faist (n 52) 51.

⁹⁹ Gosta Esping-Anderson, *The Three Worlds of Welfare Capitalism* (Cambridge, Polity Press 1990) 41-43.

ultimately the provision of a welfare state that provides a basic standard of living¹⁰⁰ which means that inability to engage with the market does not result in destitution.¹⁰¹ In this instance, those who are not able to work, either at all or not the same extent as others, are protected.

In contrast, market citizenship does not offer this protection, rights or freedoms are rewarded on the basis of performance in the market rather than through citizenship,¹⁰² resulting in almost all citizens being dependent ‘on both the[ir] personal characteristics... and prevailing labour demands.’¹⁰³ Alongside this, in keeping state interference minimal and individualism promoted, social rights are ‘severely curtailed’, the result of which is the expansion of ‘the obligation to be employed’.¹⁰⁴ Market citizenship, therefore, appears to disempower and commodify the citizen.

Citizenship comes with a number of expectations and baselines around the idea that ‘the foundation of a free society is the equal worth of all citizens’.¹⁰⁵ Not only does market citizenship fail to rearticulate the expectations found in theoretical debates of citizenship, it also fails to address the inequality in access to the market, protect the most vulnerable and to empower and de-commodify its citizens. Market citizenship struggles to resemble anything close to what is expected from the status of citizenship. Instead, it appears to be a misnomer, for a set of rights which are pitched as available to all but in reality are exclusively available to those who are ‘sufficiently’ integrated into the market.

¹⁰⁰ Maurizio Ferrera, ‘Towards an ‘Open’ Social Citizenship? The New Boundaries of Welfare in the European Union’ in Gráinne de Búrca, *EU Law and the Welfare State: In Search of Solidarity* (Oxford University Press, 2005) 23.

¹⁰¹ Sandra Shaw, ‘Comparative Welfare’ in Peter Dwyer and Sandra Shaw (eds), *An Introduction to Social Policy* (Sage, 2013) 177.

¹⁰² This is in direct contrast with the statement: ‘If social rights are... granted on the basis of citizenship rather than performance, they will entail a de-commodification of the status of individuals vis-à-vis the market’ in Esping-Anderson (n 99) 40.

¹⁰³ Everson (n 6) 84.

¹⁰⁴ Fudge (n 48) 645

¹⁰⁵ Commission on Social Justice (n 96) 17-18.

2.3.5 Expectations of Citizenship

The aim of this section is to analyse theories of citizenship to determine criteria against which EU Citizenship can be assessed. However, it is important to recognise that ‘there is, to greater and lesser degrees, blurring of the boundaries between’¹⁰⁶ different citizenship theories and that various academics have breached the gaps between them.¹⁰⁷ Taking this into account, and the assertions above that citizenship can vary greatly across multiple levels of governance and contexts, instead of modelling an exact single formula for citizenship it is more prudent to pick out some of the expectations we can anticipate EU Citizenship to fulfil. Using this approach, this chapter will measure the extent to which EU Citizenship interacts with the expectations and delivers on them.

Therefore, two key expectations of citizenship have emerged from this literature. These will form the basis of assessment of EU Citizenship:

- i. The establishment of rights and entitlements covering the grounds of civil, political and social rights versus provisions.
- ii. The notions of membership of a community denoting a sense solidarity which encourages and is enhanced by citizens enacting duties or participating in public and political life for the public good.

A third expectation concerning the active pursuit of equality for citizens overarches across both the establishment of rights and solidarity. The analysis of how EU Citizenship engages with the two components listed above will therefore consider the impact this may have on inequality. Additionally, equality considerations will play an important role in other chapters of this thesis including whether the free movement rules for EU citizens are applied equally (chapter 3) and the equality concerns present in the EU concept of worker (chapter 5 and 7, in particular).

The following sections will address the two identified expectations and transpose them on to EU Citizenship starting with rights in section 2.4 and then looking closer at solidarity and participation in section 2.5. These discussions will also utilise these

¹⁰⁶ Lister and Pia (n 80) 30.

¹⁰⁷ Lister and Pia (n 80) 30-31; for liberal communitarianism see Delanty (n 53); for liberal republicanism see Richard Dagger, ‘Republican Citizenship’, in Engin F Isin and Bryan S Turner (eds), *Handbook of Citizenship Studies*, (London: Sage, 2002); for overlaps between republicanism and communitarianism see Will Kymlicka, *Contemporary Political Philosophy* (2nd edn, Oxford University Press, 2000); Maas (2013) (n 39) 5.

expectations to examine whether EU Citizenship has expanded from its market roots to a social citizenship. Or whether, by remaining a form of a market ‘citizenship’ or membership, it is unlikely to provide a route through which atypical workers can enjoy free movement rights, without having to meet a standard of market credentials.

2.4 The Rights and Entitlements of Union Citizenship

To address the first component of rights and entitlements this section will examine the extent to which the EU grants rights and entitlements to its citizens and whether they are universally available to citizens. While the EU’s ability to provide universal rights has traditionally been restrained by both its market focus and the limitations of its competence due to its institutional status as a supranational body, EU Citizenship introduced the prospect and anticipation for notable advances in the rights and entitlements available. This section will therefore consider some of the ways that Union citizenship has either enhanced, protected or provided rights to its citizens. First, it will look at how EU Citizenship has sought to enhance the scope of EU law, ensuring that rights in EU law are available to all mobile Union citizens. Secondly, the ability of Union citizens to choose their Member State of residence and enjoy free movement rights will be analysed. Finally, the section will examine how EU Citizenship protects access to EU rights through engaging with and restricting Member States decisions in nationality law.

2.4.1 Enhancing the scope of EU law

The concept of Union citizenship is believed to have ‘far-reaching effects’ and has ‘overwhelmingly enlarged’ the scope of EU law in its personal and material application.¹⁰⁸ It has achieved this in two main ways; firstly, through enhancing the scope *rationae persone* test and subsequently the scope of the economic freedoms and secondly, through forcing a reassessment of the CJEU’s approach to purely internal matters.

Since the introduction of EU Citizenship, arguably any Union citizen can now fall ‘within the personal scope of the Treaty, regardless of...’¹⁰⁹ the economic link that was

¹⁰⁸ Eleanor Spaventa, ‘Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects’ (2008) 45(1) Common Market Law Review 13, 44; Kochenov, (2013) (n 22) 119.

¹⁰⁹ Spaventa, (2008) (n 108) 44.

previously required.¹¹⁰ The consequence was that the scope of who could use EU law was extended from only workers to supposedly all Union citizens who exercised free movement and was therefore theoretically ‘enlarged from less than 2.3 per cent of Member States nationals to 100 per cent.’¹¹¹ This meant that Union citizens could challenge Member State rules where they limit ‘residence or discriminate on grounds of nationality.’¹¹² However, the number of Union citizens who are actually able to exercise free movement rights is relatively small.¹¹³ For those that can, the CJEU has found that the scope of EU law extends to Union citizens exercising free movement so long as they establish their ‘cross-border credentials’.¹¹⁴ While there are exceptions to the cross-border requirement, such as that seen in *Zambrano* (here derivative residence rights provided to the primary carers of Member State national children where no right of residence would limit the child’s ‘genuine enjoyment of the substance’ of EU Citizenship rights)¹¹⁵, where the protections of EU law were extended to some non-mobile EU citizens in their home Member State without any transnational integration,¹¹⁶ this can be very narrow in practice both in scope and potentially substance.¹¹⁷

The CJEU has extended the scope of what is sufficiently ‘cross-border’ to cover some instances that were previously considered to be purely internal. This has included some

¹¹⁰ ‘Under this test, three criteria (“limbs”) have to be satisfied: a) the exercise of inter-state movement; b) the taking up of an economic activity; and c) the impediment to inter-state movement’ in Alina Tryfonidou, ‘In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?’ (2009) 46 Common Market Law Review 1591, 1592–5

¹¹¹ Kochenov, (2013) (n 22) 112.

¹¹² Spaventa, (2008) (n 108) 44.

¹¹³ Eurostat found that only 4% of EU citizens of working age live in another EU Member State in ‘EU citizens living in another Member State – statistical overview’ (Eurostat, April 2018) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_citizens_living_in_another_Member_State_-_statistical_overview> last accessed 3 March 2019.

¹¹⁴ Eleanor Spaventa ‘Earned Citizenship – Understanding Union Citizenship through Its Scope’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017).

¹¹⁵ Case C-34/09 *Ruiz Zambrano v Office national de l’emploi* [2011] ECR I-1177.

¹¹⁶ Loïc Azoulai, ‘Euro-bonds’: The Ruiz Zambrano judgment or the real invention of EU citizenship’ (2011) 3 Perspectives on Federalism E-31.

¹¹⁷ Charlotte O’Brien, ‘Acte cryptique? Zambrano, welfare rights, and underclass citizenship in the tale of the missing preliminary reference’ (2019) 56(6) Common Market Law Review 1697.

'hypothetical cross-border situations',¹¹⁸ including, but not limited to, potential movements in the future.¹¹⁹ However, as Nic Shuibhne points out, this approach still 'insists on the need to find some cross-border dimension, even a potential one'.¹²⁰ A case relying on a purely hypothetical prospect of future movement or obstructions to that movement will likely fail to establish enough of a connection to warrant the intervention of EU rights.¹²¹

This debate warrants a more detailed discussion and analysis, however it is not the intention of this thesis to delve into this topic in detail, as it focuses on the rights of EU citizens who have exercised free movement and therefore fulfil the cross-border criteria. Nevertheless, for the purposes of assessing the rights of EU Citizenship generally, it is worth noting the divide this criteria can create between mobile and non-mobile EU citizens. One which Reynolds points out creates further potential inequalities for those who are not able 'to move or find novel ways to satisfy the cross-border condition'.¹²² If the scope of EU law is to be implemented with citizens in mind it shouldn't legitimately differentiate 'based on the sole ground that a border has been crossed'.¹²³ Nor should it construct situations of reverse discrimination, where EU citizens in their home Member State are treated less favourably than their EU migrant counterparts when a situation is deemed to be 'purely internal'. A clear example of this can be seen where EU migrants can rely on EU law to bring certain categories of third-country national (TCN) family members to the host member state,¹²⁴ yet nationals of that member state who have not exercised free movement cannot rely on these rules and must instead follow the requirements of usually stricter national laws.

¹¹⁸ Kochenov, (2013) (n 22) 120.

¹¹⁹ Case C-200/02 *Zhu and Chen v SSHD* [2004] ECR I-9925 ; C-34/09 *Zambrano* (n 115); Tryfonidou (n 110) 1592–5.

¹²⁰ Nic Shuibhne (2010) (n 1) 1615.

¹²¹ Case C-40/11 *Iida v Stadt Ulm* EU:C:2012:691 para 77.

¹²² Stephanie Reynolds, 'Exploring the "intrinsic connection" between free movement and the genuine enjoyment test: reflections on EU citizenship after *Iida*' (2013) 38(3) *European Law Review* 376.

¹²³ Spaventa, (2008) (n 108) 44.

¹²⁴ Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77, arts 2, 3, 6 and 7 (Directive 2004/38).

In still requiring a cross-border dimension, the CJEU have created a relatively trivial divide between citizens that results in the universality of rights and equality ‘undergo[ing] something of an ideological battering’.¹²⁵ Not to mention the fact that this expansion of scope can be viewed sceptically as only reinforcing EU Citizenship’s market ties. As ‘the potency of cross-border movement’ is emphasised in the case law, the guise of facilitating the exercise of movement and residence rights for all citizens mainly facilitates access to the labour market.¹²⁶ Through this lens, the enhanced scope, can be argued to be credited to the internal market and not just a success of citizenship.

2.4.2 EU citizens and free movement

Union citizenship offer individuals the possibility of choosing which Member State to live in. With the introduction of EU Citizenship, the ability to move freely within the territory of the Member States was extended to all who held the status ‘subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect’.¹²⁷ This was previously only available to workers.¹²⁸ Directive 2004/38 (Citizens’ Rights Directive) now sets out many of these limitations by providing all EU citizens a right of residence in another Member State for an initial three month period without conditions.¹²⁹ Residence beyond this period of time is permitted under one of the qualified residence categories.¹³⁰ However, Member States’ ability to expel EU citizens without a right of residence is limited.¹³¹ While nearly all EU citizens may

¹²⁵ Niamh Nic Shuibhne, ‘The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Body?’ in Paul Beaumont, Carole Lyons, and Neil Walker, *Convergence and Divergence in European Public Law* (Hart, 2002) 188.

¹²⁶ Nic Shuibhne (2010) (n 1) 1613.

¹²⁷ Now summarised in TFEU art 20(2)(a) which states ‘Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.’ See chapter 3, section 3.2 The free movement of persons in EU legislation.

¹²⁸ Previously protected by EC Treaty (Treaty of Rome) Article 39 and Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/2.

¹²⁹ Directive 2004/38, art 6. Although Member States can restrict the rights of EU citizens relying on this right of residence for the first three months, such as restricting access to welfare support.

¹³⁰ Directive 2004/38, art 7.

¹³¹ For example, Citizens’ Rights Directive, art 14(2) provides that verification on rights of residence cannot be carried out systematically; Under art 14(3) expulsion cannot be the automatic consequence of recourse to the social assistance system; expulsion measures cannot be taken against workers, self-

technically have the freedom to move and reside in any Member State (exceptions to this including in transitional measures are discussed below), the right to equal treatment can be withheld from those who do not reside in compliance with Article 7 of the Citizens' Rights Directive. This essentially excludes EU citizens who are considered economically inactive from EU provision which protect from discrimination based on nationality and creates a significant barrier to enjoying free movement rights. While the substance of EU Citizenship rights in relation to free movement and the limitations to this will be covered in more detail in chapter 3, this section will look at the role of free movement as a right stemming from a shared citizenship and the availability of this freedom to *all* citizens.

Importantly, free movement in the EU has consistently been identified as the most common answer from EU citizens when asked what the EU means to them.¹³² Freedom of movement 'amounts to choosing friends, foes, and the law' and beyond this, the choice of residence can be made based on certain Member States offerings in terms of healthcare, work, education and lifestyle choices.¹³³

Kochenov argues that this reflects a federalist approach 'connecting the choice of jurisdiction and liberty.'¹³⁴ However, it is important to recognise that many federal states have their limits when it comes to internal migration. For example, restrictions on professional qualifications between provinces in Canada, the denial of health coverage for several months when moving provinces, the privileges given to those with inherited membership to the province in Quebec which are not available to all Canadian citizens, or different tuition fees for in-state and outside of state students in the US.¹³⁵ This shows that, while a broader and more open approach to internal migration in the EU can reflect a federalist system this should not be conflated with an expectation of completely barrier-free movement. Instead Maas argues that federal systems entail

employed persons or jobseekers (art 14(4)) and extra protection against expulsion is provided for long-term residents in art 28 (see 2.5.2 Integration and the persistence of the market).

¹³² Standard Eurobarometer, 'Public Opinion in the European Union' (No.89 March 2018) 71; Willem Maas, 'Equality and the Free Movement of People: Citizenship and Internal Migration' in Willem Maas (ed) *Democratic Citizenship and the Free Movement of People* (Martinus Nijhoff Publishers, 2013) 16.

¹³³ Kochenov, (2013) (n 22) 130.

¹³⁴ *ibid.*

¹³⁵ Willem Maas, 'Boundries of Political Community in Europe, the US, and Canada' (2017) 39(5) *Journal of European Integration* 575.

‘constant negotiation between governments at different levels, but relative security for individual citizens’.¹³⁶

Nevertheless, if freedom of movement is conceived as available to all EU citizens, then the ability to choose where to reside must be one that is thoroughly protected. Barriers to this choice of residence should be sought to be removed, especially when they limit the effective enjoyment of free movement. Yet, under EU Citizenship many barriers to free movement remain present and active, including perhaps the largest barrier to free movement; the economic focus to the right to reside test.¹³⁷ The technicalities of the right to reside test have shown that entitlement to EU law and equal treatment rights is ‘by no means universal nor derived simply from Community nationality but turns on notions of contribution and family status.’¹³⁸ Some EU citizens lack access to truly take advantage of the freedom to reside in Member States due to technical process of synchronising professional qualification. While the Directive on the recognition of professional qualification and a policy of mutual recognition exists to smooth the process of transferring qualifications across borders in the EU,¹³⁹ this can sometimes result in the disadvantaging of professionals from certain Member States who’s qualifications were not deemed as equivalent. Van Riemsdijk highlights this with the example of the valuation in Poland’s nursing qualifications at the time of accession, resulting in the Commission adopting obstacles to the transfer of these qualifications to other EU Member States; a decision which was seen as deliberate and influenced by the request to assist with Poland’s shortage of nursing staff and Member State concerns of labour market saturation.¹⁴⁰

Another potential barrier to free movement could be the restriction of political participation and the rights to vote in national elections, held by Nic Shuibhne as ‘a

¹³⁶ *ibid* 586.

¹³⁷ Charlotte O’Brien, ‘Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Law’ (2016) 53(4) *Common Market Law Review* 937.

¹³⁸ Louise Ackers and Peter Dwyer, *Senior Citizenship?: Retirement, migration and welfare in the European Union* (Bristol University Press, 2002) 3.

¹³⁹ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (2005) OJ L 255.

¹⁴⁰ Micheline van Riemsdijk, ‘Politics of Free Movement in the European Union: Recognition and Transfer of Professional Qualifications’ in Willem Maas (ed), *Democratic Citizenship and the Free Movement of People* (Martinus Nijhoff Publishers, 2013) 115-143.

defining feature of any citizenship'.¹⁴¹ The CJEU has not recognised the lack of national voting rights as a barrier to free movement, understandably given the limitations of Union competence. However, the CJEU has been criticised as treating political rights as conditional.¹⁴² Losing a key right associated with nationality, such as voting, could discourage EU citizens from exercising their free movement.¹⁴³

Alongside the various potential barriers facing EU citizens should they wish to consider moving to another Member State, transitional measures adopted after the ascension of new Member States in 2004 and 2007 permitted the limitation of free movement for some citizens depending on when their Member State joined the EU.

Transitional restrictions - the creation of second-tier citizenship

The addition of new Member States to the EU has resulted in a growing acceptance of levels of citizenship, with new arrivals being temporarily given a second-tier of Union citizenship. This is most prominent in the exercise of transitional restrictions for the A8 countries in 2004 and the A2 in 2007. The Treaties established to oversee the accession of the A8 states allowed the older EU Member States to derogate from, what was then Article 39 EC (on the free movement of workers), and Articles 1-6 of Regulation 1612/68,¹⁴⁴ effectively allowing them to withhold access to labour markets from A8 nationals for a period up to seven years.¹⁴⁵ This meant that the new EU citizens were not guaranteed key rights to free movement, even if they were seeking to move to a Member State to engage in economic activity.

While some Member States decided to implement the full restrictions allowed in the accession treaty, the variation in time periods for restrictions and the exact limitations placed on A8 nationals were significant. For example, Spain, Belgium, Luxemburg, Greece and Portugal limited access for 2 years, France had limits for 5 years but only in

¹⁴¹ Nic Shuibhne (2010) (n 1) 1619.

¹⁴² See 2.5.3 Participation and Solidarity.

¹⁴³ Dimitry Kochenov, 'Free movement and participation in the parliamentary elections in the Member State of nationality: An ignored link?' (2009) 16(2) Maastricht Journal of European and Comparative Law 197, 219.

¹⁴⁴ Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/2.

¹⁴⁵ Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (2003) OJ L236/875 (The Accession Treaty).

particular sectors of work and in particular regions, Denmark only allowed full-time workers access to their labour markets and restricted access to welfare for all workers, there were no restrictions for self-employed persons. Sweden, Ireland and the UK did not choose to limit the access to their labour markets.

The UK did introduce a range of transition measures that restricted access to welfare and required work to be authorised under the Worker Registration Scheme (WRS).¹⁴⁶ This required A8 nationals to register their employment within one month of their start date.¹⁴⁷ Registration certificates were unique to specific employments, meaning that where an A8 national changed their employment, or worked multiple jobs, they would have to notify the Home Office and receive a new certificate. This would continue until 12 months of continuous lawful residence was covered by the registration scheme. Work that had not been properly registered could not be used to establish a right to reside and access welfare benefits or permanent residence status after five years.¹⁴⁸ The WRS required A8 nationals to have an awareness of the scheme, be willing to take the time to apply and incurred an initial fee of £90. While opening access to labour markets may be less restrictive to the movement of new EU citizens than exercising the derogation from the free movement of workers, as permitted in the Accession Treaty 2003, it introduced more ways in which equal treatment may be restricted based on nationality. Currie described the UK's transition measures as 'one of the more exploitative post-accession free movement regimes to have emerged' with the promise of an open labour market in this situation as a 'wolf in sheep's clothing'.¹⁴⁹ Given that no prosecutions were made against those who failed to register their employment, it suggests that the WRS was aimed at reducing access to welfare benefits, rather than monitoring labour market activity.

Additionally, Maas questioned whether EU authorities would have the legitimacy to prevent further restrictions from Member States, should they wish to extend the time of

¹⁴⁶ Agnieszka Fihel, Anna Janicka, Pawel Kaczmarczyk and Joanna Nestorowicz, 'Free movement of workers and transitional arrangements: lessons from the 2004 and 2007 enlargements' (Centre of Migration Research, University of Warsaw, 2015) 11.

¹⁴⁷ The Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219.

¹⁴⁸ DWP 'DMG Vol 2 Chapter 7 Part 3 Habitual Residence and Right to Reside – IS/JSA/SPC/ESA' (Vol 2 Amendment 39, February 2018) [073508].

¹⁴⁹ Samantha Currie, *Migration, Work and Citizenship in the Enlarged European Union* (Ashgate, 2008) 22-23.

the period of time or the type of restrictions.¹⁵⁰ This concern came to light, as the UK extended the use of the Worker Registration Scheme for A8 nationals for 2 years after the expiry in 2009. The UK Supreme Court found that this extension was unlawful.¹⁵¹ Yet Maas' concern remains, it is not clear whether the EU authorities would have the power to prevent further restrictions if national courts do not step in.

Ultimately, Currie argues that the practical impact of this was that accession state nationals were 'assigned the role of a flexible reserve army of labour...' where the work they are called upon to do is 'characterised by poor working conditions, often resulting in a degree of de-skilling...'.¹⁵² This introduction of limits to the rights of new EU citizens, openly departing from the principle of equal treatment,¹⁵³ established a form of 'second-class citizenship',¹⁵⁴ to which holders of EU Citizenship are treated differently depending on their nationality. This is a direct affront to the concept of a shared citizenship, shared rights and entitlements and demeans the principle of equality.

Overall, due to the barriers discussed in this section, EU Citizenship has been criticised for its short-lived and nominal recognition of personhood beyond economic contribution.¹⁵⁵ This approach commodifies its citizens and restricts rights based on market credentials, as such it continues to reflect a market 'citizenship' approach. It also restricts access to free movement, even temporarily, based on the Member State nationality of certain EU citizens. Barriers to free movement could create significant hurdles to atypical workers, which are explored further in chapter 3 which analyses the substance of EU Citizenship free movement rights.

¹⁵⁰ Willem Maas, 'Unrespected, Unequal, Hollow? Contingent Citizenship and Reversible Rights in the European Union' (2009) 15(2) *The Columbia Journal of European Law* 265, 272.

¹⁵¹ *SSWP v Gubeladze* [2019] UKSC 31.

¹⁵² Currie (2008) (n 149) 201.

¹⁵³ O'Brien (2017) (n 34) 161.

¹⁵⁴ Maas (2009) (n 150) 277.

¹⁵⁵ Spaventa, (2017) (n 114) 225.

2.4.3 EU Citizenship's influence on nationality Law

While the scope of EU law may have increased under EU Citizenship, it can be seen as problematic that acquiring the status of Union citizenship and the rights it entails is entirely dependent on the regulating of Member State nationalities. This may bring into question the formidability of the rights of EU Citizenship, as a citizen can lose access based on a revocation of nationality decided only by a Member State body with no involvement of the EU. Additionally, questions are asked of what this means for long-term 'third country national' residents in the EU, as EU Citizenship cannot be granted without a Member State nationality.¹⁵⁶ The introduction of EU Citizenship has increased the EU's potential to protect the status and rights of its citizens through requiring the consideration of EU law principles in cases of nationality law.

Although a derivative status dependent initially on the fact of national citizenship, Union citizenship has since acquired the potential to limit the ability of Member States to deprive an EU citizen of their existing nationality. In *Rottmann*, the CJEU stated that EU law and the principle of proportionality must be considered when looking at decisions that could result in the loss of Union citizenship.¹⁵⁷ From this, individuals who are faced with the prospect of losing their Member State nationality, and therefore the rights granted to them through their status as an EU citizen, can rely on EU law to protect their status including a particularly thorough application of the principle of proportionality.¹⁵⁸ Davies argues that since this case, where nationality law and EU law conflict, the CJEU can now be considered 'the final authority'.¹⁵⁹ Additionally, Shaw questioned whether *Rottmann* paved the way for further restrictions on the sovereignty of Member State's nationality law, including refusals of an acquisition of nationality

¹⁵⁶ See Tamara K Hervey, 'Migrant workers and their families in the European Union: the pervasive market ideology of Community Law' in Jo Shaw and Gillian More, *New Legal Dynamics of European Union* (Oxford University Press, 1995) 91; Maas (2009) (n 150); Maas (2007) (n 2) 50; European Economic and Social Committee, 'Resolution addressed to the European Convention' (CES 1069/2002) point 2.11 'The Committee calls on the Convention to examine the possibility of granting Union citizenship to third country nationals with long-term resident status.'; Kochenov, (2013) (n 22) 106-7.

¹⁵⁷ Case C-135/08 *Rottmann v Freistaat Bayern* [2010] ECR I-1449, para 59.

¹⁵⁸ Michael Dougan, 'Some comments on Rottmann and the 'personal circumstances' assessment in the Union citizenship case law' in Jo Shaw (ed), 'Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?' (Working Papers, EUI RSCAS, 2011/62, EUDO Citizenship Observatory 2011) 17.

¹⁵⁹ Gareth Davies, 'The Entirely Conventional Supremacy of Union Citizenship and Rights' in Jo Shaw (ed), 'Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?' (Working Papers, EUI RSCAS, 2011/62, EUDO Citizenship Observatory 2011) 6-7.

rather than just loss of citizenship.¹⁶⁰ While Kochenov suggests that this case ‘started reshaping the federal status quo in Europe’ and could signal that ‘virtually any instance of loss (and, necessarily, also acquisition) of a Member State nationality is potentially covered by EU law’,¹⁶¹ Dougan points out that such an extension would be ‘stretching even the Court’s generous approach... beyond its logical limits.’¹⁶² The limits of this can also be seen in the context of Brexit which shows that EU Citizenship cannot be guaranteed as a permanent status and remains reliant on Member State nationality and continued membership of the EU. Despite its contextual limitations, *Rottmann* therefore highlights the potential of Union citizenship as a rights providing status.

This is particularly notable given some Member States reaction to a previous judgment on nationality law¹⁶³ discussed at the Edinburgh Summit 1992. During the summit, Denmark negotiated opt-outs of the Maastricht treaty including that European citizenship will not replace national citizenship,¹⁶⁴ explicitly stating that the decision of whether an individual possesses national citizenship will be left solely to the Member State concerned.¹⁶⁵ Golyner regards this summit as demonstrating that Member States never intended ‘delegation of competence on issues of nationality to the EU’.¹⁶⁶ A further example of this tension can be found in the 2004 Irish referendum resulting in the 27th amendment to the Irish Constitution removing birthright citizenship, irrespective of the parents’ status. While the provision for citizenship by birthright was originally intended to ensure that those in Northern Ireland would not be deprived of their Irish citizenship, popular opinion began to favour the change after allegations that foreign nationals were engaging in ‘birth tourism’. At the time of the referendum the

¹⁶⁰ Jo Shaw, ‘Setting the Scene: the Rottmann case introduced’ in Jo Shaw (ed), ‘Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?’ (Working Papers, EUI RSCAS, 2011/62, EUDO Citizenship Observatory 2011) 4.

¹⁶¹ Kochenov, (2013) (n 22) 115.

¹⁶² Dougan (2011) (n 158) 17.

¹⁶³ Case C-369/90 *Micheletti and others v Delegación del Gobierno en Cantabria* [1992] ECR I-4239.

¹⁶⁴ This was not originally included in the Maastricht Treaty but was later incorporated through amendments in the Amsterdam Treaty stating that EU citizenship was ‘complementary to’ national citizenship. The Lisbon Treaty then amended this to ‘additional’.

¹⁶⁵ ‘Conclusions of the Presidency’ Edinburgh Summit 1992, 57.

¹⁶⁶ Oxana Golyner, ‘The correlation between the status of Union Citizenship, the rights attached to it and nationality in Rottmann’ in J Shaw (ed), *Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law?* (EUI Robert Schuman Centre for Advanced Studies Paper No 62 (2011)) 20.

CJEU were hearing the case of *Chen*,¹⁶⁷ concerning a Chinese mother residing and facing deportation from the UK. She was pregnant and, knowing that a second child would violate the 'one child' policy in China, gave birth in Northern Ireland. Her child acquired Irish and EU Citizenship and through this she then had a right to reside in the UK as a primary carer of self-sufficient EU citizen. This case was prominent during the referendum and was later pronounced by the Irish government as 'vindication' for its decision to hold the referendum.¹⁶⁸ This ultimately resulted in the restriction of the ability to acquire EU Citizenship. While, through EU Citizenship, EU law can have some influence over matters that were previously regarded as purely internal, it is clear that this power is not unlimited. Incursions into these matters, such as with nationality law, are likely to face a backlash from the Member States.

EU Citizenship has not developed to the point where it is independent of nationality. Nor is it clear that this would be the next step taken, should a Member State revoke nationality despite disagreement from EU law (or should a Member State cease to be a Member State). Nevertheless, it highlights an effort to protect citizens from losing access to rights under their status as Union citizens.

This brief overview has considered some of the rights and entitlements available to EU citizens that have been accredited to the introduction of EU Citizenship. EU Citizenship has brought about some positive changes in the way that access to EU law rights have expanded and protected by limiting the ability of member states to strip citizens of their status under the EU. However, many of the 'rights' associated with free movement, such as the protection from discrimination based on nationality, are withheld from EU citizens based on personal attributes, market credentials and other barriers. This questions the universality and credibility of the rights offered through EU Citizenship, instead appearing more like the optional provisions highlighted by Everson. In this respect, the rights available to EU citizens are mostly awarded on the basis of market engagement, rather than being universal, and therefore continue to reflect a market citizenship approach.

¹⁶⁷ C-200/02 *Chen* (n 119).

¹⁶⁸ Siobhán Mullally, 'Children citizenship and constitutional change' in Bryan Fanning (ed), *Immigration and Social Change in the Republic of Ireland* (Manchester University Press, 2007) 38.

2.5 Solidarity and EU Citizenship

The Second core feature of citizenship identified above, is the anticipation of solidarity and participation amongst the membership of its citizens. It is important to remember that '[r]ights are always contested' and for them to be sustained they require formal safeguarding and political support.¹⁶⁹ Rights and freedoms can only survive by 'developing a certain measure of loyalty...that cannot be legally enforced'.¹⁷⁰ Further to this, if EU Citizenship is to incorporate some level of 'morally demanding/compelling' social solidarity where all Union citizens have access to non-contribution benefits and/or public services paid for through tax contributions it will have to depend on acquiring the necessary support.¹⁷¹ As a central feature to citizenship and a potential way to enhance its capabilities it is necessary to consider the different aspects of solidarity, how it can be fostered in a transnational community, and any prospective difficulties in realising this. After all, despite EU Citizenship rights already struggling to meet an acceptable standard for a status beyond market citizenship, as found above, 'all rights are reversible, no matter how fundamental they may appear.'¹⁷² Therefore, citizenship rights cannot be taken for granted; they need to achieve and maintain some political and popular support.

This section will be split into three subsections, firstly looking at the possibility of enhancing solidarity through a common European Identity, secondly analysing approaches to solidarity through integration, and thirdly, critiquing EU Citizenships' level of political participation that is necessary to give the EU the requisite legitimacy to encourage support and solidarity.

¹⁶⁹ Maas (2007) (n 2) 97-8.

¹⁷⁰ Jürgen Habermas, 'Struggles for Recognition in the Democratic Constitutional State' in Ciarran Cronin, Pablo De Greiff, *The Inclusion of the Other: Studies in Political Theory* (Cambridge, 1998) 227; Marshall also recognised that 'citizenship requires... a direct sense of community membership based on loyalty to a civilisation which is a common possession' in Marshall (n 44) 92.

¹⁷¹ Michael Dougan and Eleanor Spaventa, 'Wish you weren't here...' New Models of Social Solidarity in the European Union' in Michael Dougan and Eleanor Spaventa, *Social Welfare and EU Law* (Hart, 2005) 217.

¹⁷² Maas (2009) (n 150) 267.

2.5.1 Creating a European Identity

Achieving solidarity and support for rights depends on, according to Maas, achieving ‘a shared European identity’ and belonging.¹⁷³ It is argued that the best way to ensure allegiance and solidarity is through a ‘certain measure of loyalty’ to a state built from having a shared identity.¹⁷⁴ National identities are recognised as a ‘very strong source of solidarity’.¹⁷⁵ Maas, therefore suggests that ‘the extent to which the Europe idea becomes part of national identities will ultimately determine how successful integration can be.’¹⁷⁶ EU Citizenship was perceived to be a vital step in increasing a sense of European identity amongst those holding the status. For Kochenov, Union citizenship has gone some way in achieving this, stating that by ‘releasing [EU citizens] from the ‘suffocating bonds’ of nationality, free movement allows them to embrace Europe as their identity.’¹⁷⁷ However, as stated above, free movement is only enjoyed by a relatively small number of EU citizens. This section will therefore explore the likelihood of social solidarity forming among EU citizens based on a shared identity.

Elsmore and Starup suggest the EU ‘lacks the cultural... angle’¹⁷⁸ and has “brand identity’ problems’,¹⁷⁹ which hinder the success of a ‘euro-identity’. The blame for these problems is placed, at least partly, on the development in the EU being mainly economically motivated rather than ‘selling the idea that national citizens will acquire a Euro-social identity... and join the spirit and consciousness of a new European society’¹⁸⁰. However, it is important to remember, as Faist does, that the idea of sharing a common culture regularly places too much importance on past, traditions, religion or

¹⁷³ Maas (2007) (n 2) 97-8.

¹⁷⁴ Everson (n 6) 73.

¹⁷⁵ Rainer Bauböck, ‘Citizenship and Collective Identities as Political Sources of Solidarity in the European Union’ in Keith Banting and Will Kymlicka, *The Strains of Commitment: The Political Sources of Solidarity in Diverse Societies* (Oxford University Press, 2017) 80.

¹⁷⁶ Maas (2007) (n 2) 113.

¹⁷⁷ Kochenov, (2013) (n 22) 135.

¹⁷⁸ Matthew J. Elsmore and Peter Starup, ‘Union Citizenship—Background, Jurisprudence, and Perspective: The Past, Present, and Future of Law and Policy’ (2007) 26(1) *Yearbook of European Law* 57.

¹⁷⁹ *ibid* 109.

¹⁸⁰ *Ibid* 106.

race that are often based on false narratives.¹⁸¹ For example, a ‘pure, pristine and true cultural tradition of Europe’ does not exist.¹⁸² Going further, Anderson recognises that, rather than just an invention based on fabricated commonalities, which could imply the existence of ‘true’ nations, all communities larger than those where individuals have ‘face-to-face contact (and perhaps even these) are ‘imagined’.¹⁸³ The EU must therefore be cautious when attempting to achieve commonality through a European identity to avoid this ethno-national approach because of its potential to divide and its false perception of Europe. Awareness of this issues was recognised in the decision to remove a reference to ‘Christian values’ into the draft of the planned but ultimately rejected European Constitution. The argument for inclusion, made by Weiler, identified Christian values as the closest shared ‘European historical memory and common culture’ which could be used to benefit European integration.¹⁸⁴ Cvijic and Zucca argue that this claim is not ‘substantiated’ and fails ‘to capture a phenomenon as complex as European culture.’¹⁸⁵ It therefore places too much importance on the potential false narratives that Faist warns against.¹⁸⁶ Instead, the decision to remove reference to ‘Christian values’ shows an awareness of this issue and a desire to avoid an ‘aggressive self-assertion’ of a supposed European identity.¹⁸⁷ There is also a risk of creating a clear distinction between ‘European and non-European’. Emphasising the ‘the *otherness* or alien nature’ of not only third country nationals, but also EU citizens in ethnic, racial or religious minorities, results in the continued narrow perception of ‘Europe’ as a ‘White Man’s Club’ ignoring its multi-cultural heritage, and the (often inhumane) colonial histories of some Member States.¹⁸⁸

¹⁸¹ Faist (n 52) 53.

¹⁸² *ibid.*

¹⁸³ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1987).

¹⁸⁴ Joseph HH Weiler, *Un'Europa cristiana: un saggio esplorativo* (Rizzoli, 2003); Srdjan Cvijic and Lorenzo Zucca, ‘Does the European Constitution Need Christian Values? A review of Un'Europa cristiana: un saggio esplorativo by J. H. H. Weiler’ (2004) 24(4) *Oxford Journal of Legal Studies* 739, 742.

¹⁸⁵ Cvijic and Zucca, (n 184) 742.

¹⁸⁶ Faist (n 52) 53.

¹⁸⁷ Cvijic and Zucca, (n 184) 746.

¹⁸⁸ Hervey (n 156) 98-9.

While the creation of something akin to national identity could prove useful to fostering solidarity, it does not guarantee it. Even in national contexts, where minority communities exist, Bauböck argues that attempts to strengthen national identity ‘have contributed to further disintegration’.¹⁸⁹ It is also important to note that the strength of the link between national identity and social solidarity is disputed.¹⁹⁰ A collective European identity may therefore not create the unity or solidarity with fellow EU citizens to translate into support for redistributive social policy.

Instead, Dougan and Spaventa suggest that a common European identity could be derived from ‘shared social and cultural experiences and institutional and political bonds’.¹⁹¹ Habermas theorises that a shared political culture crystallising around constitutional principles such as human rights and popular sovereignty can form into a type of ‘constitutional patriotism’ which ‘can take the place originally occupied by nationalism’.¹⁹² With a lack of ‘true’ traditional or historical commonalities to draw on and the dangers of relying on these, a focus on political culture and constitutional values could act as the common ground where solidarity can be forged. However, Müller notes the concerns that such ties are not strong enough to ‘generate the kind of social solidarity that motivates large-scale egalitarian socioeconomic policies’.¹⁹³ This concern may be particularly true in the post-national context of the European Union.

The potential for a shared political culture among EU citizens may also be stifled by the dominance of Member State allegiance and identity. Bellamy questions EU Citizenship’s substantive contribution to supranational solidarity.¹⁹⁴ He argues that while it gives

¹⁸⁹ Relying on examples such as sustaining solidarity between Belgium’s linguistic communities or the calls for independence of Scotland from the UK and Quebec from Canada in Bauböck, (2017) (n 175) 80.

¹⁹⁰ Hall’s review of empirical studies measuring this relationship concludes that ‘stronger attachment to the nation does not promote support for redistribution’. Peter A Hall, ‘The Political Sources of Social Solidarity’ in Keith Banting and Will Kymlicka, *The Strains of Commitment: The Political Sources of Solidarity in Diverse Societies* (Oxford University Press, 2017) 202-203; Richard Johnston, Keith Banting, Will Kymlicka, and Stuart Soroka. ‘National Identity and Support for the Welfare State’ (2010) 43(2) *Canadian Journal of Political Science* 349; Moses Shayo, ‘A Model of Social Identity with an Application to Political Economy, Nation, Class and Redistribution’ (2009) 103(2) *American Political Science Review* 147.

¹⁹¹ Dougan and Spaventa (n 171) 185.

¹⁹² Jürgen Habermas, *The inclusion of the other: studies in political theory* (Cambridge, Polity Press 1998) 118.

¹⁹³ Jan-Werner Müller, ‘A general theory of constitutional patriotism’ (2008) 6(1) *International Journal of Constitutional Law* 72.

¹⁹⁴ Richard Bellamy, ‘Evaluating Union citizenship: belonging, rights and participation within the EU’ (2008) 12(6) *Citizenship Studies* 597.

holders of the status easier access to other Member States, potentially leading to citizenship of those Member States, it does little to ‘create a distinctive attachment to the EU itself.’¹⁹⁵ Instead he locates solidarity as remaining between the individual and Member States, with ‘no transfer of allegiance to the EU’.¹⁹⁶ This approach treats allegiance as a zero-sum game and does not consider the ability for individuals to grapple with multiple identities and allegiances. The Spring 2019 Standard Eurobarometer shows that 73% of EU nationals felt that they were European Citizens,¹⁹⁷ however this feeling was mainly expressed as secondary to that of national citizenship.¹⁹⁸ Perhaps a transfer of allegiance from Member State to the EU is not necessary, rather a fostering of solidarity towards to EU irrespective of allegiance to a Member State. Nevertheless, it is not insignificant that EU citizens have more affiliation with individual Member States than the EU itself, as it may limit the potential for social solidarity for citizens beyond national borders.

Solidarity and identity are thus intertwined concepts that can assist each other to form. It seems that a sense of European identity is unlikely, potentially inappropriate and not necessarily effective, especially when focused on a false impression of shared culture and given its divisive and exclusionary nature. Alternatively, establishing a common identity based on shared a political culture and values that are reflected in constitutional provisions could be more helpful. While EU Citizenship has taken some steps in establishing a shared supranational legal culture, this is perhaps too abstract a notion to foster a shared identity and solidarity. This begs the question of how far a common identity through EU Citizenship can go, particularly if it is to ‘justify the assimilation of economically inactive migrants into the traditional welfare societies of the Member States?’¹⁹⁹ Instead, it is necessary to consider other potential drivers of solidarity in the EU.

¹⁹⁵ *ibid* 598.

¹⁹⁶ *ibid* 609.

¹⁹⁷ Standard Eurobarometer, ‘European Citizenship’ (No.91, June 2019) 39.

¹⁹⁸ The Eurobarometer identified that 88% of respondents either identified solely by their Member State nationality or first by their nationality and then as a European citizen. Of these 55% of respondents defined themselves first by their own nationality and then as a European citizen. Only 8% stated that they felt European first and 2% identifying solely as European, Standard Eurobarometer 91 (n 197) 46.

¹⁹⁹ Dougan and Spaventa (n 171) 217.

2.5.2 Integration and the persistence of the market

One of the ways in which solidarity and a sense of community could be enhanced in the context of the EU is through greater recognition of integration as a key factor to belonging. By recognising the value of belonging-by-choice, the EU can play to its strengths, rather than focusing on its lack of ‘national identity’. Free movement gives EU citizens the option to move, work, study and build a new life in any of the Member States. For example, in AG Wathelet’s opinion in *NA*, the salience of integration was highlighted by determining that a German national who had no connection with that Member State and had been born and educated in the UK had ‘constructed their citizenship’.²⁰⁰ If EU Citizenship can create a community based on the recognition of integration, rather than a common identity or involvement with the market, it may be able to establish further support and solidarity.

Integration as an escape from the market

In some ways, EU law pays homage to the value of integration. Spaventa argues that Union citizenship, a status that promoted a ‘more fluid concept...’ of belonging determined by ‘the actual links established by the (individual) citizen with the polity of reference’²⁰¹ enhances the importance of integration. This can be examined in three main scenarios. Firstly, through the enhanced protection granted to EU nationals in relation to deportation providing they have the right of permanent residence²⁰² or have resided in the host Member State for 10 years.²⁰³ Secondly, through permanent residence which provides more rights to individuals who have spent at least 5 years in a host Member State,²⁰⁴ recognising that time can create a genuine link with a Member State.²⁰⁵ And thirdly through the CJEU’s approach to welfare benefits which is argued

²⁰⁰ Case C-115/15 *SSHD v NA* EU:C:2016:259, Opinion of AG Wathelet, para 115.

²⁰¹ Spaventa (2017) (n 114) 208-9.

²⁰² Directive 2004/38, art 28(2).

²⁰³ *ibid*, art 28(3).

²⁰⁴ *ibid*, art 16; art 17 contains specific circumstances where permanent residence can be acquired in a period of time shorter than 5 years. See chapter 5, section 5.2.2 Long-term resident workers.

²⁰⁵ Spaventa, (2017) (n 114) 217.

by Thym to display some recognition of integration into host societies.²⁰⁶ All three of these scenarios appear to award the time spent in a host Member State recognising the importance of integration and encouraging Union citizens to reach a certain level of integration to acquire further rights. However, problems arise with the actual considerations when assessing levels of integration.

Spaventa recognises that these systems are often not awarded on time and social integration alone; the acquisition of permanent residence and access to many means-tested benefits includes a qualitative element, ‘the citizen has to be migrant; economically active or economically independent; and she must have been ‘good’’.²⁰⁷ Adding a qualitative hurdle that relies on economic situations diminishes the importance of integration into the community, time and laying down roots in a Member States. This also creates a situation where two individuals who have lived in a Member States for the same amount of time have very different rights because one satisfies the economic hurdles and the other doesn’t without much consideration of other forms of integration.

However, this approach to integration is foreseeably most problematic when faced with accessing welfare benefits as, the easiest way to establish integration is through sufficient economic activity or independence, two scenarios where welfare benefits may not be required. Additionally, when it comes to welfare benefit systems, they are often built on a notion of membership with ‘duties to contribute to the financing’ of the system alongside the right to claim benefits.²⁰⁸ Communities based on membership have a ‘built-in bias towards ‘otherness’ and often ‘shift from addressing structures of inequality and discrimination to individuals’ responsibilities’.²⁰⁹ A community based on market focused integration and individual responsibility such as economic activity and

²⁰⁶ Daniel Thym, ‘Towards “Real” Citizenship? The Judicial Construction of Union Citizenship and its Limits’ in Maurice Adams, Henri de Waele, Johan Meeusen, Gert Straetmans (eds), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice Examined* (Hart, 2013) 155, 162.

²⁰⁷ Spaventa, (2017) (n 114) 218. For example, the right of permanent residence requires individuals to have ‘resided legally’ for a continuous period of five years. Directive 2004/38, art 16 ‘Legal residence’ in this context means residence which ‘complies with the conditions laid down in the directive, in particular those set out in Article 7(1)’ in Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja v Land Berlin* [2011] ECR I-14035, para 46. See chapter 5 section 5.2.1 on how access to many welfare benefits also requires ‘legal’ residence.

²⁰⁸ van der Mei (n 49) 5.

²⁰⁹ Dora Kostakopoulou, ‘The Anatomy of Civic Integration’ (2001) 73(6) *Modern Law Review* 933, 957.

contribution, seems unlikely to foster any kind of solidarity that will protect the rights of citizens who have integrated in other ways.

In these examples, the focus on the internal market taints the significance of integration. It is only the extra protection for those faced with deportation that does not rely on an economic style integration, and this is only activated after 10 years of residence. Solidarity and loyalty may never be established if the rights available through EU Citizenship continue to rely on economic considerations as benchmarks for deserving citizens. Continuing to apply a market focus to integration may continue to alienate Union citizens as when certain forms of welfare needs are ignored it 'effectively excludes many individuals from membership of the... community'.²¹⁰ It is also recognised that EU Citizenship, being so encompassed by the market, creates a relationship between the citizen and the EU that hinders the development of allegiance.²¹¹ An EU citizens role in the market is integral to their rights as a citizen. In contrast, a social citizenship protects its citizens who are unable to engage in the market as their rights and entitlements are affirmed by the institution of citizenship rather than performance in the market.²¹² Perhaps, the expectation for involvement in economic activity is translated more severely into Union citizenship as the strength and integration of the internal market is essential for the 'economic cooperation' necessary to achieve the aims of the EU.²¹³ Yet, the reality of this means that a Union citizen lacks the same protections as that expected from citizenship. If the choice is made to engage in the internal market there is no guarantee of success *or* entitlements to fall back on. Everson warns that without the benefits of status and entitlements granted from the traditional forms of citizenship a Union citizen's only reason to engage with the single market is for 'self-interest'.²¹⁴ When the recognition of rights is dependent on the commodification of individuals it 'is most unlikely to win firm support among those it

²¹⁰ Dougan and Spaventa (n 171) 186.

²¹¹ Everson (n 6) 73.

²¹² *ibid* 87-88.

²¹³ 'The EU in brief' (Europa) <https://europa.eu/european-union/about-eu/eu-in-brief_en> accessed 8 August 2017.

²¹⁴ Everson (n 6) 73.

commodifies,²¹⁵ and may therefore never encourage solidarity among other EU citizens and between Member States or allegiance towards the EU.

Integration versus assimilation

Where integration is replaced with expectations of assimilation, the notion can quickly introduce new forms of othering or alienation. Spaventa recognises the risk that further qualifications to assess integration could be introduced, for example through language skills,²¹⁶ or cultural knowledge tests to establish access to EU Citizenship rights. While assessing integration beyond economic circumstances is a welcome approach, the methods adopted to test this can sometimes rely on an expectation for individuals to assimilate, rather than integrate. Testing language skills and cultural knowledge, which are often adopted for those who wish to naturalise as national citizens, can often be a misleading, unnecessary and an inappropriate test of integration.²¹⁷ Kostakopoulou convincingly argues that integration tests based on national values, ways of life and sometimes political views can actually produce the opposite of the desired effect and result in individuals feeling ‘more estranged, apprehensive, fixated and resistant.’²¹⁸ There is equally a danger that if states do not offer classes on language and cultural knowledge, these types of integration tests can create discriminatory boundaries for those with less access to education and where private tuition is not an option.²¹⁹ As Nic Shuibhne argues, ‘The European anthem cannot be shoved down the throats of EU citizens. They will respond to it or they won’t.’²²⁰ Integration, focusing on forced assimilation often mirrors the issues of false narratives and ethno-nationalism discussed in section 2.5.1. It is therefore at risk of encouraging further alienation and, in the interest of fostering support for citizenship rights, should be avoided.

²¹⁵ Kochenov, (2017) (n 16) 8.

²¹⁶ Spaventa, (2017) (n 114) 218.

²¹⁷ See Tommaso M. Milani, ‘Language Testing and Citizenship: A Language Ideological Debate in Sweden’ (2008) 37(1) *Language in Society* 27, 49; Sara Wallace Goodman, ‘Integration Requirements for Integration's Sake? Identifying, Categorising and Comparing Civic Integration Policies’ (2010) 36(5) *Journal of Ethnic and Migration Studies* 753

²¹⁸ Kostakopoulou (n 209) 957.

²¹⁹ Amitai Etzioni, ‘Citizenship Tests: A Comparative, Communitarian Perspective’ (2007) 78(3) *The Political Quarterly* 353, 361.

²²⁰ Nic Shuibhne (2010) (n 1) 1624-5.

Supranational Integration

Instead, it is important to recognise the aspects of integration that can form a positive community which is less likely to alienate based on market credentials and ‘otherness’. Kostakopoulou supports the pluralist approach, where ‘developing partnerships, cultivating mutual respect, fostering interactions and dynamic learning in action’ are prioritised.²²¹ To achieve this, it is imperative to prioritise ‘equality and non-discrimination...’, especially towards migrant communities to ‘safeguard[...] the dignity of human beings... giv[ing] them the opportunity to thrive.’²²² This entails an equality which includes, in some ways, those who do not fit the mainstream demands of a capitalist market as ‘fairness and sensitivity are crucial.’²²³ Although this aspiration is both admirable and sensible, it is equally quite optimistic and a little too intangible. Against the backdrop of the 2008 economic crisis and the ‘current of national protectionism in associated public debate’, Nic Shuibhne predicts that the success of creating a transnational solidarity based on integration and community ‘will be challenging, at best.’²²⁴

Indeed, even the CJEU have shown a willingness to reject notions of supranational integration as legitimate reasons for access to citizenship rights. While the CJEU has historically used proportionality tests to consider the individual circumstances of EU nationals, including levels of integration, more recently the Court has been reluctant to adopt these positions and in some cases ignored it altogether.²²⁵ However, the case of *Alokpa* shows the CJEU rejecting or even reversing the Courts previous approach to proportionality.²²⁶ In *Alokpa* the court denied access to a residence and work permit, in Luxemburg, to a third country national who was the primary carer of French national children on account of her not having the resources to be self-sufficient.²²⁷ However,

²²¹ Kostakopoulou (n 209) 957.

²²² *ibid.*

²²³ Veit Bader ‘The Cultural conditions of Transnational Citizenship: On the Interpenetration of Political and Ethnic Cultures’ (1997) 25(6) Political Theory 771, 796 cited in Kostakopoulou (n 209) 958.

²²⁴ Nic Shuibhne (2010) (n 1) 1625.

²²⁵ See chapter 3, section 3.3.2 The dismantling of individual proportionality assessments.

²²⁶ Case C-86/12 *Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2013:645.

²²⁷ C-86/12 *Alokpa* (n 226); C-200/02 *Chen* (n 119) para 28-30 on how sufficient resources can come from the income of a parent.

Ms Alokpa had been offered a job, which she was unable to take without the residence permit, but paradoxically without the job she ‘could not demonstrate that her children had sufficient resources... to qualify for residence rights under Article 7(1)(b).’ In this case, the CJEU decided that no proportionality test was necessary if the residency requirements were not met, and that the children’s French nationality meant that it was the responsibility of France to allow the family to reside there, despite the fact that Ms Alokpa’s children had never lived in France and had no family life with their French father.²²⁸ Spaventa draws attention to the fact that, in doing this, ‘the Court is privileging an abstract notion of belonging’ which is allocated at birth, almost always irrespective of the country of birth,²²⁹ ‘at the expense of the supranational notion of belonging-by-choice’.²³⁰ This is repeated in *Alarape*,²³¹ where the CJEU also disregards the level of integration and belonging that could form by residing in a Member State for five years under a lawful derivative right of residence. This case saw the specific exclusion of time spent as a *Teixeira* carer (a derivative right of residence provided to the child, or primary carer of the child, of an EEA national worker or former worker where that child is in education and where requiring the primary carer to leave the host Member State would prevent the child from continuing their education there)²³² from what is considered ‘legal residence’ in relation to the requirements for permanent residence under Article 16(2) of the Citizens Directive.²³³ This is despite this category qualifying as exercising a right to reside in other situations, including access to welfare benefits. With the CJEU rejecting notions of supranational integration through long periods of residence and ‘belonging-by choice’, it seems even more unlikely that transnational solidarity will be formed in the way Kostakopoulou envisions.

With this analysis in mind, the concepts of identity and integration must be carefully navigated if they are to avoid some of the dangers that could lead to further

²²⁸ C-86/12 *Alokpa* (n 226) para 12-19.

²²⁹ *SSWP v Sequeira-Batalha* [2016] UKUT 511 (AAC).

²³⁰ Spaventa (2017) (n 114) 215.

²³¹ Case C-529/11 *Alarape and Tijani v SSHD* EU:C:2013:290.

²³² As the primary carer of an EU national workers child who is in full-time education. See Case C-480/08 *Teixeira v London Borough of Lambeth and SSHD* [2010] ECR 2010 I-1107; For more detail see Chapter 5, section 5.2.3 Rights acquired from previous work.

²³³ Directive 2004/38, art 16(2).

estrangement rather than solidarity. It is equally necessary to bear in mind the symbiotic nature of solidarity and rights. With more rights to equality and non-discrimination comes more of a sense of community and solidarity and equally, further solidarity provides the necessary support to justify the expansion of rights. To agree with Faist, 'the causal arrows usually run both ways'.²³⁴ Therefore, while nurturing a transnational solidarity seems in many ways unlikely and, at best, challenging, it will be necessary if EU Citizenship is to grow from its market confines. Additionally, it will not be sufficient for the EU to wait to enhance citizenship rights until the support for rights has reached a substantial level, as the protection of human dignity through equality and non-discrimination is seemingly vital to the progression of solidarity. Equally, it is important to recognise that sticking to an EU Citizenship 'where the commodification of the human being is the core rationale behind the construction of personhood' may well receive a lot of support in law is most unlikely to win firm support among those it commodifies.²³⁵

2.5.3 Participation and Solidarity

A final consideration that could improve the feeling of solidarity among EU citizens and support for the EU, is the value of political participation. As discussed above, political participation can be a tool for a citizenship to help ensure that the good of the community is pursued and that the institution is seen as a legitimate enough to warrant allegiance to. The EU's focus on economic integration and market interests can 'lead to pressures for more political participation',²³⁶ this can be difficult on the supranational or international arenas where engagement may be low compared to local or national levels. As Davies points out in referring to Hirschman's work on 'Exit, Voice and Loyalty',²³⁷ if the engaged and politically active 'customer' or citizen is denied a voice in encouraging improvements in a 'service' they may be likely to exit that 'service'.²³⁸ However, when

²³⁴ Faist (n 52) 52.

²³⁵ Kochenov, (2017) (n 16) 8.

²³⁶ Bartle (n 55) 417.

²³⁷ Albert O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organisations and States* (Harvard University Press 1970).

²³⁸ Gareth Davies, 'The Price of Letting Courts Value Solidarity: The Judicial Role in Liberalizing Welfare' in Malcolm Ross and Yuri Borgmann-Prebil, *Promoting Solidarity in the European Union* (Oxford University Press, 2010) 112-114.

the ‘service’ is more social or political, the result is that a lack of voice, likely begets a lack of loyalty. As such, this section will briefly consider the problems with participation in EU Citizenship.

Currently, the political rights available to mobile Union citizens include ‘access to diplomatic or consular protection of any Member State when in a third country, and rights to vote in/stand for municipal and European Parliament elections’.²³⁹ There is no right for union citizens residing in a Member State, even for long periods, to vote in national elections. Shaw has raised a concern regarding the compatibility of access to social welfare benefits and permanent residence with the absence on national voting rights.²⁴⁰ Being unable to vote in national elections in the Member State where a Union citizen actively chooses to reside is considered, by Nic Shuibhne, as ‘the most problematic gap in EU Citizenship’.²⁴¹

In fact the CJEU has not treated the voting rights that *are* available to mobile EU citizens as inherent or fundamental rights but rather identifying them as something which is not ‘unconditional’²⁴² and which states have a ‘wide margin of appreciation in imposing conditions on’.²⁴³ In Besselink’s words the CJEU has treated EU Citizenship voting rights as ‘a nice thing to have, but a privilege which does not of necessity have to be granted by law’.²⁴⁴ Instead, Union citizens are dependent on thorough and consistent implementation of their voting rights at all levels of governance,²⁴⁵ leaving the possibility

²³⁹ Nic Shuibhne (2010) (n 1) 1620.

²⁴⁰ Jo Shaw, ‘EU citizenship and political rights in an evolving European Union’ (2007) 75(5) Fordham Law Review 2549.

²⁴¹ Nic Shuibhne (2010) (n 1) 1622.

²⁴² Case C-300/04 *Eman and Sevinger v College van burgemeester en wethouders van Den Haag* [2006] ECR I-8055, para 52.

²⁴³ Case C-145/04 *Spain v United Kingdom* [2006] ECR I-7917, para 94.

²⁴⁴ Leonard F.M. Besselink ‘Case C-145/04, Spain v. United Kingdom, judgment of the Grand Chamber of 12 September 2006; Case C-300/04, Eman and Sevinger, judgment of the Grand Chamber of 12 September 2006; ECtHR (Third Section), 6 September 2007, Applications Nos. 17173/07 and 17180/07, Oslin Benito Sevinger and Michiel Godfried Eman v. the Netherlands (Sevinger and Eman).’ (2008) 45(3) Common Market Law Review 787, 808.

²⁴⁵ Jo Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (Cambridge University Press, 2007) 122-167.

of active participation in politics at the European level as minimal.²⁴⁶ Yet, even within these limited rights, EU citizens are vulnerable to unlawful restrictions on their voting rights in Member States.²⁴⁷

Voting rights for national elections continue to be unavailable despite Union citizens showing support for the extension,²⁴⁸ with just more than two thirds (67%) of respondents believing that EU nationals should be allowed to vote in the national elections of the Member State they are residing in.²⁴⁹ To address this growing interest, a European parliament resolution in 2017 called for extending the electoral rights of EU citizens residing in a Member State of which they are not nationals ‘to include all remaining elections’ that were left out of Article 22 TFEU, including national elections.²⁵⁰ However, as resolutions are not binding this has not yet resulted in the extension of voting rights for EU citizens.

The EU has also often been criticised for having a democratic deficit more generally and while it is not the intention to discuss this at length in this thesis, some elements of this criticism are important to the discussion on giving *all* EU citizens a voice, even when they do not exercise free movement. It is particularly important to reflect on issues of representation at the European parliament level including the low turn-out of European elections (with the 2019 elections producing an average turnout of 50.7% across Member States)²⁵¹ and the issues with indirect representation through... parts of the EU that are not directly electable.²⁵² However, the EU also operates a form of

²⁴⁶ Kochenov, (2013) (n 22) 110.

²⁴⁷ For example, after the 2019 European Parliament elections the Commission received a large number of complaints concerning the effective exercise of voting rights for mobile EU citizens in the UK. A European Commission public consultation found that 21% of respondents had faced difficulties in voting in European Parliament or local elections when living in another Member State. See Věra Jourová, ‘Public Consultation on EU Citizenship 2015’ (European Commission, November 2018).

²⁴⁸ Shaw, (2007) (n 240) 2557–2558.

²⁴⁹ Special Eurobarometer, ‘Electoral Rights’ (No.364, March 2013) 22.

²⁵⁰ European Parliament, ‘Resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union’ (2014/2248(INI)), 50.

²⁵¹ Although this is a considerable increase from 42.6% in the 2014 elections, ‘Turnout by Year’ (2019 European election results, European Parliament) < <https://europarl.europa.eu/election-results-2019/en/turnout/>> last accessed 29 August 2020.

²⁵² Simon Hix and Andreas Follesdal, ‘Why is there a Democratic Deficit in the EU? A Response to Majone and Moravcsik’ (2006) 44(3) Journal of Common Market Studies 533.

deliberative democracy which prioritises consultation with civil society organisations and experts on narrow agendas to inform policy choices. Through this, it aims to achieve ‘consensus on the best policy rather than bargaining to reconcile competing interests’.²⁵³ However, Bellamy and Castiglione argue that this approach cannot substitute the representation and transparency of the authorising and holding to account of decision makers that is provided for by more traditional representative democracy models.²⁵⁴

While claims that the EU has a democratic deficit have been disputed,²⁵⁵ it is likely a mixture of the issues above which influence 40% of Eurobarometer respondents to express a feeling that their voice did not count in the EU.²⁵⁶ The belief that the EU has a democratic deficit could be enough to deter some EU citizens from expressing allegiance to the EU. Efforts have been made to address the feeling of detachment from the EU for all its citizens. An example of this can be seen in the European Citizens’ Initiative (ECI) – a mechanism aimed at increasing direct democracy by inviting EU citizens to collect support in the form of one million signatures across seven Member States for initiatives which will then be considered by the Commission. However, this route of participation is limited. Longo’s analysis of the ECI finds that it is hindered by the inaccessibility of ‘e-democracy’, difficulty in stimulating participation and the cumbersome role of the EU Commission with the power ‘of either hearing or not hearing the voice of the European people’.²⁵⁷ Awareness levels of this mechanism are low²⁵⁸ and despite running since May 2012 and attracting 98 registered initiatives, to date

²⁵³ Richard Bellamy and Dario Castiglione, ‘Democracy by Delegation? Who Represents Whom and How in European Governance’ (2011) 46(1) *Government and Opposition* 101, 118.

²⁵⁴ *ibid* 114.

²⁵⁵ Koen Lenaerts and José A. Gutiérrez-Fons, ‘Epilogue on EU Citizenship: Hopes and Fears’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017) 753-757.

²⁵⁶ This Standard Eurobarometer was the first where an absolute majority (56%) of Europeans believed that their voice counts in the EU, Standard Eurobarometer, ‘Public Opinion in the European Union’ (No.91, June 2019) 148.

²⁵⁷ Erik Longo, ‘The European Citizens’ initiative: too much democracy for EU polity?’ (2019) 20(2) *German Law Journal* 181.

²⁵⁸ Dominik Hierlemann and Christian Huesmann, ‘Policy Brief 2 / 2018 - More Initiative for Europe’s Citizens’ (Bertelsmann Stiftung, February 2018).

only five have been successful. Increasing the available routes of participation through the ECI is therefore unlikely.

If the EU does not foster an environment for political participation, including respecting the voting rights of citizens, addressing some concerns of the democratic deficit and extending the right to vote, it cannot expect its citizens to feel included and loyal. The significance of this lies in the EU's potential to establish a supranational political community, that can draw on solidarity with fellow citizens to enhance the potential of free movement rights and social policies for all EU citizens.

EU Citizenship's relationship with solidarity is one of its biggest challenges. As a supranational status, the difficulties faced in national contexts of constructing social solidarity are felt even more keenly. This is particularly noticeable when trying to construct solidarity through a shared identity or constitutional patriotism and through promoting the participation of citizens who may not participate at a national level. While the re-framing of community to include those who demonstrate integration by choosing where they belong, live or work could offer a route through which solidarity can be fostered, the CJEU's move away from this approach. However, it appears that the failure to protect the rights of EU citizens to engage in political participation and to assert rights through integration, could in fact damage the construction of allegiance to the EU and any social solidarity that may be formed by that. While these challenges persist, solidarity in the EU may remain only between market actors based on 'interdependency and economic reciprocity between the migrant worker and the host state'.²⁵⁹ In this conception of EU Citizenship, atypical workers must rely on being seen as economic actors to benefit from this solidarity, not as a Union citizen.

2.6 Summary

Overall, EU Citizenship fails to meet the expectations set out in this chapter of a social citizenship. From the analysis set out, EU Citizenship faces two main challenges in meeting these expectations; the difficulty to develop beyond its market focus and the solidarity deficit in a supranational citizenship.

²⁵⁹ Floris De Witte, 'Transnational Solidarity and Conflicts of Justice' (2012) 18(5) *European Law Journal*, 705.

Beyond a market citizenship?

EU Citizenship has not been freed ‘from its market roots’.²⁶⁰ The origins of EU Citizenship are embedded in the achievement of an integrated market, and this is reflected in the foundations of Union citizenship. Instead of being grounded in any kind of purpose away from the market, that may protect the values of rights, solidarity and political participation, EU Citizenship continues to serve the economic interests of the market. While the status of EU Citizenship has brought about some enhancements to the rights of those who hold this status, these are limited and often tangled up with the requirement for market credentials. These rights are therefore not always applied equally and universally among EU citizens. A reliance on the internal market as the centre piece around which many ‘citizenship’ rights have crystallised limits the scope of those who can enjoy its benefits to those who are deemed to be engaged in the market. This results in the exclusion of individuals whose personal circumstances do not meet those of the model market citizen.

Such exclusions make it unsurprising that solidarity amongst EU citizens has struggled to develop. As Everson points out, market citizens are guided by their self-interest and as such allegiance or solidarity is difficult to foster.²⁶¹

Solidarity deficit

While some of the earlier case law citing solidarity as a justification to enhance the rights of Union citizens, it has not been enough to foster, either through a ‘European identity’ or constitutional patriotism, support and realisation of redistributive social policies for all EU citizens. Neither has integration been embraced as a route to establish support for furthering the rights of Union citizenship. Additionally, the level of political participation in EU Citizenship is still quite low. Despite citizens’ interest in extending these rights, the EU institutions have yet to deliver on this. Nor has the CJEU consistently asserted a route to citizenship rights through long periods of residence or other forms of integration. Without solidarity among EU citizens, any future detangling of citizenship rights from the internal market will be challenging.

²⁶⁰ Spaventa, (2017) (n 114) 207.

²⁶¹ Everson (n 6) 89.

EU market membership and atypical workers

Ultimately, EU Citizenship has failed to meet the identified components of social citizenship. Instead, the two main shortfalls identified suggest that EU citizens cannot expect the rights and entitlements, equality or solidarity inherent in a social citizenship. It is a status where, to enjoy the fullest array of benefits of EU law, a citizen must be involved with the market.²⁶² Therefore, theoretically and significantly in practical terms, Union citizenship appears to be an aspirational but erroneous misnomer and is, at best, no more than a form of market membership. Membership in this context allows EU nationals to choose to exercise free movement at their own risk. However, free movement and equal treatment rights are a performance related benefit attached to this membership. To access the fullest array of protection to ensure free movement can be exercised, an EU citizen must essentially pay their dues through market activity.

Moving forward, this chapter has raised an important question concerning the relationship between atypical workers and Union citizenship. As set out in the introduction to this chapter, EU Citizenship could offer a potential route for atypical workers, who are not within the scope of Article 45 TFEU, to assert their right to free movement and protection from discrimination based on nationality. Therefore, this question must ask whether the limitations of EU Citizenship prevents the status from protecting the free movement and equal treatment rights of atypical migrant workers? This chapter suggests that status as a Union citizen is unlikely to provide solace from the market for those deemed economically inactive and therefore may not be a viable option for atypical workers who cannot establish status as a worker. Chapter 3 will address this question by analysing the substance of EU Citizenship in relation to free movement and unpick some of the consequences of its market construction through an examination of how the CJEU interprets free movement and equal treatment rights for all EU citizens. This will determine whether EU migrant atypical workers must establish their status as an economically active citizen to be able to fully exercise freedom of movement.

²⁶² Herwig Verschueren, 'Being Economically Active: How it Still Matters' in Herwig Verschueren (ed.) *Residence, Employment and Social Rights of Mobile Persons: On how EU Law defines where they belong* (Intersentia, 2016) 187.

Chapter 3: To each according to their affluence: Atypical workers and the limits of free movement rights

3.1 Introduction

The introduction of EU Citizenship increased prospects for a European Union where all citizens can move and reside freely to any of the Member States. But free movement, while considered ‘the cornerstone of EU Citizenship’,¹ is not unconditional. EU citizens must fall within the scope of equal treatment rights to be protected from discrimination based on nationality, without which free movement may not be a realistic prospect. Chapter two established that EU Citizenship is still very much constrained by the market. This has an impact on EU Citizenship’s capacity to provide rights and to establish solidarity, both of which are likely necessary to deliver free movement to all citizens, even when they are without market credentials. The focus on the market results in a conflict of two concepts that ‘protect different values’; ‘market integration’ for the internal market and ‘human dignity’ for social citizenship.² It is, therefore essential to examine the consequences of this, including its impact on individual citizens and their ability to enjoy free movement rights as a Union citizen. These rights appear to have gone through a phase of being enacted and enhanced with ‘conscious attempt[s] to free citizenship... from its market roots’,³ but has since suffered from a reactionary phase retreating to ‘minimalist interpretation’ and a return to market citizenship.⁴ This journey is worth examining in more detail to establish the limits of EU Citizenship as a status to derive free movement rights from. The role of this chapter is to determine the possibility for atypical workers to rely solely on their status as an EU citizen to access free movement and equal treatment rights in the UK, rather than depending on worker status.

¹ ‘Free Movement of Persons’ (EU Parliament, October 2018) <<http://www.europarl.europa.eu/factsheets/en/sheet/147/free-movement-of-persons>> accessed 5 November 2018.

² Pedro Caro de Sousa, ‘Quest for the Holy Grail: Is a Unified Approach to the Market Freedoms and European Citizenship Justified?’ (2014) 20(4) *European Law Journal* 499, 501; Dmitry Kochenov, ‘On Tiles and Pillars: EU Citizenship as a Federal Denominator’ in Dmitry Kochenov, *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017) 43.

³ Eleanor Spaventa, ‘Earned Citizenship – understanding Union Citizenship through its scope’ in Dmitry Kochenov, *EU Citizenship and Federalism: the Role of Rights* (Cambridge University Press, 2017) 207.

⁴ *ibid* 206-209.

This chapter analyses EU law concerning the free movement and equal treatment rights of all EU citizens. It will detail the transition of this law in EU legislation and in the Court of Justice of the European Union (CJEU) to analyse the terms, dictated by the Treaties and Directive 2004/38, by which mobile EU citizens can claim access to a host Member States' national welfare systems. This will address research question 2, which asks: 2. How does the CJEU's interpretation of EU Citizenship and free movement rights impact upon atypical migrant workers' access to equal treatment? The chapter contributes to the literature on free movement and equal treatment rights in an EU Citizenship undermined by its market focus through adopting the atypical worker as a focal point of these discussions. The limits of EU Citizenship and transnational solidarity are therefore tested on the type of citizen who is both engaged in the market and may also depend on the protection of social rights to realistically exercise the freedom to move to another Member State. The analysis draws out the reduced and limited usefulness of EU Citizenship to those who fall outside of the scope of Article 45 TFEU *even* though when some may be economic actors. Atypical workers must instead rely on worker status to enjoy access to welfare benefits in a host Member State.

The chapter will address this question by first analysing the relevant EU legislation in section 3.2, including the ambiguities and nuances introduced in secondary law. How the CJEU interpreted this legislation is then discussed in section 3.3. This section examines the case law by focusing on three different ways the Court has changed their approach to citizenship rights: the interpretation of the objectives of the relevant legislation to protect Member States from unreasonable burdens, the reversal on an individualised approach to proportionality and the re-classification of welfare benefits to permit further restrictions. All three of the changes examined have resulted in the restricting of free movement rights for EU citizens. Section 3.4 will then consider the evidence behind the Court's 'reactionary approach', by looking to the potential political drivers behind this change and the correlation of the timing and response of the CJEU judgements. Finally, this chapter will use this analysis to examine the consequences for the free movement of EU citizens in section 3.5. This will include how Member States have used distinguishing facts to avoid compliance and how the more recent restrictive judgments permitting the discrimination of the 'economically inactive' reduces legal certainty and makes the exercise free movement a less realistic option for some.

In the course of this chapter, the term 'economically inactive' is adopted to describe EU citizens who would not be able to rely on their status as a worker, self-employed person

and their family members under Article 7 Directive 2004/38. This term is used in its technical meaning and is therefore inclusive of many EU migrants who will, in fact, be engaged with economic activity including work. The boundaries of the definition of economic activity and how this excludes many EU nationals who are working will be explored further from chapter five. For atypical workers, reliance on their status as an economically active EU citizen will depend on the inclusivity of the definition and its implementation in Member States. Therefore, the examination of the rights of those deemed to ‘economically inactive’ provides the groundwork for the limited rights available to atypical workers who are not covered by the definition of work.

3.2 The free movement of persons in EU legislation

In its design, the free movement of persons principally concerned workers and self-employed persons, perceived as essential to the furtherance of the European free market and improving the living standards of persons living in the Member States.⁵ The free movement for workers is now provided for in Article 45 of the Treaty on the Functioning of the European Union (TFEU).⁶ This allows EU nationals to freely accept offers of employment in other Member States, to move and reside there for work and a range of other social rights to remove barriers to free movement.⁷ Among these, is the protection from discrimination based on nationality regarding ‘employment, remuneration and other conditions of work and employment.’⁸ This freedom is guaranteed subject to ‘limitations justified on grounds of public policy, public security or public health’.⁹

With the introduction of EU Citizenship,¹⁰ the freedom ‘to move and reside freely within the territory of the Member States’ was extended to all Union citizens.¹¹ This

⁵ ‘Editorial Comments’ ‘The free movement of persons in the European Union: Salvaging the dream while explaining the nightmare’ (2014) 51 Common Market Law Review 729.

⁶ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art 45.

⁷ TFEU, art 45(3); chapter 5, section 5.2.1 Present Work.

⁸ TFEU, art 45(2).

⁹ TFEU, art 45(3).

¹⁰ Consolidated Version of the Treaty on European Union [1992] OJ C 325/5 Article 8 (Maastricht Treaty)

¹¹ TFEU, art 21.

freedom is ‘subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect’.¹²

Access to social rights in host Member States are essential for the freedom of movement to be feasible for many EU citizens. The introduction of EU Citizenship therefore saw the CJEU, in *Martínez Sala*, extend the scope of protection from ‘discrimination on the grounds of nationality’ now provided for in Article 18 TFEU to mobile EU citizens.¹³ It is from this provision that EU citizens can, in theory, claim equal treatment with Member State nationals with regard to accessing welfare benefits, provided that the discrimination is not justified. In this regard, direct discrimination, or where a rule results in a decision being made on the basis of an applicant’s nationality,¹⁴ can only be justified on strictly expressed and limited grounds such as ‘public policy, public security and public health’. Indirect discrimination, as defined in *O’Flynn*, concerns decisions based on criteria which, ‘although applicable irrespective of nationality...’, is essentially more likely to affect EU migrants. This might be because the majority of those affected are EU migrants; the criteria can be more easily satisfied by nationals than EU migrants; or there is a risk that it may operate to the particular detriment of EU migrants.¹⁵ Instances of indirect discrimination can be justified where it is ‘proportionate to the legitimate aim pursued’.¹⁶ While aims that are determined to be ‘purely economic’ are not considered legitimate,¹⁷ the Court has become more lenient where the protection of public finances from a ‘unreasonable burden’ of free movement or ‘the financial balance of the social security system’ is expressed as ‘the pursuit of an objective in the public interest’.¹⁸ Where indirect discrimination is not justified, it will be prohibited. Without an effective claim to equal treatment, EU citizens who are not financially self-sufficient or who cannot rely on rights through the status of a worker or

¹² TFEU, art 21(1).

¹³ Case C-85/96 *Martínez Sala v. Freistaat Bayern* [1998] ECR I-2691; TFEU, art 18.

¹⁴ Case C-124/99 *Borawitz v Landesversicherungsanstalt Westfalen* [2000] ECR I-7293 para 24.

¹⁵ Case C-237/94 *O’Flynn v Adjudication Officer* [1996] ECR I-02617 para 18.

¹⁶ *ibid* para 19.

¹⁷ Case C-137/04 *Rockler v Försäkringskassan* EU:C:2006:106, para 24.

¹⁸ Case C-515/14 *Commission v Cyprus* EU:C:2016:30, para 53.

self-employed person will face significant barriers to realistically moving and residing to a new Member State.

The Limiting conditions of free movement

The limitations and conditions expressed in Article 21(1) TFEU are shaped by secondary law. This includes, but is not limited to, what is now Directive 2004/38,¹⁹ which was brought into force at the time of the 2004 enlargement, and concerns from existing Member States about the potential impact of differentiated economies for free movement.²⁰ Nic Shuibhne identifies the creation of Directive 2004/38 as ‘an opportunity to re-regulate free movement rights within the “new legal and political environment”’.²¹

Directive 2004/38 allows all Union citizens to reside in a Member State for 3 months without restriction.²² Article 7 requires EU citizens to exercise a right to reside should they wish to exercise free movement past 3 months. This includes residing as a worker or self-employed person²³ or, providing that they do not become a burden on the social assistance system of the host Member State and have comprehensive sickness insurance, as a self-sufficient person²⁴ or student.²⁵ Jobseekers may have a right to reside after the initial 3 months providing they are ‘continuing to seek employment and that they have a genuine chance of being engaged’.²⁶ There is also a general requirement for those deemed economically inactive to not become an ‘unreasonable burden on the social assistance system of the host Member State’.²⁷ Article 7 Directive 2004/38

¹⁹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (Directive 2004/38).

²⁰ ‘The 2004 Enlargement: the challenge of a 25 member EU’ (Europa, Updated 23 Jan 2007) <<http://europa.eu/scadplus/leg/en/lvb/e50017>> accessed 8 May 2017.

²¹ Niamh Nic Shuibhne, ‘Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship’ (2015) 52(4) Common Market Law Review 889, 895.

²² Directive 2004/38, art 6.

²³ Directive 2004/38, art 7(1)(a).

²⁴ Directive 2004/38, art 7(1)(b).

²⁵ Directive 2004/38, art 7(1)(c).

²⁶ Directive 2004/38, art 14(4)(b).

²⁷ Directive 2004/38, art 14(1).

presents a much more limited vision than the potential of rights expressed in the Treaty. While the Treaties do confer ‘competence on the legislature in the field of citizenship’,²⁸ the TFEU provides that this should be done ‘with a view to facilitating the exercise of the rights’ which enable the free movement of all Union citizens.²⁹

For EU atypical workers, the Treaty appears to provide a route through their status as an EU citizen to move and reside in another Member State. However, the conditions in Directive 2004/38 may limit this, requiring them to exercise rights as a worker to gain *full access* to free movement and equal treatment rights. The exact meaning of becoming a ‘burden’ or ‘unreasonable burden on the social assistance system’ of a Member State and the extent to which Article 18 TFEU can be relied on by those who do not meet the conditions of Article 7 Directive 2004/38 are therefore key questions in testing the boundaries of free movement for all EU citizens and where atypical workers do not fit into the definition of worker. The next section will explore these how the CJEU has interpreted these rules.

3.3 Free movement of EU citizens in the CJEU

The boundaries of free movement rules are interpreted by the CJEU to determine which EU citizens fall within the scope of the Article 18 TFEU. The extent to which economically inactive EU citizens can assert free movement and equal treatment rights in a host Member State are therefore determined in these judgments.

Different phases of the Court’s judgments have been identified, with a transition to more expansive and pro-citizenship cases back to restrictive interpretations reinforcing the economic focus of EU Citizenship rights.³⁰ Spaventa argues that this switch is a product of a ‘reactionary phase’, where the CJEU has responded to the political movement against EU migration with judgments permitting Member States to limit free movement and control entitlement to national welfare systems.³¹ However, Davies argues that rather than inconsistency, the recent judgments from the CJEU represent a

²⁸ Nic Shuibhne, (2015) (n 21) 900.

²⁹ TFEU, art 21(2).

³⁰ Spaventa (n 3) 204.

³¹ *ibid.*

change in the specific facts presented to them.³² Davies sees this as a development of Member States' competence and subsequent assertiveness in bringing cases to the Court; only going to the CJEU when they are confident they can win.³³

There is not one exact 'turning point' of the CJEU's citizenship case law. There are several defining moments during the Court's judgments which represent a constraining of previous expansive approaches. For example, the CJEU in *Förster*, influenced by the adoption of Directive 2004/38,³⁴ approved national limitations on EU citizens' access to student maintenance grants from a host Member State for five years.³⁵ For O'Leary, this decision represented a potential 'end of an era' for the fundamental status of EU Citizenship.³⁶ Similarly, the cases of *Dereci*³⁷ and *McCarthy*³⁸ saw a generally progressive approach to the substance of EU Citizenship in relation to the rights of third country national (TCN) family members be significantly limited.³⁹ While these shifts are both significant chapters in EU Citizenship case law, they reflect, to use the language adopted by Thym, the 'battleground' of EU Citizenship rights being drawn up either 'beyond the transnational market paradigm',⁴⁰ or for the rights specifically relating to students. Instead, this section focuses on the shift in approach seen in the cases of *Dano*,

³² Gareth Davies, 'Migrant Union citizens and Social Assistance: Trying to Be Reasonable About Self-Sufficiency' (College of Europe Research Papers in Law No. 2/2016) 7.

³³ Davies (n 32) 25.

³⁴ Directive 2004/38 Article 24(2); Although this Directive had been adopted it had not come into force at the time of the judgment.

³⁵ Case C-158/07 *Förster v. Hoofddirectie van de Informatie Bebeer Groep* [2008] ECR I-8507.

³⁶ Siofra O'Leary 'Equal treatment and EU citizens: A new chapter on cross-border educational mobility and access to student financial assistance' (2009) 34(4) *European Law Review* 612; Michael Dougan, 'The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union citizens' in Maurice Adams, Johan Meeusen, Gert Straetmans and Henri de Waele (eds.), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice* (Hart: Oxford, 2013) 127.

³⁷ Case C-256/11 *Dereci and Others v Bundesministerium für Inneres* [2011] ECR I-11315.

³⁸ Case C-434/09 *McCarthy v SSHD* [2011] ECR I-3375.

³⁹ Niamh Nic Shuibhne, '(Some of) The kids are all right: comment on McCarthy and Dereci' (2012) 49(1) *Common Market Law Review* 349.

⁴⁰ Daniel Thym, 'Towards 'Real' Citizenship? The Judicial Construction of Union Citizenship and its Limits' in Maurice Adams, Johan Meeusen, Gert Straetmans and Henri de Waele (eds.), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice* (Hart: Oxford, 2013) 155, 165.

Alimanovic, *García-Nieto* and *Commission v UK*,⁴¹ as they more directly impact the rights of EU citizens who are deemed to be ‘economically inactive’ to equal treatment in a host Member State. This is also the route which would most likely be relied on by atypical workers excluded from worker status.

It must also be recognised that the trajectory of this case law is not a straightforward journey. There are outlying cases which enhance or re-assert the rights of Union Citizenship.⁴² To discuss the ‘reactionary phase’ of the Court in this section does therefore deal with a degree of oversimplification. Nevertheless, the overall downward trajectory of the free movement rights for EU citizens exists and impacts the availability of this free movement for atypical workers who do not have worker status.

This section will therefore analyse the CJEU judgments, identifying where the Court has been inconsistent, not just in the outcomes of the cases, but in the reasoning and application of EU principles. It will cover three main changes; the interpretive U-turn of the purpose and objective of the relevant legislation, the dismantling of the individual-centred approach to proportionality and the reclassification of welfare benefits to permit derogation from the duties of more protected categories. Overall, these interpretative changes have resulted in Directive 2004/38 assuming the role of a ceiling to citizenship rights.

3.3.1 The shifting objectives of the legislation

The CJEU’s purposive interpretation of the relevant free movement legislation has shifted significantly overtime. From initialising viewing the residency Directives (that were repealed and consolidated into Directive 2004/38) as aiming to facilitate the free movement of EU nationals to it being necessary to protect Member States from unreasonable burdens. Nic Shuibhne identifies this shift, describing the CJEU

⁴¹ Case C-333/13 *Dano v Jobcenter Leipzig* [2014] ECR I-2358; Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* EU:C:2015:597; Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v García-Nieto* EU:C:2016:114; Case C-308/14, *Commission v. United Kingdom* EU:C:2016:436.

⁴² For example, the judgment in Case C-165/16 *Lounes v SSHD* EU:C:2017:862 is an example of the Court returning to EU Citizenship as a status which grants free movement rights. This case concerned dual nationals who, although couldn’t rely on Directive 2004/38 as they were residing in a Member State of nationality, could rely on Article 21 TFEU and their status as an EU citizen to provide derivative residence rights to a third country national family member. This was found on the basis that there had been prior exercise of free movement rights before the claimant had naturalised.

judgments as retracting Citizenship rights ‘through prioritizing different or altered objectives.’⁴³

An early sign of the Court’s expansive approach can be found in the landmark case of *Martínez Sala*.⁴⁴ Here, the Court identified EU Citizenship as a potential source of equal treatment rights.⁴⁵ Mrs Martínez Sala, a Spanish national, had previously worked in the host Member State (Germany - where she had resided since she was twelve) and had been in possession of and had applied to renew a residence permit when her application for child-raising allowance was refused.⁴⁶ The case illustrates an opportunity taken by the CJEU to find that ‘as a national of a Member State lawfully residing in the territory of another Member State,’ Mrs Martínez Sala came within the scope of the Treaty provisions and could therefore rely on equal treatment rights.⁴⁷ At the time of this judgment, O’Leary stated that it did ‘more for the status of Union Citizenship than legal commentators would have anticipated’ from the introduction of the new status.⁴⁸ While the Court did not expressly comment on the intention of legislation, *Martínez Sala* does act as the beginning of the expansive phase of EU Citizenship with regard to free movement rights.

The facilitation of free movement

Later cases saw the CJEU identify and act on the perceived intention of EU Citizenship as a status which facilitates and strengthens free movement rights. In *Grzeleczyk*, for example, the CJEU stated that EU Citizenship is ‘destined to be the fundamental status of nationals of the Member States, enabling those... to enjoy the same treatment in law irrespective of their nationality’,⁴⁹ a sentiment would be echoed in later cases,

⁴³ Nic Shuibhne, (2015) (n 21) 909.

⁴⁴ Case C-85/96 *Martínez Sala* (n 13).

⁴⁵ Christian Tomuschat ‘Case C-85/96, *Maria Mar’ia Martínez Sala v. Freistaat Bayern*, Judgment of 12 May 1998, Full Court. [1998] ECR I-269’ (2000) 37(1) Common Market Law Review 449, 450.

⁴⁶ Case C-85/96 *Martínez Sala* (n 13) para 37.

⁴⁷ *ibid* para 61.

⁴⁸ Sofia O’Leary, ‘Putting flesh on the bones of European Union Citizenship’ (1999) 24(1) European Law Review 68.

⁴⁹ Case C-184/99 *Grzeleczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-06193, para 31.

particularly to expand the use of proportionality in free movement cases.⁵⁰ The CJEU argued that since the introduction of EU Citizenship Mr Grzelczyk's right to equal treatment was derived directly from his status as an EU citizen and he could therefore be entitled to the minimum subsistence allowance without the requirement to prove a qualified residence status as a worker or self-sufficient person.⁵¹ The Court also distinguished this judgment from previous precedent set in *Brown*,⁵² due to the change in law from the introduction of EU Citizenship.⁵³

In reaching the conclusion in *Grzelczyk*, the CJEU also interpreted the requirement that EU migrants do not become an 'unreasonable burden' on a host Member State, found in the preamble of Directive 93/96 (now replaced with Directive 2004/38 with the same preamble language adopted), as indicative of the existence of 'a certain degree of financial solidarity' between EU citizens.⁵⁴ While it has been criticised as 'imaginatively interpreted' by Cousins,⁵⁵ it relies on an understanding that as an 'unreasonable burden' is prohibited, a *reasonable* burden must not be and should be expected and managed by host Member States.⁵⁶ Or as Davies puts it, the language of an 'unreasonable burden' implies that an EU national 'can be at least a bit of a burden'.⁵⁷ The 'degree of financial solidarity' reasoning was also adopted in further cases such as *Bidar* and *Brey*.⁵⁸ In *Bidar*, despite concerns of 'benefit tourism' being recognised as 'legitimate' in AG Geelhoed's

⁵⁰ See Case C-413/99 *Baumbast and R v SSHD* [2002] ECR I-7091 para 82; Case C-224/98 *D'Hoop v Office national de l'emploi* [2002] ECR I-6191 para 28; Case C-138/02 *Collins v SSWP* EU:C:2004:172, [2004] ECR I-2703 para 61; Case C-209/03 *Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119 para 31.

⁵¹ Case C-184/99 *Grzelczyk* (n 49) para 29.

⁵² Case C-197/86 *Brown v Secretary of State for Scotland* EU:C:1988:323, [1988] ECR I-3205.

⁵³ Case C-184/99 *Grzelczyk* (n 49) para 35.

⁵⁴ *ibid* para 44.

⁵⁵ Mel Cousins 'The baseless fabric of this vision' EU Citizenship, the right to reside and EU law' (2016) 1 Journal of Social Security Law 89, 90.

⁵⁶ Michael Blauberger, Anita Heindlmaier, Dion Kramer, Dorte Sindbjerg Martinsen, Jessica Sampson Thierry, Angelika Schenk & Benjamin Werner, 'ECJ Judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence' (2018) 25(10) Journal of European Public Policy 1423; Davies (n 32) 3.

⁵⁷ Davies (n 32) 3.

⁵⁸ Case C-209/03 *Bidar* (n 50) para 56; Case C-140/12 *Pensionsversicherungsanstalt v Brey* EU:C:2013:565, para 72.

opinion,⁵⁹ the CJEU relied on the proposed financial solidarity to ensure that student maintenance could not be withheld to lawfully resident EU citizens with a ‘genuine link’ with the host Member State.⁶⁰ *Brey* saw this reasoning used to require a proportionality assessment of individual circumstances when deciding whether granting access to a welfare benefits would be an unreasonable burden.⁶¹ In reaching this conclusion, the Court also identified the objective of Directive 2004/38 as ‘to facilitate and strengthen the exercise of Union citizens’ primary right to move and reside freely within the territory of the Member States’.⁶² These expansive interpretations of the purpose of EU Citizenship and relevant legislation opened up the possibility for EU citizens to be empowered simply by their status as an EU citizen, rather than relying on economic activity.⁶³

This interpretation of the objective of Directive 2004/38 was also set out in *Lassal* as the facilitation and strengthening of ‘the primary right to move and reside freely in the territory of the Member States’.⁶⁴ Further emphasis was bestowed upon Article 16, concerning the right to permanent residence,⁶⁵ which the Court identified as representing a specific aim to ‘promote social cohesion and strengthen the feeling of Union Citizenship’.⁶⁶ The Court found that this objective would be ‘seriously compromised’ if the five continuous years required to be eligible for permanent residence could only be accrued after the Directive came into force.

The interpretation of EU Citizenship as ‘destined to be the fundamental status’ of nationals in the Member States and of the legislation implying a level of ‘financial solidarity’ assisted in the expanding of the free movement to be enjoyed by some economically inactive EU citizens, even when they require access to financial support in

⁵⁹ Case C-209/03 *Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119, Opinion of AG Geelhoed, para 66.

⁶⁰ Case C-209/03 *Bidar* (n 50) para 63.

⁶¹ Case C-140/12 *Brey* (n 58) para 72.

⁶² *ibid* para 71.

⁶³ Adrienne Yong, *The Rise and Decline of Fundamental Rights in EU Citizenship* (Hart Publishing 2019) 52.

⁶⁴ Case C-162/09 *SSWP v Lassal* [2010] ECR I-9217, para 53.

⁶⁵ Directive 2004/38, Article 16.

⁶⁶ Case C-162/09 *Lassal* (n 64) para 53.

a host Member State. More recently, the Court has altered its understanding of the intention of these rules, often favouring the view that it intends to protect Member States from the threat of ‘benefit tourism’.

Protection from ‘unreasonable burdens’

The shift in focus from facilitation of free movement to the protection from unreasonable burdens is made clear in *Dano*. Although, the Court in *Dano* did not hide from previous rulings by reflecting that it had been ‘held on numerous occasions...’ that the status of EU citizen is destined to be the fundamental status of nationals of the Member States,⁶⁷ the focus shifted from the Treaty rights (ie primary law rights) of EU Citizenship to the limitations and residency requirements found in Directive 2004/38 (secondary law limitations). This required mobile EU citizens to have a recognised right of residence as either a worker, self-employed person, student or those who could demonstrate self-sufficiency before they could rely on a right to equal treatment.⁶⁸ The Court’s shift in focus is criticised by Nic Shuibhne as a failure to scrutinise ‘the legitimacy of legislative limits vis-à-vis the Treaty and wider principles at both a general level and in the individual case’.⁶⁹ Besides the change of focus in the source of rights, we also see the Court prioritising the protection of Member States from the burden of ‘benefit tourism’.

An example of the change in approach can be seen in a comparison of the differing interpretations in *Grzelczyk* and *Dano* of the ‘unreasonable burden’ language. In *Dano*, the Court identifies the objective of Directive 2004/38 as the protection of Member States’ social assistance systems from unreasonable burden which could materialise from the free movement of EU citizens.⁷⁰ The CJEU used this reason to argue that granting access to welfare benefits to EU migrants with no qualified right to reside ‘would run counter to an objective of the directive’ as it would cause an unreasonable burden on the host Member State.⁷¹ This contrasts with the reading in *Grzelczyk* of the

⁶⁷ Case C-333/13 *Dano* (n 41) para 58.

⁶⁸ Directive 2004/38, art 7.

⁶⁹ Nic Shuibhne, (2015) (n 21) 910.

⁷⁰ Directive 2004/38, Preamble.

⁷¹ Case C-333/13 *Dano* (n 41) para 74.

identical language in the preamble of a preceding Directive,⁷² where the Court identified the acceptance of reasonable burdens and an expectation of financial solidarity between Member States, as discussed above.⁷³ Thym argues that the judgment in *Dano* was ‘founded upon an argumentative U-turn’, where the ‘shift of emphasis’ side-lines constitutional arguments for welfare solidarity and equal treatment stemming from the Treaties which, if considered, ‘could have justified a different outcome.’⁷⁴

Davies, on the other hand, argues that ‘*Dano* is as orthodox as can be, no more than an application of *Martínez Sala* or *Grzelczyk*.’⁷⁵ His argument relies on the recognition that the specific facts of *Dano* differ greatly from previous case law. While Mr Grzelczyk was a student with temporary financial problems, Ms Dano and her son were applying for a minimum subsistence benefit by relying on their status as a jobseeker but provided no evidence of looking for work. The CJEU noted that evidence of Ms Dano’s circumstances suggested a lack of ‘integration’ in the host Member State.⁷⁶ The Court acknowledged that the motives of an economically inactive citizen were potentially relevant where it reflected an intention to move ‘solely in order to obtain another Member State’s social assistance’,⁷⁷ though no evidence was discussed to suggest this was the claimant’s intention. The national court had also already declared that Ms Dano had no right of residence. The extent to which this judgment represented a change in interpretation, rather than an outcome determined by particular facts,⁷⁸ was confirmed in subsequent cases.

Alimanovic, for example, concerned the rights of jobseeking EU citizens to receive social assistance after six months of retaining worker status under Article 7(3)(c) Directive

⁷² Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L317/59.

⁷³ Case C-184/99 *Grzelczyk* (n 49) para 44.

⁷⁴ Daniel Thym, ‘The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union citizens’ (2015) 52 (1) Common Market Law Review 17, 25

⁷⁵ Davies (n 32) 19.

⁷⁶ Case C-333/13 *Dano* (n 41) paras 35-39.

⁷⁷ Case C-333/13 *Dano* (n 41) para 78; Herwig Verschueren ‘Preventing “Benefit Tourism” in the EU: A Narrow or Broad Interpretation of the possibilities offered by the ECJ in *Dano*’ (2015) 52(2) Common Market Law Review 363, 374

⁷⁸ Verschueren, (2015) (n 77) 388.

2004/38. This Article provides for worker status to be retained for a minimum period of six months for those who had become involuntarily unemployed from work lasting less than 12 months. In permitting the restriction to social assistance in this case, the CJEU referred to *Dano* to clarify that an EU migrant can only claim equal treatment with regards to accessing social welfare benefits ‘if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38’.⁷⁹ This case also replicated the reasoning in *Dano* where granting access to benefits to EU migrants with no qualified residence status was seen to be ‘unreasonable burden’ which would ‘run counter to an objective of the directive’.⁸⁰

These two interpretations are replicated in *García-Nieto*, which saw the Court permit the exclusion of economically inactive EU citizens from accessing welfare benefits in the first three months of residence.⁸¹ Noticeably any mention of financial solidarity between Member States or of Citizenship as a fundamental status were absent from these judgments. Davies argues that these cases, rather than reflecting an overruling by the Court, demonstrate an accurate and consistent approach by the CJEU.⁸² He regards *Alimanovic* and *García-Nieto*, like *Dano*, as exemplifying a change in the facts presented to the Court and that the law considered, which concerned the rights of jobseekers,⁸³ was more specific, ‘uncompromising and non-contextual’.⁸⁴ Spaventa identifies that these judgments show the Court departing ‘from the fundamental status rhetoric’ and interpreting that the Citizenship provisions should protect host Member States from being held responsible for the unreasonable burdens of EU migrants, instead ‘re-allocating responsibility for the vulnerable Union citizen (solely) with the State of origin’.⁸⁵ While the facts in these cases might have been less favourable, the approach of the Court in the judgments represents a shift from the expressed aims of facilitation and

⁷⁹ Case C-67/14 *Alimanovic* (n 41) para 49.

⁸⁰ Case C-67/14 *Alimanovic* (n 41) para 50.

⁸¹ Case C-299/14 *García-Nieto* (n 41) paras 38-39.

⁸² Davies (n 32) 20.

⁸³ Directive 2004/38, art 24.

⁸⁴ Davies (n 32) 20.

⁸⁵ Spaventa (n 3) 205.

financial solidarity to the shielding of Member States from an alleged danger of ‘benefit tourism’, even if no such danger is evident from empirical studies.⁸⁶

To provide greater clarity in the judgments, it would have been useful for the CJEU to have engaged with previous declarations of financial solidarity, detailing precisely how the circumstances and law should be differentiated. Without being clear on what aspects of previous judgments are still valid, Member States are left to try and operate a national welfare system which accommodates this piecemeal approach to sensitive residence and equal treatment rights. Member States may seek to cynically utilise this confusion to avoid responsibilities.⁸⁷ Some of the consequences of this inconsistency is currently visible in the UK, where the continuing relevance of residents permits in pro-citizenship CJEU case law has been brought into question when determining the rights associated with the residence status provided by the EU Settlement Scheme – the system designed to ensure EEA nationals and family members can continue to reside in the UK after Brexit.⁸⁸

3.3.2 The dismantling of individual proportionality assessments

As a general principle of Community law, any restriction on the right to free movement should be met with a consideration of proportionality.⁸⁹ The relevance of the principle of proportionality to restrictions on free movement rights has also been subject of CJEU strengthening and subsequent rescinding.

Individual circumstances and the proportionality principle

Grzelczyk saw the Court introduce the requirement for Member States to consider the specific individual circumstances of EU citizens when deciding whether provision of a welfare benefit would be an ‘unreasonable’ burden.⁹⁰ The court argued that Mr Grzelczyk’s circumstances, as a student in their final year of study, meant that the burden on the host Member State would only be temporary and therefore not unreasonable. Instead, the judgment described the temporary nature of the need to be

⁸⁶ See section 3.4 The political fragility of free movement.

⁸⁷ See section 3.5.1 Residence cards as a tool for Member States to swerve obligations.

⁸⁸ *Fratila v Secretary of State for Work and Pensions* [2020] EWHC 998.

⁸⁹ Case C-147/03 *Commission v Austria* [2005] ECR I-5969, para 63; Case C-165/14 *Rendón Marín v Administración del Estado* EU:C: 2016:675, para 45.

⁹⁰ Case C-184/99 *Grzelczyk* (n 49).

included in the ‘certain degree of financial solidarity’ between Member States that free movement legislation was interpreted as instructing.⁹¹ This was further considered in *Baumbast* where it was decided that the limitations and conditions to Citizenship rights must be applied ‘in accordance with the general principles of that law, in particular the principle of proportionality.’⁹² The strengthening of the proportionality assessment in these cases ensured that integration to the host Member State was recognised and valued beyond the requirement of economic activity. For example, this could include an EU migrant ‘who has resided in the Member State for a number of years without reliance on social benefits and who required benefits for a specified temporary period’.⁹³

Dougan and Spaventa recognised that this requirement to look beyond the residence rules created an inverse relationship where ‘the stronger the nexus of “belonging” between EU citizen and host state’, the more disproportionate it is to consider them an unreasonable burden.⁹⁴ While there were concerns that the CJEU was overstepping its remit and using EU Citizenship and proportionality to ‘re-write’ the rules,⁹⁵ Dougan attributes this shift to the change to the constitutional environment created by the introduction of Union Citizenship in, what is now, Art.21 TFEU. This, Dougan argues, ‘furnished the Court with the opportunity’ to review the appropriateness of all restrictions adopted by Member States to the residency and equal treatment rights of EU citizens, even where these restrictions are compliant with secondary EU law.⁹⁶

By requiring all restrictions to be applied proportionately, EU citizens who could demonstrate a ‘real’ or ‘genuine’ link with the host Member State could justify the protection of equal treatment rights. This formulation of a proportionality assessment allowed consideration of some of the individual circumstances of the cases. This test was introduced and the link easily established in *D’hoop* through nationality and a ‘real

⁹¹ *ibid* para 44.

⁹² Case C-413/99 *Baumbast* (n 50).

⁹³ *Cousins* (n 55) 91.

⁹⁴ Michael Dougan and Eleanor Spaventa, ‘Educating Rudy and the non-English patient: a double bill on residency rights under Article 18 EC’ (2003) 28(5) *European Law Review* 699, 712.

⁹⁵ Kay Hailbronner, ‘Union Citizenship and Access to Social Benefits’ (2005) 42 *Common Market Law Review*, 1245, 1251; Davies (n 32) 11.

⁹⁶ Michael Dougan, ‘The constitutional dimension to the case law on Union Citizenship’ (2006) 31(5) *European Law Review* 613.

link' with the 'geographic employment market concerned', as the claimant was a Belgian national who had been denied access to a Belgian welfare benefit which sought to facilitate transition from education to the employment market, due to having completed her secondary education in France.⁹⁷ This case law progressed in *Collins*,⁹⁸ and *Bidar*⁹⁹ where the CJEU identified a 'genuine link' in circumstances of non-national EU citizens access to welfare benefits, despite being considered economically inactive. In *Collins*, rights as a jobseeker, and access to 'a benefit of a financial nature intended to facilitate access to employment', were interpreted in light of Mr Collins' status as an EU citizen.¹⁰⁰ This meant that any residence requirement adopted by the Member State must assess whether a genuine link to the employment market exists and must be applied in a proportionate and non-discriminatory way.¹⁰¹ The judgment in *Bidar*, discussed above, also relied on the link forged through length of residence and attendance at secondary school in the host Member State to justify access to a student loan.¹⁰² For Yong, this line of cases exhibit 'the true effectiveness of the Court in substantiating and legitimising the status of EU Citizenship' as it established that status as an EU citizen under Article 20 TFEU was enough to engage consideration of the right to non-discrimination and proportionality.¹⁰³ Yet, rather than progress, O'Brien identified setbacks in the 'genuine link' criteria, as it retained national privilege and granted Member States considerable discretion in determining what defined a 'real link' and how it would be tested, only demanding that the assessment must not fall on a 'single binary condition'.¹⁰⁴ While these cases introduced a 'much more muted right' for EU citizens to have restrictions applied proportionately, as O'Brien argues,¹⁰⁵ they also illustrate that

⁹⁷ Case C-224/98 *D'Hoop* (n 50).

⁹⁸ Case C-138/02 *Collins* (n 50).

⁹⁹ Case C-209/03 *Bidar* (n 50).

¹⁰⁰ Case C-138/02 *Collins* (n 50) para 63.

¹⁰¹ *ibid* paras 69-72.

¹⁰² Case C-209/03 *Bidar* (n 50).

¹⁰³ Yong (n 63) 57-61.

¹⁰⁴ Charlotte O'Brien, 'Real links, abstract rights and false alarms: the relationship between the ECJ's "real link" case law and national solidarity' (2008) 33(5) *European Law Review* 643.

¹⁰⁵ Charlotte O'Brien, *Unity and Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Bloomsbury, 2017) 37.

the CJEU was willing to treat almost any barrier to free movement as a potential breach of EU law and therefore requiring justification. Even where that justification rested on a proportionate restriction, it provided some basic protection and consideration of the personal circumstances in individual cases rather than the sweeping generalisations seen in more recent cases.

The introduction of Directive 2004/38, while formalising the limitations and conditions to the free movement of EU citizens, did not fully incorporate the CJEU case law on the need for Member States to adopt measures in accordance with the principle of proportionality. The principle of proportionality is only mentioned twice in the Directive, both in reference to the power of Member States to restrict the right of entry and residence to EU citizens in the preamble and Article 27.¹⁰⁶ This requires Member States to take into account, when considering expulsion of Union citizens, ‘the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.’¹⁰⁷ While it includes no mention of the principle of proportionality, Article 8(4) of the Directive includes a requirement for Member States to ‘take into account the personal situation of the person concerned’ when deciding if an EU citizen is self-sufficient.

The language of Article 8(4),¹⁰⁸ alongside the need to view these provisions in light of the Treaty,¹⁰⁹ was found by the CJEU in *Brey* to strengthen the principle of proportionality in relation to Member States restricting equal treatment rights of EU citizens. The Court determined that Member States could not set a blanket rule or minimum income requirement to determine whether a claim for welfare benefits from an ‘economically inactive’ EU citizen would be an unreasonable burden.¹¹⁰ Instead they must carry out ‘an overall assessment of the specific burden’ which granting the benefit would create by considering ‘the personal circumstances characterising the individual

¹⁰⁶ Directive 2004/38, Preamble.

¹⁰⁷ *ibid.*

¹⁰⁸ Case C-140/12 *Brey* (n 58) para 67.

¹⁰⁹ *ibid* para 70.

¹¹⁰ *ibid* para 77.

situation of the person concerned.¹¹¹ This proportionality test would take into consideration whether the problems are likely to be temporary,¹¹² the amount of aid granted to them,¹¹³ if they have received a residence permit or certificate¹¹⁴ or the duration of their residence.¹¹⁵

This expansive approach sets the residency requirements and limitations in the Directives as only representing the ‘framework’ or ‘the floor of rights available’, with EU Citizenship and treaty provisions providing for *some* Union citizens who fall in the gaps.¹¹⁶ The progress made by the CJEU in proportionality was limited, yet provided for a way for EU citizens outside of the residence requirements of Article 7 Directive 2004/38 to assert their free movement and equal treatment rights. For atypical workers, such flexibility and assessment of individual circumstances could prove beneficial to locating themselves within the scope of free movement rights. Where work was deemed not to meet the requirements of worker status under Article 7, it could still prove useful under a proportionality assessment which would consider links to the employment market, integration and a full assessment of the extent of the burden they represent. Yet the trajectory of more recent cases, discussed below, limits the usefulness of proportionality to those who fall outside of the scope of Article 7 Directive 2004/38.

The scale of the test required by *Brey* was criticised as too onerous for Member States to realistically carry out. For Verschueren, it placed its own type of ‘unreasonable burden’ on Member States by requiring a proportionality assessment that is, in effect, twofold by requiring individual circumstances of the applicants and the overall burden to be considered.¹¹⁷ Verschueren points out that the Court gave no acknowledgement of the potential administrative cost and burden of this test, which could result in higher

¹¹¹ *ibid* para 64.

¹¹² *ibid* para 72.

¹¹³ *ibid* para 69.

¹¹⁴ *ibid* para 80.

¹¹⁵ *ibid* para 76.

¹¹⁶ Spaventa (n 3) 219; Dougan (2006) (n 96); Charlotte O’Brien, ‘Civis Capitalist Sum: Class as the new guiding principle of EU Free Movement Rights’ (2016) 53(4) *Common Market Law Review* 937, 945.

¹¹⁷ Herwig Verschueren, ‘Free Movement or Benefit Tourism: The Unreasonable Burden of *Brey*’ (2014) 16(2) *European Journal of Migration and Law* 147.

expenditure ‘than the “profit” the Member State concerned could gain by refusing these benefits to a number of Union citizens’.¹¹⁸ An individual assessment of unreasonable burden could be viewed as insufficient; no individual could create a burden on a Member States social assistance system. Additionally, Thym argued that the test in *Brey* was unclear on whether it imposed an individual or systemic test, both of which would push ‘the debate in opposite directions’.¹¹⁹ The unclear and administratively unworkable¹²⁰ individual assessment proposed in *Brey* required a closer inspection by the CJEU to determine how Member States should approach the proportionality test. The Court’s clumsy handling of the proportionality principle, which left a test that was confusing, burdensome and potentially contradictory, set the path towards opting for more convenience for Member States.

Replacement with a ‘likely overall burden’-based proportionality

The review of this test, in cases concerning the more politically sensitive topic of welfare benefit provision for those deemed economically inactive, saw the Court reverse its position on proportionality, unpicking the individual assessment language and instead opting for a more sweeping ‘likely overall burden’ test. In some cases, proportionality is ignored altogether.

The court first appears to switch its approach in *Alimanovic*, where it argued that individual assessments on the burden of granting a specific benefit cannot be viewed in terms of its burden from a single applicant as that ‘can scarcely be described as an ‘unreasonable burden’ for a Member State’¹²¹. The new test required Member State to consider ‘the accumulation of all the individual claims which would be submitted to it’ if it granted the benefit in the specific situation of the case.¹²² This exact wording was then repeated by the Court in *García-Nieto*.¹²³ These judgments appeared to reverse the need Member States to conduct an individual assessment. The CJEU specifically refers to and distances itself from the language in *Brey* on individual assessments, instead suggesting

¹¹⁸ *ibid* 174.

¹¹⁹ Thym, (2015) (n 74) 28.

¹²⁰ Cousins (n 55) 99-100.

¹²¹ Case C-67/14 *Alimanovic* (n 41) para 62.

¹²² *ibid*.

¹²³ Case C-299/14 *García-Nieto* (n 41) para 50.

that individual circumstances are largely irrelevant.¹²⁴ An unreasonable burden should be measured with ‘the amount which would be awarded to some (undefined) broader group.’¹²⁵ Here, the Court establishes a ‘likely overall burden’ test where Member States are permitted to make a sweeping generalisation about the potential burden a type of claim could reflect.

However, Davies argues that this judgment reflects a clarification of the Court’s position.¹²⁶ He argues ‘the precedential effect’ of *Brey* was addressed, clarified and simplified in *Alimanovic*.¹²⁷ In this light, *Brey* is considered a ‘Janus-faced judgment’ masquerading as ‘migrant-friendly’, while guided by the restrictive residence requirements in Directive 2004/38.¹²⁸ Even if the *Brey* judgment was not exactly ‘migrant-friendly’, the judgment in *Alimanovic* goes further than clarification and instead produces a shift in the focus of the proportionality assessment. The Court also suggested that for some Union citizens, for example jobseekers, no proportionality test was required at all, as Directive 2004/38 had sufficient proportionality built into it.¹²⁹ This change can drastically alter the outcome of such an assessment.

In *Grzelczyk*, the court ‘placed great emphasis on Mr Grzelczyk’s successful efforts to “defray his own costs” during the first three years of his study’.¹³⁰ Additionally, in *Grzelczyk* and *Brey* the court notably focused on the length of time which the Union citizen requires support and the amount of money they are requesting for that support.¹³¹ It is through a strong focus on the personal circumstances of the claimants which identifies the burden they present as potentially ‘reasonable’. The shift in *Alimanovic* therefore represents more than a mere clarification of language and instead alters the proportionality calculation significantly. Cousins has called out the Court,

¹²⁴ Case C-67/14 *Alimanovic* (n 41) para 62.

¹²⁵ Cousins (n 55) 100.

¹²⁶ Davies (n 32).

¹²⁷ *ibid* 11.

¹²⁸ *ibid* 12.

¹²⁹ Case C-67/14 *Alimanovic* (n 41) para 60.

¹³⁰ O’Brien (2008) (n 104).

¹³¹ Case C-184/99 *Grzelczyk* (n 49) para 44; Case C-140/12 *Brey* (n 58) para 72.

suggesting that it should ‘honestly acknowledge when it was distancing itself from earlier case law’.¹³² As the CJEU is not bound by precedent, the subsequent pretence of consistency is unhelpful, particularly if the ‘consistency’ relies on a tenuous distinguishing of facts.¹³³ This can create unclear and conflicting rules for Member States to apply and result in the assertion that aspects of CJEU case law on citizenship rights do not apply to specific national administrative systems.¹³⁴ Based on these considerations, it would have been preferable for the CJEU to follow the path set in previous cases by applying a proportionality test which safeguards the free movement rights of EU citizens, whose personal circumstances mean that the burden on a Member State should be considered reasonable.

For example, a legitimate clarification that may have been addressed by the Court in *Alimanovic* is the unworkability of the individual assessment in *Brey*, discussed above. The demands of the *Brey* proportionality assessment appears to be unrealistic, which has led to the insistence that the Court must not have meant what it said. For example, in the UK Supreme Court, Lord Neuberger stressed that the rule taken in *Brey* would ‘place a substantial burden on a host Member State if it had to carry out a proportionality exercise in every case’ and therefore the reversal on this practice in *Alimanovic* seemed ‘good sense’.¹³⁵

While the need to address the cumbersome test formulated in *Brey* could go some way to rationalise the Court’s change of direction, it does not necessarily justify its decision to replace it with the different but flawed ‘overall burden’ test. The ‘likely overall burden’ test proposed in *Alimanovic* is also problematic as it requires the consideration of a theoretical number of claims which can much more easily demonstrate an unreasonable burden on the national welfare system as a whole. It is not difficult to see how such a test could be used to declare all benefit applications from economically inactive EU citizens as an unreasonable burden. The CJEU is also unclear on how exactly this overall burden should be calculated. Does the assumed overall burden only

¹³² Cousins (n 55) 100.

¹³³ See section 3.5.1 Residence cards as a tool for Member States to swerve obligations.

¹³⁴ As seen in the UK Upper Tribunal which found the ruling of *Brey* to not apply in the UK as they did not provide residence cards or assess levels of self-sufficiency, *VP v. Secretary for Work and Pensions (JSA)* [2014] UKUT 32 (AAC); O’Brien (2016) (n 116) 946.

¹³⁵ *Mirga v SSWP, Samin v Westminster City Council* [2016] UKSC 1 [68-69].

include the number of EU migrants present in the Member State at the time, or an estimate of how many Union citizens might move to the Member State in the future? Does it include all Union citizens who would be eligible for the benefit or recognise that EU migrants may not choose to claim benefits or be aware of their entitlement to benefits in host Member States? Will it take into account the economic contribution of EU migrants simply through residence in the Member State as an offset to the potential burden? Or will it include a calculation of the net financial benefit bestowed upon Member States by the free movement of EU citizens?¹³⁶ Unless individual circumstances are taken into account, an individual application for benefits may be assumed to create the same burden as a total of all possible further applications by an immeasurable, and plausibly erroneous, number of EU citizens.¹³⁷ The assumption in *Alimanovic* and *García-Nieto* that individual circumstances have no consequence on the burden placed on the host Member State ‘relies heavily upon generalizations’ and fails to recognise situations where the law disproportionately denies support.¹³⁸ Yet the administrative problems of the individual assessment are still pertinent. There is a risk that either approach will have overwhelmingly sweeping results, with an individual assessment leading to an almost guaranteed finding of a ‘reasonable’ burden, and the ‘overall potential burden’ producing sweeping limitations. *Alimanovic* provided no fix to this dilemma and instead produced the new ‘likely overall burden’ test which now potentially requires fresh clarification on how it should be operated. It therefore adds little improvement to the administrative confusion of the *Brey* test and instead reflects a shift in the focus of the test itself. By drawing it away from the individual to a generalised perceived burden which, in practice, may constitute little more than a ceremonial mention.

¹³⁶ Commission, ‘Free movement of EU citizens and their families: Five actions to make a difference’ (Communication) COM(2013)837 final; OECD ‘Fiscal Impact of Migration’ in OECD, *International Migration Outlook 2013*; ICF GHK Milieu, ‘A fact finding analysis on the impact on the Member States’ social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence’ (2013).

¹³⁷ The nature of free movement and the common lack of registration or declaratory process make estimates of the number of EU citizens resident in different States difficult to calculate. Such difficulties can be seen in estimations of the number of EU citizens in the UK who must now register for the EU Settlement Scheme; see Madeleine Sumption, ‘Not Settled Yet? Understanding the EU Settlement Scheme using the Available Data’ (Migration Observatory, April 2020).

¹³⁸ O’Brien (2016) (n 116) 949.

The Court's apparent move to a restrictive approach has further extended to cases where the principle of proportionality seems to be forgotten entirely. In *Alokpa*,¹³⁹ the CJEU ruled that if an economically inactive citizen does not meet the residency requirements they will automatically fall outside the scope of Article 21 TFEU.¹⁴⁰ There is no mention of the need for Member States to conduct a proportionality assessment in this case. This omission is particularly problematic given the facts of this case. Ms Alokpa was a TCN living in Luxembourg with her French national children. When seeking to establish a right to reside in Luxembourg for the purpose of accepting a job offer, the national Court found that they did not meet the residence requirements in Article 7(1)(b) Directive 2004/38, as they did not have sufficient resources not to be a burden on the Member State.¹⁴¹ Paradoxically, had an assessment of the personal circumstances been required and residence rights been granted to Ms Alokpa's children as self-sufficient EU citizens, Ms Alokpa could have used her right as an EEA national family member to receive a work permit and accept the job offer, thereby not being a 'burden' on the host Member States welfare system. Spaventa argues that, by ignoring the need for proportionality in *Alokpa*, any flexibility to take account of individual circumstances from previous case law is deemed no longer relevant, with the limitations in Directive 2004/38 being treated as 'standard'.¹⁴²

The rejection of the individual focus for proportionality assessments has tipped the balance in favour of identifying an unreasonable burden. It has therefore created a situation where any claim for benefits from citizens falling outside the scope of Article 7 Directive 2004/38 can automatically be declared a burden despite empirical evidence finding that the 'budgetary impact' of welfare claims by economically inactive EU migrants 'is very low'.¹⁴³ This current interpretation, ensures that the Directive residency requirements are the 'floor and ceiling of rights'¹⁴⁴ and are enough to 'sufficiently

¹³⁹ Case C-86/12 *Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2013:645.

¹⁴⁰ *ibid* para 31.

¹⁴¹ *ibid* para 30.

¹⁴² Spaventa (n 3) 220.

¹⁴³ ICF GHK Milieu (n 136) 203.

¹⁴⁴ Spaventa (n 3) 220.

constitute “citizenship” in the eyes of the Court’.¹⁴⁵ The analysis in this section is also consistent with the argument that the Court adjusted judgments to appease Member States by providing a sweeping justification for limitations on EU migrants’ rights; effectively allowing national authorities the final say on benefit claims. This leaves little room for the consideration of personal circumstances. Consistent economic activity is therefore made even more vital for many Union citizens to access equal treatment rights.¹⁴⁶ For atypical workers who are not recognised as workers under Article 7 Directive 2004/38, personal circumstances and *actual* level of burden are potentially irrelevant for their free movement rights to be safeguarded.

3.3.3 Inconsistent categorising of benefits

Another route through which EU citizens equal treatment rights have been reduced is through the Court’s miscategorising of benefits. This is apparent in two ways, firstly in the Court’s categorising some jobseeking benefits as social assistance, allowing Member States to withhold them from EU citizen jobseekers and secondly, through subjecting benefits that cannot be categorised as social assistance to the same treatment as social assistance benefits.

Jobseeking benefits and social assistance

A financial benefit for work seekers intending to facilitate access to the labour market is protected by Article 45(2) TFEU,¹⁴⁷ particularly since the establishment of EU Citizenship.¹⁴⁸ However, Article 24(2) Directive 2004/38 allows Member States to withhold entitlement to benefits classified as social assistance for the first three months of residence, unless the claimant is a worker, self-employed person or a family member under Article 7 Directive 2004/38.¹⁴⁹ The re-classifying of financial job-seeking welfare benefits as social assistance, as seen in *Alimanovic*, allows Member States to employ

¹⁴⁵ O’Brien (2016) (n 116) 949.

¹⁴⁶ Herwig Verschueren, ‘Being Economically Active: How it Still Matters’ in Herwig Verschueren (ed.) *Residence, Employment and Social Rights of Mobile Persons: On how EU Law defines where they belong* (Intersentia, 2016) 187, 191.

¹⁴⁷ TFEU, Article 45(2).

¹⁴⁸ Case C-138/02 *Collins* (n 50) para 63.

¹⁴⁹ Directive 2004/38, art 24(2).

restrictive entitlement requirements while bypassing the need for the Court to address a potential change in approach.

The introduction of EU Citizenship has seen the CJEU protect work-seekers access to benefits that facilitate access to the labour market. In *Collins* the Court stated that the ‘establishment of citizenship of the Union’ was a development which must be reflected and distinguished from previous case law which had previously found that work seekers could not rely on Article 45(2) for equal treatment rights.¹⁵⁰ In *Vatsouras*, the Court clarified this, stating that welfare benefits of a financial nature intending to facilitate a Union citizen’s access to the labour market cannot be regarded as constituting ‘social assistance’, independently of the status given to it by national law.¹⁵¹ Benefits which were considered to facilitate access to the labour market could therefore not be withheld from EU work seekers under the rules intended for social assistance benefits in Article 24(2) Directive 2004/38. The Court also referenced AG Ruiz-Jarabo Colomer’s argument that a benefits’ objective ‘must be analysed according to its results and not according to its formal structure’, and therefore a benefit requiring that the recipient be capable of earning a living ‘could constitute an indication that the benefit is intended to facilitate access to employment.’¹⁵²

In *Alimanovic*, the Court discussed the categorisation of a benefit to give minimum subsistence to those looking for employment, classifying it as social assistance. The CJEU took note that the national authorities had ‘characterised the benefits at issue as ‘special non-contributory cash benefits... even if they form part of a scheme which also provides for benefits to facilitate the search for employment.’¹⁵³ In *Dano*, a special non-contributory cash benefit was found to fit ‘within the concept of ‘social assistance’’.¹⁵⁴ The Court failed to consider the requirements of accessing the benefit, including that the recipient must be fit for work, or the relevance that it is one of two components to a benefit provided for by a job centre, described as ‘entitlement to basic provision for

¹⁵⁰ Case C-138/02 *Collins* (n 50) paras 63-64.

¹⁵¹ Joined Cases C-22 & 23/08, *Vatsouras and Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg* 900 [2009] ECR I-4585, para 45.

¹⁵² *ibid* para 57.

¹⁵³ Case C-67/14 *Alimanovic* (n 41) para 43.

¹⁵⁴ Case C-333/13 *Dano* (n 41) para 63.

job-seekers’.¹⁵⁵ Instead, they agreed with AG Wathelet’s opinion, that the predominant function of the benefit must be regarded, which was determined to be the cover of ‘subsistence costs necessary to lead a life in keeping with human dignity’.¹⁵⁶ The CJEU appears to have altered or at least stepped away from the guidance it provided in the earlier judgments of *Collins* and *Vatsouras* which stressed the relevance of requiring recipients to be able to work or to seek employment in determining the objective of the benefit as the facilitation of access to employment. Instead, by singling out the ‘human dignity’ or means-testing aspect of the welfare benefit as the core objective and therefore the reason to require more restrictive access, the CJEU has withheld access to financial support, to the very EU citizens who require it to seek employment. The ability to move to another Member State to seek employment is therefore only available to those who have savings, are aware of and can export their unemployment benefits under Regulation 883/2004¹⁵⁷ or those who are willing to live without the support ‘necessary to lead a life in keeping with human dignity’.

Social security or assistance

The CJEU has also applied the rules relating to social assistance to benefits that are expressly identified as social security benefits, such as in *Commission v UK*.¹⁵⁸ Through this case, the CJEU extended the ability of Member States to require EU citizens to prove that they possess a right to reside to access social assistance to social security benefits. This extends the hurdles facing EU citizens when attempting to access financial support where they are not economically active.

Commission v UK concerned Child Benefit and Child Tax Credit which the CJEU identified as falling within the ‘family benefit’ category of social security benefits in Regulation 883/2004,¹⁵⁹ as they are ‘granted automatically to families meeting certain objective criteria, relating in particular to their size, income and capital resources’.¹⁶⁰

¹⁵⁵ Case C-67/14 *Alimanovic* (n 41) para 13.

¹⁵⁶ Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* EU:C:2015:210, Opinion of AG Wathelet, para 72.

¹⁵⁷ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, [2004] OJ L200/1 (Regulation 883/2004).

¹⁵⁸ Case C-308/14 *Commission v. UK* (n 41).

¹⁵⁹ Regulation 883/2004.

¹⁶⁰ Case C-308/14 *Commission v. UK* (n 41) para 60.

However, the Court agreed with the UK's submissions, finding that social security benefits should be applied with the same principles decided in *Brey*, namely 'that there is nothing to prevent... the granting of social benefits to Union citizens conditional upon those citizens meeting the necessary right to reside requirements' as economically active or financially independent EU citizens.¹⁶¹ This argument relies on an expansive reading of the *Brey* judgment. The UK argued that the term 'social benefits', as seen in the original German and French Language versions of the judgment, should be understood broadly and does not in any way indicate that the reasoning set out by the Court is confined exclusively to the type of benefits at issue in *Brey*.¹⁶²

However, the benefits concerned in *Brey* were designated to be social assistance benefits rather than social security. O'Brien argues that the principle in *Brey* was seemingly applied, not as 'a standalone, catch-all principle' but was 'inextricably linked to the nature of the benefits'.¹⁶³ The UK argued, and the Court appeared to accept, that 'it is difficult to conceive' that Member States are not required to pay social assistance benefits but are required to pay social security benefits when both 'have the potential to impose an unreasonable burden on the public finances of the host Member State'.¹⁶⁴ The CJEU found that the principle in *Brey* should also cover special non-contributory benefits – a sub-category of social security benefits. In reaching this decision the Court did not explicitly agree with the UK or AG Cruz Villalón that the principle extended to social security benefits simply because the court omitted to say that it did not.¹⁶⁵

Davies sees the decision in *Commission v UK* as a continuation of previous judgments of *Dano*, *Alimanovic* and *García-Nieto*, which all followed the requirement of mobile EU citizens claiming benefits to have 'substantive compliance' with EU right of residence rules.¹⁶⁶ However, this doesn't consider the sleight of hand with which the CJEU intermingled principles for social assistance benefits with the theoretically better-

¹⁶¹ Case C-140/12 *Brey* (n 58) para 44.

¹⁶² Case C-308/14 *Commission v. UK* (n 41) para 33.

¹⁶³ Charlotte O'Brien, 'The ECJ sacrifices EU Citizenship in vain: *Commission v. United Kingdom*' (2017) 54(1) *Common Market Law Review* 209, 219

¹⁶⁴ Case C-308/14 *Commission v. UK* (n 41) para 50.

¹⁶⁵ Case C-308/14 *Commission v. UK* EU:C:2015:666, Opinion of A.G. Cruz Villalón.

¹⁶⁶ Davies (n 32) 15.

protected category of social security benefits. The result of which is the suggestion by O'Brien, that the *Commission v UK* judgment is 'very shaky', relying on the fact that the judgement in *Brey*, when determining that right to reside tests were permitted to grant access to 'social benefits',¹⁶⁷ omitted to specify that this was *not* the case for social security benefits. The judgment therefore relied on 'not only a single paragraph in a judgment, but on something the Court did not say in that paragraph'.¹⁶⁸ Additionally, the CJEU ignored how social security and social assistance benefits should be treated differently. Had the Court identified the UK's right to reside test as direct discrimination rather than indirect discrimination, as it arguably should have done by considering how the right to reside test is intrinsically linked to nationality,¹⁶⁹ then it would need to locate specific exceptions in the legislation that allow for the derogation. Verschueren highlights that while exceptions to equal treatment are contained in Directive 2004/38 in relation to social assistance benefits and some benefits included in Regulation 883/2004, no such exceptions apply specifically to 'family benefits' in Regulation 883/2004.¹⁷⁰ These differences in restrictions should be respected. Merging the principles of social assistance regardless of the extra protections provided to social security benefits allows Member States to further restrict EU migrants' access to more types of financial support.

Overall, this section has analysed three ways in which the CJEU case law has transitioned from an expansive to restrictive approach when looking at EU Citizenship free movement rights. In more recent judgments the CJEU can be seen to be ignoring previous precedent or flexibly interpreting legislation and case law to allow Member States to restrict access to benefits. Given that the text of the Treaty and Directive has not been amended to warrant this departure from previous cases, it appears to be a change in approach from the Court. Examples of this change have been identified in the Court's language around EU Citizenship rights and the objectives of the legislation

¹⁶⁷ Case C-140/12 *Brey* (n 58) para 44.

¹⁶⁸ O'Brien (2017) (n 163) 220.

¹⁶⁹ As being a UK citizen automatically grants them a right of residence in the UK. See also Case C-73/08 *Bressol v Gouvernement de la Communauté française*. [2009] ECR I-2735, Opinion of AG Sharpston, para 53; Herwig Verschueren, 'Recent case before the Court of Justice of the European Union: Case C-308/14, European Commission v United Kingdom, ECLI:EU:C:2016:436 (14 June 2016)' (2017) 19(1) *European Journal of Social Security* 71, 77; O'Brien (2017) (n 163) 225.

¹⁷⁰ Verschueren, (2017) (n 169) 82.

to give them effect, the approach to applying the principle of proportionality and the how types of welfare benefits are categorised and the ability to restrict access to them. The change in the Court's reasoning and approach to core EU Treaty rights and principles suggest that the restriction in EU Citizenship rights goes beyond the different and politically sensitive facts of these cases and improvement in Member State competence at defending their restrictions, as Davies has suggested.¹⁷¹ The Court has been inconsistent in its handling of EU Citizenship and free movement rights. For Nic Shuibhne, the CJEU is forgetting that, for now, citizenship rights are part of primary EU law and '[t]he Court should be responsible enough to guard the boundaries of existing primary rights' until it is altered by the legislature.¹⁷² The switch in interpretation has resulted in a restricting the scope of free movement and equal treatment rights to only those EU citizens who can evidence their right of residence according to Directive 2004/38. The potential implications of this for the reality of free movement for EU citizens who are deemed economically inactive is discussed below.¹⁷³ In order to analyse the citizenship rights of those deemed economically inactive, it is first useful to consider the potential drivers behind the Court's shift. Spaventa attributes the CJEU's reactionary phase to increased negative political focus on free movement and the desire of Member States to limit entitlement to their national welfare systems.¹⁷⁴ The next section will explore the relevant political context and how this may have influenced the inconsistency in case law.

3.4 The political fragility of free movement

The shift in the Court's approach to free movement rights for EU citizens must be viewed alongside the relevant political context. It is noticeable that the Court's approach to EU Citizenship rights has progressively become more restrictive in recent years, with the CJEU's most restrictive judgments of *Dano*, *Alimanovic*, *García-Nieto* and *Commission v UK* occurring within a two-year period between 2014-2016. From the analysis above, the CJEU's switch in approach cannot be attributed to substantial legislative change as the text of the Treaty was not amended during this period. While Directive 2004/38 was introduced during the course of the cases analysed, judgments released after its

¹⁷¹ Davies (n 32) 25.

¹⁷² Nic Shuibhne, (2015) (n 21) 937.

¹⁷³ 3.5.2 The reality of a free movement limited to Directive 2004/38

¹⁷⁴ Spaventa (n 3).

implementation did not adopt the restrictive approach of the CJEU seem in more recent cases.¹⁷⁵ Instead this section will explore some of the potential political drivers of this reactionary phase, finding the Court and through it free movement rights to be vulnerable to political discourse, even when they are not supported by the evidence.

3.4.1 EU enlargement and unfounded fears of ‘benefit tourism’

The question of who should be included in national welfare systems is a highly sensitive political topic and it is therefore it is worth examining the political context of the judgments examined. As discussed in section 3.2, the creation of Directive 2004/38 and optional transition measures were, at least in part, to soothe the concerns of ‘mass migration’ from new Member States joining the EU in 2004.¹⁷⁶ For Thym, the broad and sometimes vague construction of Directive 2004/38 suggests the EU has ‘opted for deliberate ambiguity’ to accommodate ‘politically sensitive terrain’.¹⁷⁷ This ambiguity can be seen most notably in the language precluding EU citizens from becoming a ‘burden’ or an ‘unreasonable burden’ as discussed in section 3.3.2.

Given this reaction to new Member States joining the EU in 2004, it is therefore not surprising that a 2014 report for European parliament identified the further EU enlargement in 2007, alongside the 2008 economic crisis as catalysts to ‘a sharper discourse against intra-EU immigration amid claims that it burdens national welfare systems’.¹⁷⁸ Alongside this, transition measures for Bulgarian and Romanian nationals ended in 2014,¹⁷⁹ sparking Member States to warn against a possible ‘flood’ of immigration’ and subsequent ‘pressure on public budgets’.¹⁸⁰

This feeling of concern over free movement’s role in enabling ‘benefit tourism’ was expressed in a joint letter sent from political leaders in Austria, Germany, the

¹⁷⁵ Blauberger et al, (n 56) 1432.

¹⁷⁶ ‘The UK, EU Citizenship and Free Movement of Persons’ (The Migration Observatory, 2014) <<http://www.migrationobservatory.ox.ac.uk/resources/primers/the-uk-eu-citizenship-and-free-movement-of-persons>> accessed 12 April 2017.

¹⁷⁷ Thym, (2015) (n 74) 26.

¹⁷⁸ Eva-Maria Poptcheva ‘Freedom of movement and residence of EU citizens: Access to social benefits’ (European Parliamentary Research Service, 2014) 1

¹⁷⁹ László Andor, ‘End of restrictions on free movement of workers from Bulgaria and Romania’ (1 January 2014) <[http://europa.eu/rapid/press-release MEMO-14-1_en.htm](http://europa.eu/rapid/press-release_MEMO-14-1_en.htm)> accessed 16 April 2017.

¹⁸⁰ Poptcheva (n 178) 3.

Netherlands and the UK to the EU in 2013. In the letter the four Member States detailed their concerns of EU migrants 'burdening the host countries' social welfare systems.¹⁸¹ The letter argued that EU free movement rules which provide access to welfare benefits were 'an affront to common sense' that 'ought to be reviewed urgently' to prevent any potential burden and to strengthen the actions that can be taken against those who, in their words, 'abuse' the right to free movement.¹⁸² However the concerns over benefit tourism lacks any substantial evidence. Poptcheva argues that the discussion of free movement and its potential burden on welfare systems 'has long gone beyond proof by numbers' with Member States instead relying on feelings of a loss of control over their welfare systems.¹⁸³

Evidence on the economic impacts of free movement instead tends to point to it as net benefit to most Member States. A Communication from the Commission in 2013, points to independent research showing that, in most Member States, EU citizens are net contributors providing more in tax than they receive in benefits or through use of public services.¹⁸⁴ They also provide evidence that no 'statistical relationship' has been identified between the generosity of welfare systems and the inflow of mobile EU citizens.¹⁸⁵ In response to the joint letter, foreign ministers from the Czech Republic, Hungary, Poland and Slovakia released a statement reminding the EU that free movement of people is vital for the success of the single market. The statement challenged the misconception of the burden of benefit tourism referring specifically to data on the impact of free movement in the UK which shows that migrants from Central and Eastern Europe 'have been hugely beneficial for the British economy.'¹⁸⁶

Despite the evidence detailing the positive impact of free movement for most Member States, the politization of free movement persisted. The European elections in 2014 saw

¹⁸¹ Letter from Johanna Mikl-Leitner (Minister of the Interior, Austria), Hans Peter Friedrich (Minister of the Interior, Germany), Fred Teeven (Minister for Immigration, Netherlands) and Theresa May (Home Secretary, UK) to the EU Council Presidency and to Commissioners Viviane Reding, Cecilia Malmström and László Andor of April 2013, 2.

¹⁸² *ibid* 4.

¹⁸³ Poptcheva (n 178) 4.

¹⁸⁴ Commission, (2013) (n 136); OECD (2013) (n 136); ICF GHK Milieu (n 136) 203.

¹⁸⁵ Commission (2013) (n 136) 4.

¹⁸⁶ Joint Statement from the Foreign Ministers of the Visegrad countries of 4 December 2013.

a significant increase in support for Eurosceptic parties.¹⁸⁷ The issue of immigration came third in an assessment of voter concerns.¹⁸⁸ In the UK, this increase appeared to be related, at least in part, to the desire for stronger controls on immigration, a problem which was often attributed to membership of the EU and the free movement of people.¹⁸⁹ This was then followed by the 2015 UK general election which saw the Conservative party win a majority while promising a referendum on the membership of the EU.¹⁹⁰ Before this referendum took place, David Cameron set out his demands to change the UK's membership with the EU, including relief from the 'pressures free movement can bring' by requiring EU migrants to reside in the UK for four years before they could 'qualify for in-work benefits or social housing'.¹⁹¹ The EU agreed to a version of this provision, introducing the 'benefit-brake' mechanism. This would allow Member States to request, when experiencing exceptional pressure on their welfare system, labour market or public services as a result of free movement, the power to limit the access of newly arriving EU workers to in-work benefits until they had resided for a total period of up to four years.¹⁹² The 'new settlement' made with the UK also provided Member States with a route to restricting the exportability of family benefits for EU workers.¹⁹³ Nic Shuibhne, in examining both restrictions, identified that neither 'could be defended against established principles constituting the integrated system of free movement and equal treatment law'.¹⁹⁴ Among issues such as fitting into the permitted derogations from equal treatment rights and ignoring the legal distinction of the treatment of those who are economically active and those who are not, Nic

¹⁸⁷ Oliver Hawkins, Vaughne Miller and Jeremy Hardacre 'European Parliament Elections 2014' (House of Commons Library Research Paper 14/32, 2014).

¹⁸⁸ European Parliament '2014 post-election survey, European elections 2014: Analytical overview, Directorate General for Communication, Public Opinion Monitoring Unit' (October 2014) 9.

¹⁸⁹ Hawkins et al (n 187) 2.

¹⁹⁰ David Cameron, 'EU speech at Bloomberg' (Bloomberg, London, 23 January 2013) <<https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>> accessed 24 June 2020.

¹⁹¹ Letter from David Cameron to Donald Tusk (10 November 2015).

¹⁹² Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union OJ C691/1 (New Settlement) Annex I section D(2)(b).

¹⁹³ *ibid* Annex I section D(2)(a).

¹⁹⁴ Niamh Nic Shuibhne, 'Reconnecting free movement of workers and equal treatment in an unequal Europe' (2018) 43(4) *European law Review* 477.

Shuibhne also identifies that these measures would struggle to meet ‘the proportionality test and its demands for evidence-based decisions’.¹⁹⁵ A declaration from the Commission deemed that the circumstances in the UK demonstrated ‘the type of exceptional situation that the proposed safeguard mechanism is intended to cover’,¹⁹⁶ despite a lack of evidence supporting this finding published by either the Commissions or reports by the UK Department of Work and Pensions.¹⁹⁷ The legal legitimacy of these restrictions are therefore put into question, particularly when it’s implementation can rely on unsubstantiated predictions of the impact of free movement and equal treatment.

The 2016 referendum resulted in the UK choosing to leave the European Union and therefore the benefit brake mechanism was never implemented. Nevertheless, it is telling of the extent to which the EU would tolerate and was prepared to contribute to the sacrifice the free movement rights of working EU citizens to placate Member States’ desires to withhold access to national welfare systems. For Nic Shuibhne, the departure from equal treatment for a significant period of time, while not easing obligations on EU workers, such as tax payments, illustrates ‘the degree of the inequality of treatment contemplated’.¹⁹⁸ If these measures had been adopted and implemented, EU migrant workers would have to be able to reside without the support provided by ‘in-work benefits’ for 4 years, regardless of their individual circumstances. Given the fragmentation of the labour market, discussed next in chapter four, free movement under these requirements would not be a realistic possibility for many workers in precarious, low-paid atypical work. Such a limit would therefore have reduced free movement rights beyond the pre-citizenship rules.

3.4.2 The EUs sensitivity to free movement concerns

This increase in political sensitivity surrounding free movement arose around the same period of time as the CJEU’s most restrictive judgments in *Dano*, *Alimanovic*, *García-Nieto* and *Commission v UK* and has therefore been highlighted as a potential driver for this change. Spaventa is not alone in her opinion that ‘the Court is reflecting a change in the

¹⁹⁵ *ibid* 496.

¹⁹⁶ New Settlement, Annex VI.

¹⁹⁷ O’Brien (2017) (n 105) 264; Nic Shuibhne, (2018) (n 194) 495.

¹⁹⁸ Nic Shuibhne, (2018) (n 194) 486-7.

political appetite for citizenship'.¹⁹⁹ O'Brien also points to the judgment in *Dano*, stating that 'the Court was at pains to reassure Member States concerned about benefit tourism'.²⁰⁰

One of the most apparent examples of the CJEU reacting to political events is the judgment in *Commission v UK*, which was released just nine days before the UK's referendum on membership to the EU. Blauberger et al note that, the decision not to postpone such a politically sensitive decision which was a 'heated subject of campaigning' illustrates 'the Court's willingness not to avoid the impression of political intervention'.²⁰¹ The timing of this judgment may suggest the political intervention involved, while stark, was perhaps limited to the particular context of the UK and the upcoming referendum. For example, Costamagna described the judgment as an attempt 'to join in the efforts to defuse British voters' concerns with migration-related issues'.²⁰² Verschueren also criticises this judgment, suggesting that the referendum 'did not produce the result that the judges in Luxembourg probably had in mind'.²⁰³ While the intention may have been limited to intervention in the UK referendum, the implications are far-reaching and speak to the growing politicising of free movement across Europe. For O'Brien, the 'sweeping acceptance of automatic exclusions of those falling foul' of the right to reside test and 'deference to the public finance trump card' provides a shining example of the Court dismantling EU Citizenship in an attempt to both 'placate the UK population sufficiently to tempt it to vote to stay in the Union' and 'accommodate Member States desires to discriminate'.²⁰⁴

By tracking the increase of both public discourse and media coverage of 'benefit tourism' or 'welfare migration', Blauberger et al find a 'strong correlation' is identified between increased public consternation and media attention to 'benefit tourism' and the more restrictive judgments of the CJEU such as *Dano*, *Alimanovic*, *García-Nieto* and

¹⁹⁹ Spaventa (n 3).

²⁰⁰ O'Brien (2016) (n 116) 946.

²⁰¹ Blauberger et al, (n 56) 1437.

²⁰² Francesco Costamagna, 'Restricting access to social benefits and the lasting legacy of the Brexit debate' (EuVisions, July 2016) <<http://www.euvisions.eu/restricting-access-to-social-benefits-and-the-lasting-legacy-of-the-brexite-debate/>> accessed 30 July 2020.

²⁰³ Verschueren, (2017) (n 169) 82.

²⁰⁴ O'Brien (2017) (n 163).

Commission v UK.²⁰⁵ In particular, Blauberger et al draw a comparison between public discourse around ‘benefit tourism’ and the Court’s language in *Dano*,²⁰⁶ where the Court referred to the motive of EU citizens to move ‘solely in order to obtain another Member State’s social assistance’.²⁰⁷ Their research distinguishes the public mood from Member State opposition to free movement rules or threats of non-compliance, which they find has been present in many examples of expansive citizenship case law.²⁰⁸ While this correlation does not automatically imply causation, it is important to recognise, as O’Brien states, that the Court does ‘not operate in a vacuum’.²⁰⁹ In fact, the Court were specifically drawn to the attention and interest given to ‘benefit tourism’ in the public sphere when it was noted by AG Wathelet in his opinion in *Alimanovic*.²¹⁰

The ties between the Court’s judgments and the political context suggests that the CJEU was responsive to the political environment and may further suggest that the transition in the case law could be politically motivated. While these decisions may be understandable and ‘may even play a vital part in the preservation of harmonious EU relations overall’, Nic Shuibhne argues that it represents ‘a tainted compromise’ where free movement rights, marketed to the public as rights for all EU citizens, are in fact restricted for only those who can afford them.²¹¹ Given the indications that the EU is willing to restrict free movement rights further, as evidenced in the negotiated benefit-brake with the UK, it seems that concern around the future for these rights is entirely warranted. However, a response to one political movement may be met with a backlash from another. Spaventa notes that by limiting free movement to an option only available to those who meet the residence requirements, while potentially aiming to comfort concerned populations, increases ‘the sense of alienation from... a project that is exclusive rather than inclusive in nature.’²¹² As a result, trust in the EU and perceived

²⁰⁵ Blauberger et al, (n 56) 1436.

²⁰⁶ *ibid* 1436.

²⁰⁷ Case C-333/13 *Dano* (n 41) para 78.

²⁰⁸ Blauberger et al, (n 56) 1432.

²⁰⁹ O’Brien (2017) (n 163).

²¹⁰ Case C-67/14 *Alimanovic*, Opinion of AG Wathelet (n 156) para 4.

²¹¹ Nic Shuibhne, (2015) (n 21) 936.

²¹² Spaventa (n 3) 220.

advantages of membership may be damaged. For EU citizens whose rights have been limited, and free movement no longer a realistic option, they may begin to question ‘what has the EU ever done for us?’.

3.5 The uncertainty and inequality of EU Citizenship and free movement

Given that citizenship rights were already limited, further restrictions could see the extinction of free movement as realistic option available to all EU citizens. For example, before the Court’s recent restrictive tendencies, Dougan identified the ‘added value’ of EU Citizenship to be limited to ‘a charitable fund for distressed gentlefolk to help them overcome temporary financial embarrassments’ or to those who ‘seem deserving of support because they are trying to better themselves in some orthodox economic sense’.²¹³ The Court’s judgments in *Dano*, *Alimanovic*, *García-Nieto* and *Commission v UK* has reduced the ‘added value’ of EU Citizenship further by limiting the scope of rights. By linking access to equal treatment to the residence criteria in the Directive, the Court has turned citizenship ‘rights’ into an exclusive privilege. The Court’s framing of free movement as a binary conflict of the ‘market’ interests of Member States against the ‘social’ interests of the citizen, ignores need to need to balance multiple interests and ‘subdues the complex reality’ of the situations that arise.²¹⁴ Nic Shuibhne highlights the these more complex tensions, such as the ‘balance between economic responsibility and protection of vulnerable citizens’, are ‘sidelined’ and ‘socially vulnerable EU citizens are not protected; and neither is their fate considered within the judicial discussion’²¹⁵

This section will therefore examine some of the consequences of the Court’s judgments, including the Member States’ distinguishing of facts to avoid duties set in previous case law, using residence cards as an example, the diminished ability for EU citizens to exercise free movement and what this means for the status of EU Citizenship and finally, the damage to legal certainty for EU citizens.

²¹³ Dougan, (2006) (n 96) 622-623.

²¹⁴ Niamh Nic Shuibhne, ‘The Social Market Economy and Restriction of Free Movement Rights: plus c’est la même chose?’ (2019) 57(1) *Journal of Common Market Studies* 111.

²¹⁵ *ibid.*

3.5.1 Residence cards as a tool for Member States to swerve obligations

While the above sections have concerned themselves with the restrictions following more recent judgments, some of earlier citizenship case law has presented avenues through which Member States can distinguish facts and divert from duties. An example of this is the significance bestowed on the acquisition of residence permits and how the UK has focused on residence permits to distance itself from much of the earlier judgments.

The early EU Citizenship cases which are often cited as exemplars of the positive extension of EU Citizenship rights, are instead argued by Davies to reflect the CJEU prescribing particular significance to the acquisition of a residence permit in a Member State.²¹⁶ This interpretation views the claimants' free movement rights as stemming from national law, where a residence card operates as confirmation of a right of residence, rather than solely sourcing rights from the status of EU Citizenship. The importance bestowed on residence permits leaves the increasingly limited equal treatment rights of economically inactive EU citizens dependent on Member States *accidental generosity* through the provision of residence permits, such as that found by Heindlemaier and Blauburger where Member States were not effective at enforcing restrictive residence rules.²¹⁷ Member States are also able to distance themselves from the duty to recognise some EU citizens' free movement rights as they do not provide such residence permits.

Martínez Sala, as discussed above,²¹⁸ has been both celebrated as showing EU Citizenship rights to 'have real teeth'²¹⁹ and criticised as too radical a concept of equal treatment, interfering with national welfare systems.²²⁰ However, it also represents a case where the 'combination of circumstances behind the reference' were considered unusual by O'Leary and 'excite[d] as many questions as it provide[d] answers'.²²¹ This concern

²¹⁶ Davies (n 32) 16.

²¹⁷ Anita Heindlemaier and Michael Blauburger, 'Enter at your own risk: free movement of EU citizens in practice' (2017) 40(6) West European Politics 1198.

²¹⁸ See section 3.3.1 The shifting objectives of the legislation.

²¹⁹ Albertina Albors-Llorens, 'Case Comment: A broader construction of the EC Treaty provisions on citizenship?' (1998) 57(3) Cambridge Law Journal 461, 463.

²²⁰ Tomuschat (n 45) 457.

²²¹ O'Leary (1999) (n 48) 77-78.

centres around the judgment's apparent reliance on Mrs Martínez Sala's acquisition of a residence permit in Germany as proof of her right to reside. The CJEU ruled that the German law requiring non-nationals to produce residence permits to access benefits was found to be directly discriminatory and could not be justified.²²² Firstly, the court assumed that 'it is common ground' that Mrs Martínez Sala was lawfully resident in Germany as she has been authorised to reside there through consequent residence permits.²²³ However, as the claimant did not have an extension of her residence permit - only 'documents certifying that the extension... had been applied for'²²⁴ - the court also suggested that Mrs Martínez Sala may have a right to benefits solely by virtue of her being a Union citizen.²²⁵ Through these facts, Union Citizenship rights might appear to be immediately limited to situations where the claimant has permission from the host Member State to reside. The Court's discussion of equal treatment rights is not general and instead applied rigorously to the specific facts of the case, stating that a non-economically active citizen may rely on these in situations where Member States require a document which is not required of nationals to access benefits.²²⁶ O'Leary views this reliance on residence permits as revealing of the limited nature of the Court's adoption of Union Citizenship as a source of rights.²²⁷

Another expansive citizenship case, *Trojani*, saw a French volunteer apply for the minimum subsistence allowance in Belgium (the *minimex*). While the Court declared that Mr Trojani had no Community right to reside, he was deemed lawfully resident under national law as 'attested by the residence permit'²²⁸ which had been issued to him by national administration.²²⁹ Here, the Court appeared to expand on the meaning of lawful residence beyond the qualified residence statuses found in Directive 90/364 (now

²²² Case C-85/96 *Martínez Sala* (n 13) para 64.

²²³ *ibid* para 60.

²²⁴ *ibid* para 14.

²²⁵ *ibid* para 63.

²²⁶ *ibid* para 63.

²²⁷ O'Leary (1999) (n 48) 77.

²²⁸ Case C-456/02 *Trojani v Centre public d'aide sociale de Bruxelles* [2004] E.C.R. I-7573 para 37

²²⁹ Robin C A White, 'Residence, Benefit entitlement and Community Law' (2005) 12(1) *Journal of Social Security Law* 10, 16.

Directive 2004/38),²³⁰ as a status which could be provided for through national legislation alone and in my many cases confirmed by the issuing of a residence permit. Additionally, the Court in *Brey* ruled that EU law must be interpreted as precluding national legislation which automatically bars the grant of a benefit to a non-economically active EU migrant, ‘despite having been issued with a certificate of residence’.²³¹ Once again, the Court’s specific reference to the ownership of a residence certificate suggests that the right to a proportionality assessment was influenced, not purely by Union Citizenship rights but, by the provision of nationally recognised lawful residence.

The focus on residence permits in these cases therefore puts into question how expansive these judgments were for EU Citizenship rights. The CJEU’s ‘reversal’ in later cases discussed above, may appear to be less dramatic when viewed through the residence card specific facts. As discussed above, Davies argues that the behaviour of the Court in *Brey* is entirely predictable, his view on this also extends to the judgment in *Trojani*.²³² He argues that a ‘migrant’s capacity to challenge decisions and enforce their rights’ would be harmed if a Member State were to hypocritically provide a Union citizen with a residence permit confirming their right of residence and then deny access to welfare benefits on the grounds of lacking a right to reside.²³³ It is from the distinction of earlier, often cited ‘pro-citizenship’, cases which include the possession of residence permits that Davies locates some of the CJEU’s consistency, whereas more recent, so-called ‘reactionary’, cases present facts where the EU citizens involved had neither an EU nor national right of residence to rely on. In *Dano*, for example, the claimant was in possession of a residence certificate from the German authorities, which was provided automatically and therefore not deemed to confirm a right of residence.²³⁴ The court decided that Ms Dano had no right of residence and was

²³⁰ Council Directive 90/364/EC of 28 June 1990 on the right of residence [1990] OJ L180/26.

²³¹ Case C-140/12 *Brey* (n 58) para 80.

²³² Davies (n 32) 16.

²³³ *ibid.*

²³⁴ Case C-333/13 *Dano* (n 41) para 36.

therefore not entitled to benefits and the residence certificate in this case was deemed to merely perform ‘a declaratory function and did not change her status under EU law’.²³⁵

However, this analysis fails to recognise the expansion of Union Citizenship beyond the use of residence cards. The CJEU in *Trojani* drew on Mr Trojani’s status purely as an EU citizen to bring him into the scope of the Treaty.²³⁶ The Court gave effect to Union Citizenship as a source of residence rights where a citizen is ‘lawfully resident in the host Member State for a certain time *or* possess[ing] a residence permit’²³⁷ While the permit was useful, it was arguably not necessarily the only source of these rights, as the long period of residence could also constitute lawful residence.²³⁸ White also views that Mr Trojani’s lawful residence is identified on the basis of his long period of time in the country without ‘fraud or improper purpose at the point of entry’.²³⁹ As discussed above, non-economically citizens have been granted access to welfare benefits in a range of cases and circumstances,²⁴⁰ including through the use of proportionality to determine whether they are an unreasonable burden,²⁴¹ where they have a genuine link with the employment market²⁴² or have demonstrated integration into the society of the host Member State.²⁴³

While they can provide important evidence of national recognition of a right to reside, residence permits were not intended to be the entirety of examination into an economically inactive citizens’ lawful residence, at least until the CJEU’s ‘reactionary phase’ in later cases such as *Dano*. Nevertheless, the perceived focus on residence permits could be utilised in national courts as a distinguishing fact, to separate their own

²³⁵ Thym (2015) (n 74) 41.

²³⁶ Case C-456/02 *Trojani* (n 228) para 31.

²³⁷ *ibid* para 43 (emphasis added).

²³⁸ Cousins (n 55) 92.

²³⁹ White (n 229) 892.

²⁴⁰ See Verschueren, (2016) (n 146) 191.

²⁴¹ Case C-184/99 *Grzelczyk* (n 49); Case C-413/99 *Baumbast* (n 50); Case C-140/12 *Brey* (n 58); See section 3.3.2 The dismantling of individual proportionality assessments.

²⁴² Case C-138/02 *Collins* (n 50); Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze* (n 151).

²⁴³ Case C-456/02 *Trojani* (n 228); Case C-209/03 *Bidar* (n 50).

national legislation which does not provide such residence documents and subsequently restricting the scope of equal treatment for non-economically active citizens.

Member State response to this case law

Given that the resident permits held by the claimants in *Martínez Sala*, *Trojani* and *Brey* were granted on the basis of national rather than EU law, a reading of these cases which grants too much importance to the residence document would mean that the free movement rights of EU citizens could be left vulnerable to the whims of Member States. Tomuschat's concerns that such an expansive approach to EU Citizenship rights in *Martínez Sala* could 'stimulate negative State practices' and restrictive behaviour,²⁴⁴ could easily be achieved through a mere change of national law, removing the provision of residence permits.

An alternative restrictive approach from Member States involves a sweeping dismissal of the relevance of CJEU cases if they do not operate a system of residence cards. An example of this practice can be seen in the UK. In applying the rulings of the CJEU, the UK national courts have used direct references to residence permits in *Trojani* and *Brey* to withhold EU Citizenship rights where migrants do not have a qualified Directive right of residence. In *Abdirahman*, the Court of Appeal stated that 'Mr Trojani's possession of the residence permit made all the difference'²⁴⁵ for the CJEU and that the right to reside 'was derived from the permit he obtained, in the nick of time'²⁴⁶ as without the permit 'he had no right of residence'.²⁴⁷ It was therefore determined that, as the UK does not give out residence permits to EU nationals, this judgment and the extension to EU Citizenship and equal treatment rights to those with lawful residence did not apply to the UK.

In *VP v SSWP*, the Upper Tribunal (UT) Judge stated that the decision in *Brey* 'may have been influenced by the fact that Mr Brey had been granted a registration certificate' and that the repeated references to the certificate 'are a powerful indication that... the CJEU was not' trying to establish a rights for EU migrants falling outside

²⁴⁴ Tomuschat (n 45) 456.

²⁴⁵ *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657 [32].

²⁴⁶ *ibid* [68].

²⁴⁷ *ibid* [32].

Article 7 of Directive 2004/38.²⁴⁸ Rather, the UT Court believed that the CJEU were ‘concerned with what follows where a right of residence has arisen in the first place.’²⁴⁹ The UT followed that, as the UK does not issue residence cards to EU migrants, the claimants had to prove that had acquired a right of residence in accordance with Directive 2004/38. As mentioned above, the relevance of residence permits has resurfaced in the context of the UK’s EU Settlement Scheme. Here, the question is whether the ‘pre-settled status’, provided to applicants who can only evidence less than five years residence in the UK, is merely a declaratory residence status or a permit which signals lawful residence and triggers equal treatment rights, in line with the judgment in *Trojani*.²⁵⁰

It is through this restrictive interpretation by Member States that undermines much of the progress made in early expansive citizenship case law and reduces access to equal treatment rights. Allowing Member States to cynically seal-off expansive judgments due to their inclusion of residence permits has an overarching restrictive impact on EU citizens’ free movement rights, which has only been intensified by the more recent patchwork of restrictive CJEU judgments. As O’Brien points out, the dismissive attitude of these CJEU judgments in UK courts has meant that the UK ‘has continued to treat the ‘economically inactive’ as automatically not having sufficient resources at the point of claim.’²⁵¹ Any hope of applying the exceptions to this rule or for a proportionality assessment must be asserted at the point of appeal.

3.5.2 The reality of a free movement limited to Directive 2004/38

By binding the right to equal treatment with an EU citizens’ ability to establish a right of residence under Article 7 Directive 2004/38, the full force of free movement rights is reserved for the economically active or those who have enough wealth or capital to be financially self-sufficient. The CJEU has even almost acknowledged how these judgments restrict longer term free movement when it defended its judgment in *García-Nieto*. Here, the Court justifies the restrictions placed on jobseekers, reminding us that EU Citizenship provides for the initial three months where a ‘Member States cannot

²⁴⁸ *VP v. Secretary for Work and Pensions (JSA)* [2014] UKUT 32 (AAC) [79].

²⁴⁹ *ibid* [79].

²⁵⁰ *Fratila* (n 88).

²⁵¹ O’Brien (2016) (n 116) 946.

require Union citizens to have sufficient means of subsistence and personal medical cover'.²⁵² By singling out the ability to move with no restrictions for three months,²⁵³ the Court recognises that after these three months, time is up on free movement, unless the residency requirements are met. As Davies puts it, this judgment shows the Court confirming that 'even the poor are entitled to move for short periods'.²⁵⁴ Additionally, the case of *Alokpa*, discussed above, is a further example of the Court opting to treat free movement rights differently depending on levels of wealth. The only notable difference between *Alokpa* and the previous case of *Chen*, where a right of residence was identified,²⁵⁵ is that self-sufficiency was established through pre-held resources in the latter whereas the former's self-sufficiency would have to be earned through work. Despite AG Mengozzi's wish to avoid 'individual situations of Union citizens and their family members being treated unfairly',²⁵⁶ the CJEU found that Ms Alokpa could not rely on a derivative right of residence from her children as they did not have sufficient resources, despite Ms Alokpa's offer of employment which required a right of residence and permit to be granted.²⁵⁷ Spaventa calls this a 'form of hideous discrimination between those who have inherent resources... and those who have to earn their living'.²⁵⁸

Nic Shuibhne argues that the impact of the Court's restrictive approach raises important 'questions about the extent to which the existence and not just the exercise of free movement rights has been undermined'.²⁵⁹ For Spaventa, free movement rules now only cater to 'the wealthy, healthy and good Union citizens', leaving out those who have a low income, disabilities and health conditions (who cannot afford the health insurance required of the Directive) and those who have alternative lifestyles.²⁶⁰ She further argues

²⁵² Case C-299/14 *Garía-Nieto* (n 41) para 45.

²⁵³ Under Directive 2004/38, art 6.

²⁵⁴ Davies (n 32) 22.

²⁵⁵ Case C-200/02 *Zhu and Chen v SSHD* [2004] ECR I-9925.

²⁵⁶ Case C- 86/12 *Alokpa* (n 139) para 29.

²⁵⁷ *ibid.*

²⁵⁸ Spaventa (n 3) 215.

²⁵⁹ Nic Shuibhne, (2015) (n 21) 892.

²⁶⁰ Spaventa (n 3) 220.

that the reactionary phase of the Court has returned EU Citizenship to market-based rights as ‘the European project helps those who can help themselves and solidarity is confined to those who have proven their market credentials’ fostering exclusion and discrimination.²⁶¹ While this makes the status of EU Citizenship of very little use to the EU atypical worker, who will instead have to rely on their work meeting the requirements of economic activity, it also raises some serious concerns about the availability of free movement to all who hold the status of EU Citizenship.

Unless an EU citizen is wealthy enough to reside in a Member State without needing to assert equal treatment with nationals in regard to accessing welfare benefits, free movement is unlikely to be an option available to them. Kochenov argues that these restrictions mean that all citizens ‘who fail to construct their lives along the lines enforced and endorsed by the economic project’ are excluded from the rights and provisions that are supposed to go hand in hand with holding the status.²⁶² Spaventa contends that this exercise reduces the status of an economically inactive EU citizen to ‘only one step above the ‘alien’’.²⁶³ This may have a ‘chilling effect’ on EU nationals, who may be discouraged to take the gamble of free movement or who may choose to move and, due to the lack of clarity that mystifies the rights of EU Citizenship, unwillingly expose themselves to the risks it entails. In this regard, three months free movement, but with no entitlement to equal treatment,²⁶⁴ is a poor consolation prize for a community of supposedly equal citizens, especially when the reliance on economic activity encourages many of the inequalities present in the labour market to resurface.

It is important to recognise that national welfare models are becoming more commonly reliant on conditionality, linking eligibility for welfare benefits to responsibilities and engagement with various sanctions for non-compliance,²⁶⁵ a shift that is seemingly encouraged by the EU too.²⁶⁶ In some circumstances, this has also been extended to

²⁶¹ *ibid* 222-3.

²⁶² Kochenov, (n 2) 15.

²⁶³ Spaventa (n 3) 220-221.

²⁶⁴ Directive 2004/38 art 24(2).

²⁶⁵ Peter Dwyer, ‘Final findings report: Welfare Conditionality Project 2013-2018’ (June 2018).

²⁶⁶ European Commission, ‘Report from the Commission to the Council on the evaluation of the Council Recommendation on the integration of the long-term unemployed into the labour market’ COM (2019) 169 final.

previously exempt groups of people such as those with disabilities, lone parents and low-income workers and their families.²⁶⁷ The level of conditions relating to welfare benefits will differ greatly in different states, even within the territory of the European Union. Nevertheless, it must be remembered that the question here is not, does free movement fail to establish equality in welfare models, as many national welfare models are already unequal. Rather, the question is whether free movement, while inherently reducing the inequalities faced between *some* EU national workers and nationals of the Member States they live in, also preserves and perpetuates existing inequalities or introduces further inequalities between its' citizens. The danger of this for potential spiralling inequality is highlighted by O'Brien, who documents the utilisation of treating EU nationals as a menace to restrict their access to welfare benefits then resulting in the holding up of EU nationals as 'models' of personal responsibility, working around increased levels of conditionality.²⁶⁸ This then inspires further conditionality for national citizens, who are expected to meet the same level of individual responsibility.²⁶⁹ Spaventa also warns against the 'link between rights and economic status', present in national systems, being 'reinforced and legitimised by its reiteration on a grander scale at the European level.'²⁷⁰

To return to the use of Everson's distinction between entitlements and provisions, free movement rights dependence on economic activity means that the status of EU Citizenship merely offers the ability to choose to engage in the European internal market.²⁷¹ While, theoretically, any EU citizen could chose to exercise free movement as a worker, this choice is contingent on, among other variables, the available gaps in the market.²⁷² The expectation of EU citizens to make this choice is irrespective of the

²⁶⁷ Peter Dwyer, 'Citizenship, conduct and conditionality: sanction and support in the 21st century UK welfare state' in Menno Fenger, John Hudson, and Catherine Needham (ed) *Social Policy Review 28: Analysis and Debate in Social Policy* (Policy Press, 2016) 41.

²⁶⁸ Charlotte O'Brien, 'From Safety Nets and Carrots to Trampolines and Sticks: National Uses of the EU as Both Menace and Model to Help Neoliberalize Welfare Policy' in Dagma Schiek (ed) *The EU Economic and Social Model in Crisis: Interdisciplinary Perspectives* (Ashgate, 2013).

²⁶⁹ *ibid.*

²⁷⁰ Spaventa (n 3) 223.

²⁷¹ Michelle Everson, 'The Legacy of the Market Citizen' in Jo Shaw and Gillian More, *New Legal Dynamics of European Union* (Oxford University Press, 1995) 73, 87.

²⁷² *ibid*; see also chapter 4, section 4.5 A brief equality impact assessment.

diversity in personal circumstances and fails to account for existing barriers to work which mean that opportunities are not equally available.²⁷³ More often than not, the requirement for economic activity ‘perpetuates particularism and inequality’ for marginalised groups already facing exclusion from the market because of these societal presumptions.²⁷⁴ Alongside the disadvantage this places on women and ethnic minorities, as recognised by Hervey,²⁷⁵ this also has a huge impact on those with disabilities²⁷⁶ and those in ‘low paid, low status and low security jobs.’²⁷⁷ Ultimately, a requirement for economic activity which must meet a certain standard,²⁷⁸ means that any migrant worker who fails to acquire worker status cannot rely on their status as an EU citizen to access the necessary support to secure their ability to continue to reside and work in a host Member State. While free movement gives the illusion of being available to all EU citizens, it is only practically achievable for a limited group.

3.5.3 The uncertainty of the legal but unlawful EU citizen

Although permitted to move, reside and contribute to a host Member State, the economically inactive EU citizen cannot rely on that Member State for welfare support. Given that Member States do not always expel EU citizens who do not have a right of residence,²⁷⁹ an EU citizen, while not treated as living in the Member State ‘illegally’, does not have lawful residence in the context of equal treatment rights. As Thym

²⁷³ See chapter 4, section 4.5 A brief equality impact assessment and chapter 7, section 7.4.3 The unequal impact of worker status.

²⁷⁴ Tamara K Hervey, ‘Migrant workers and their families in the European Union: the pervasive market ideology of Community Law’ in Jo Shaw and Gillian More, *New Legal Dynamics of European Union* (Oxford University Press, 1995) 91, 92.

²⁷⁵ *ibid.*

²⁷⁶ Charlotte O’Brien, ‘Union Citizenship and Disability: Restricted access to Equality Rights and the Attitudinal Model of Disability’ in Dimitry Kochenov (eds), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017) 509, 524-528.

²⁷⁷ O’Brien, (2016) (n 116) 953.

²⁷⁸ See chapter 5, section 5.3 EU law: when work = work.

²⁷⁹ See Niamh Nic Shuibhne and Jo Shaw, ‘General Report: Union Citizenship: Development, Impact and Challenges’ in Ulla Neergaard, Catherine Jacqueson & Nina Holst-Christensen, *Union Citizenship: Development, Impact and Challenges* (DJØF Publishing, 2014) 89–90; Daniel Thym, ‘When Union citizens turn into illegal migrants: the Dano case’ (2015) 40(2) *European Law Review* 249, 259-260.

suggests, rather than actively removing these EU migrants, Member States may instead opt to ‘starve them out’.²⁸⁰

The dichotomy of unlawful yet legal residence also extends to the right of permanent residence, granted in Article 16 Directive 2004/38, in a host Member State for EU citizens who ‘have resided legally for a continuous period of five years’.²⁸¹ Despite permanent residence emerging in a Directive tasked with facilitating and strengthening the treaty rights of all EU citizens to free movement, the term ‘residing legally’ in this context is considered to link directly to the right of residence requirements in Article 7 Directive 2004/38.²⁸² Therefore, any period of time in the five continuous years relied on, where an EU citizen is deemed to be without a right of residence does not qualify, even if they have resided in a host Member State for well over the required five years. Long-term residents in a Member State, who exercise their free movement rights in good faith and may not interact with their right of residence until it is needed will find out, at the point of need, that they do not meet the requirements. Further to this, residing legally in this context has been interpreted by the CJEU to exclude time spent with derivative rights to reside that are not including in Article 7 Directive 2004/38,²⁸³ such as through *Chen*,²⁸⁴ *Teixeira*²⁸⁵ and *Zambrano*²⁸⁶ routes. The result of this leaves EU citizens who have a right to reside, and in the case of *Teixeira* carers have access to welfare benefits from this right to reside,²⁸⁷ but find that they cannot use this time towards gaining the EU Citizenship right of permanent residence. In this example, the residence which is not included in the ‘legal’ residence required for permanent residence is a type of residence stemming from EU law.

²⁸⁰ Thym (n 279) 259-260.

²⁸¹ Directive 2004/38, art 16.

²⁸² Joined cases C-424/10 and C-425/10 *Ziolkowski and Szeja v Land Berlin* [2011] ECR I-14035, para 47.

²⁸³ Case C-529/11 *Alarape and Tijani v Secretary of State for the Home Department* EU:C:2013:290, para 40.

²⁸⁴ Case C-200/02 *Chen* (n 255).

²⁸⁵ Case C-480/08 *Teixeira v London Borough of Lambeth and SSHD* [2010] ECR I-1107.

²⁸⁶ Case C-34/09 *Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-1177.

²⁸⁷ Case C-480/08 *Teixeira* (n 285).

Despite the potential benefit of permanent residence as a method of recognising and awarding rights to EU citizens based on integration, the technical eligibility criteria limits this to only the *right kind* of integration. Through the limitations and restrictions of EU Citizenship case law discussed in this chapter, this kind of integration can be summarised as EU migrants who are sufficiently economically active or financially independent. The potentially confusing difference of lawful and legal residence can cause significant uncertainty for EU citizens wishing to exercise their free movement rights. If the Citizen's Directive and subsequent case law are visibly departing from the Treaty the EU should seek to either correct this restrictive diversion or be responsible enough to, as Nic Shuibhne argues, alter the law to reflect these changes 'through the legitimate channels of legislative action and Treaty change where needed.'²⁸⁸ This would require an honest recognition that free movement is not a right enjoyed by all Union citizens and that where an EU citizen is not *sufficiently* economically active, they may not have the right to live in other Member States.

3.5 Summary

The introduction of EU Citizenship saw an extension of free movement rights from workers to citizens encompassed in EU primary law. These rights were not unconditional and instead were to be viewed in light of the limitations and conditions provided for in secondary law. It is through a restrictive approach to these limitations and conditions and treatment of secondary law as an almost overriding authority of the rights of EU citizens that has led to the dismantling of free movement for EU citizens deemed to be 'economically inactive'.

CJEU judgments on the free movement of EU citizens, while initially expansive, have since seen period of restrictive outcomes, limiting the ability of all EU citizens to claim equal treatment. Three changing aspects of the judgments have been identified as signalling the shift to this restrictive approach. Firstly, the Court has altered the perceived objective of the relevant legislation, from the facilitation of free movement to emphasising the aim to protect Member States from the burden of free movement. Secondly the CJEU's re-examination of its approach to the principle of proportionality has been a reversal of previous individualised assessment, instead allowing restrictive policies to be justified with vague and potentially imaginary 'likely overall burden'

²⁸⁸ Nic Shuibhne, (2015) (n 21) 937.

assessments or no proportionality at all. Lastly, the Court have re-categorised financial support for jobseekers and expanded vague language concerning social assistance benefits to cover social security benefits, both of which permit further restrictions to eligibility for EU citizens. The combination of these changes has altered the way the Court engages with the status of EU Citizenship, giving overarching primacy to the residency requirements in Directive 2004/38.

The significant restrictions on EU citizens free movement rights brought about by these cases were not triggered by an amendment to legislation and instead appear to be attributable to a change in political climate. Correlation can be drawn between an amplified, but unsubstantiated, concern of benefit tourism from Member States, the media and public discourse to the timing of the most restrictive judgments of the CJEU and the language used in them. The result of allowing free movement rights to be vulnerable to the political context they operate in, leads to significant legal precarity and uncertainty. Through both Member States subverting duties by distinguishing facts from the expansive CJEU judgments and the authorising of sweeping discriminatory practices in more recent CJEU judgments, 'economically inactive' EU citizens have seen their free movement rights be dismantled and discrimination permitted. Free movement must therefore be understood as a negative freedom as it requires activation triggered by enough economic activity.

This has implications for the fundamental status of EU Citizenship. The journey of EU Citizenship rights is significant here as it provides a glimpse at what the status of a supranational citizenship could have provided. While it is the case that many of the 'achievements' of EU Citizenship are grounded ties to economic integration, these limited achievements still offered a social safety net to some citizens who did not meet the residency requirements. Now, the deference to Directive 2004/38 as the full provision of a right of residence has meant that a Member States can successfully restrict access to welfare benefits from those who need them, because they need them. The introduction of EU Citizenship has therefore not released free movement from its market origins. Economically inactive EU citizens will not be able to enjoy freedom of movement without enduring great risk, if at all. As Nic Shuibhne puts it, market citizenship is not 'a construct of the distant past' but a continuing feature of Union

Citizenship.²⁸⁹ Economic activity remains the key to unlock the full range of free movement and equal treatment rights. By viewing EU Citizenship as a membership, EU nationals can choose, through *enough* market activity, to opt-in or ‘buy-in’ to membership. Enough economic activity to meet the residency requirements acts as a subscription fee. Any EU national is welcome to try to move and reside in a Member State, but if this fee cannot be paid they do not have full membership and therefore move at their own risk.

Where does this leave the EU atypical worker? With EU Citizenship ruled out as a reliable or realistic option to acquire equal treatment rights, they must instead rely on being identified by a Member State as economically active. This question concerns the extent to which atypical workers are protected in the EU’s market ‘citizenship’ or membership. As a status that supposedly rewards rights to those based on market engagement, the automatic assumption is that citizens engaged with and participating in the market should be awarded access.²⁹⁰ As flawed as market ‘citizenship’ or membership is, it still implies a collection of rights to those who can show their market credentials. The scope of economic activity must therefore be examined to gauge the full availability of free movement rights for atypical workers. For this limited vision of free movement to be available to all who ‘choose’ to engage in the labour market, the definition which unlocks the associated rights must reflect the reality of work for all EU citizens.

For those in atypical work, the question then becomes: are they economically active *enough* to enjoy free movement and the rights associated with it?

The following chapters engage with this question through a case study of EU atypical workers in the UK. Chapter 5 contributes to answering this by examining the scope of the EU concept of worker by assessing how inclusive it is of all workers. How this is filtered into Member State’s administrative practice will be examined further in chapters 6 and 7 by analysing how this is applied to atypical workers in the UK. However, it is first necessary to set the expectations of what should be included in the definition of worker status. Chapter 4 will therefore look to the labour market in Europe and the UK

²⁸⁹ Niamh Nic Shuibhne, ‘The Resilience of EU Market Citizenship’ (2010) 47(6) Common Market Law Review 1597, 1627.

²⁹⁰ Floris De Witte, ‘Transnational Solidarity and Conflicts of Justice’ (2012) 18(5) European Law Journal, 705.

to assess the level of and various forms of atypical work, and the implications for EU migrant workers.

Chapter 4: ‘What a way to take a living’¹: The Rise and Risks of the Atypical Labour Market

4.1 Introduction

The European labour market has changed quite significantly since the introduction of free movement for workers in EU Member States. This chapter will address how economic recessions, developments in technology and pressures to integrate those previously excluded from the labour market, (from both the perspective of increasing equality of opportunity, but also more instrumental objectives of ‘activating’ the ‘inactive’ to ‘activate’), have together increasingly shifted the standard conception of work. While the most common type of employment contract is still full time and permanent,² atypical work sectors have been growing, and new forms of flexible working have emerged.

While flexibility can mean higher employment rates, space for those who have limited capacity for full-time work and more freedom in work, the price of that flexibility is being shifted onto those same workers. A high employment rate does not guarantee good employment. To adjust to the increase in part time and atypical contracts in the labour market,³ welfare systems began to provide more ‘in-work’ benefits. This reflects Davies’ assertion that now, the ‘assumption that those in employment are self-sufficient is not reflected in many European societies’.⁴ Yet, EU migrants who are stuck in a labour market which is less likely to offer full time employment may find themselves outside the scope of ‘worker status’ and left without access to essential ‘in-work’ benefits.

Before this thesis considers the suitability of the legal status of an EU migrant ‘worker’ for atypical workers, it is important to reflect on the reality of work in the labour market it serves. Given that, as Nic Shuibhne states, EU legislation on workers has ‘barely

¹ To paraphrase Dolly Parton’s ‘9 to 5’ (1980).

² Figure 4.1 below shows that full-time permanent work still makes up 59% of employment in the EU.

³ Chris Belfield, Jonathan Cribb, Andrew Hood and Robert Joyce, ‘Two decades of income inequality in Britain: the role of wages, household earnings and redistribution’ (Institute for Fiscal Studies, 2017).

⁴ Gareth Davies, ‘Migrant Union Citizens and Social Assistance: Trying to Be Reasonable About Self-Sufficiency’ (2016) College of Europe Research Papers in Law No. 2/2016 5.

changed notwithstanding transformative change in the practice of work itself’,⁵ this chapter will build an understanding of the labour market context in Europe and what may be required of the legal framework to accurately reflect the experience of cross-border workers. The increased dependence on social assistance to alleviate risks associated with precarious employment will also be considered. Together, this will address research question 4: How does the rise in and precarity of atypical work present barriers to the free movement of workers?

The analysis in this chapter contributes to the thesis by establishing an expectation of what the EU definition of worker will need to include for atypical workers to access equal treatment rights in a host Member State. This understanding of the labour market is taken forward in chapter 5 to analyse the suitability of the worker definition in EU law. This builds on the arguments put in forward in previous chapters on EU citizenship’s conception as a market membership. Free movement rights are contingent on economic activity, yet the changing labour market depicts a growing number of EU migrant workers who may be relying on the edge of the definition of worker and facing the risks of precarious employment which make access to welfare more essential. Atypical workers therefore play a key role in the discussion of EU citizenship and free movement; they are simultaneously economic actors and likely recipients of social assistance. Should atypical workers face exclusion from the definition of worker, it suggests that the full rights of EU citizenship are reserved, not just for those who engage in the market, but those who engage *enough* and in the right way.

Firstly, section 4.2 will highlight common trends in statistics showing an increase in various forms of non-traditional employment across both Europe and the UK. Section 4.3 will then take a detailed look at the rise of the gig economy, including the problems with measuring gig work. Section 4.4 will focus on the experience of those in atypical work, including how increased flexibility, often touted as a benefit to those in atypical work, can lead to increased precarity in workers lives. This section also highlights why atypical workers may depend on access to welfare and social rights to alleviate some of the risks associated with these forms of work. Finally, section 4.5 examines how atypical work particularly impacts women, disabled, younger and migrant workers, including any

⁵ Niamh Nic Shuibhne, ‘Reconnecting free movement of workers and equal treatment in an unequal Europe’ (2018) 43(4) European Law Review 477, 479.

specific risks these groups may face in the atypical labour market. This section, therefore, disputes the narrative that flexible work inevitably benefits individuals alienated from the traditional labour market. Instead, it can instead push the risk and precarity disproportionately on those workers, while the benefits promised may not fully materialise.

4.2 Atypical work in numbers

The European labour market is shifting away from traditional full-time and permanent jobs as the norm. Instead atypical forms of work such as part-time, temporary and casual contracts are increasing. As AG Geelhoed stated in *Baumbast*, it is not necessarily the case that these forms of work are new, but that ‘the intensity with which and the scale on which they now occur have become so considerable’ that the Union must take account of them.⁶ While the rise of atypical work can be hard to measure, due to problems with overlapping and differing definitions and reliance on self-reporting, this section will look to consolidate some of the research into the changes in the labour market in Europe and, specifically, the UK.

Atypical work can include various types of employment. This research relies on a broad definition of atypical work to capture all employment in part-time, fixed-term, casual, seasonal and agency work alongside the growth of the gig economy. This approach is necessary to measure the scope of ‘worker’ status and the rights of an EU market ‘citizenship’ against the backdrop of a full variety of work experienced in the European labour market. It is also necessary to examine a wide variety of working situations to reflect the experiences documented in the case studies collected for this research.⁷

Overall trends, across Europe and the UK show that atypical work is becoming more prevalent. Statistics show that many different forms of flexible work are increasing in the EU and UK, and the trajectory suggest they will likely continue ‘to be a feature of the EU labour market in years to come.’⁸

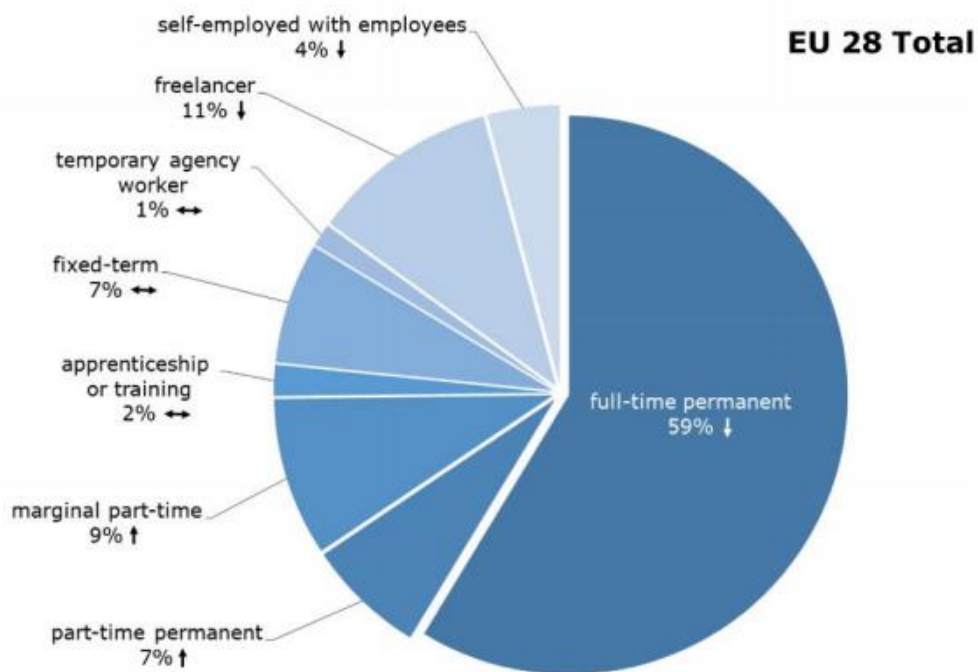
⁶ Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* EU:C:2002:493, [2002] ECR I-7091, Opinion of AG Geelhoed, para 26.

⁷ See appendix, Case data.

⁸ Commission, ‘Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union’ SWD (2017) 478 final, 13.

The Commission's impact assessment for the Directive on transparent and predictable working conditions reported that across the EU, more than half of all new jobs created between 2006-2016 were considered 'non-standard' contracts (not full-time permanent contracts).⁹ Additionally, data from the European Labour Force Survey (EU-LFS) compiled in Broughton et al's 2016 report shows that the percentage of 'standard' full-time, permanent contracts has decreased from 62% in 2003 to 59 % in 2016 in Europe with the trend expected to continue.¹⁰

Figure 4.1: Extent of different types of employment relationship in the EU 28 in 2014¹¹



Source: EU-LFS 2014, weighted results, own calculation.

It is therefore necessary to look at the increase of some of these atypical forms of work in more detail before addressing the impact they have on workers and the disparate impact on different demographics.

⁹ Commission 'Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union' COM (2017) 797 final, 1.

¹⁰ Andrea Broughton, Martha Green, Catherine Rickard and Sam Swift, 'Precarious employment in Europe part 1: patterns, trends and policy strategy' (European Parliament Committee on Employment and Social Affairs, July 2016) 32-33

¹¹ *ibid.*

4.2.1 Part-time work

As can be seen in Figure 4.1, both ‘permanent’ and ‘marginal’ part-time work is shown to be increasing in Europe. In particular, part-time work of less than 20 hours a week, referred to in Broughton et al’s report as ‘marginal part-time’ work (not to be confused with the term ‘marginal and ancillary’ work which is used in CJEU case law on the definition of worker and discussed in chapter 5), is found to be ‘constantly growing’.¹² The Commission has also reported on an increase in part-time work of eight hours or less from 3.4 million in 2005 to 3.8 million in 2016.¹³

The EU-LFS records the UK has having a higher than average rate of part-time work of under 20 hours, compared to other EU Member States.¹⁴ In 2019, the Resolution Foundation recorded part-time work as making up around 26.5% of total employment in the UK.¹⁵ Over the last ten years, this proportion had only increased by 1.1%.¹⁶ The Office for National Statistics finds that the percentage of total part-time work in the UK equates to approximately 8.6 million workers.¹⁷

4.2.2 Non-permanent, fixed-term and temporary contracts

As seen in Figure 4.1 above, ‘fixed-term contracts’ were reported to account for around 7% of employment in Europe in 2014,¹⁸ 5.7% of employment in the UK in 2019.¹⁹ This figure does not account for the other categories such as ‘marginal part-time’ or ‘temporary agency work’ which can include both permanent and fixed-term contracts.²⁰

¹² *ibid* 77.

¹³ SWD (2017) 478 final, (n 8) 13.

¹⁴ Broughton et al (2016) (n 10) 46.

¹⁵ Stephen Clarke and Nye Cominetti, ‘Setting the record straight: How record employment has changed the UK’ (Resolution Foundation, January 2019).

¹⁶ *Ibid*.

¹⁷ Blessing Chiripanhura, ‘Labour market economic commentary’ (ONS, April 2020) <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/labourmarketeconomiccommentary/april2020>> accessed 5 September 2020.

¹⁸ Broughton et al (2016) (n 10) 33.

¹⁹ Clarke and Cominetti (n 15) 45.

²⁰ Broughton et al (2016) (n 10) 24.

However, a Eurofound report provides data on showing that temporary work (which includes fixed-term contracts, on-call work, probationary jobs, leave replacements and sometimes temporary agency work)²¹ increased 25% between 2001 and 2012 in the EU27.²² This is a proportionately faster rise than that of permanent contracts, which increased by 7% in the same period.²³

Additionally, across Europe, only around 27.6% of fixed-term contracts lasted for over 12 months with a further 25% for 7-12 months, meaning many fixed-term contracts only last for 6 months or less and were found not to represent ‘stepping stones’ to more permanent positions.²⁴ Those working under fixed-term contracts lasting less than one month were recorded as increasing from ‘373,000 in 2002 to almost 1.3 million in 2016’ suggesting that even the extreme examples of temporary work are increasing.²⁵

4.2.3 Zero-hours contracts

Zero-hours and on-demand contracts are also on the rise. The EU Commission proposal for the directive on transparent and predictable working conditions estimates that ‘between 4 and 6 million workers are on on-demand and intermittent contracts,’ with little indication of their work hours.²⁶ While exclusivity clauses are prohibited for zero-hours contracts (ZHCs) in the UK,²⁷ up to 1 million on-demand workers in Europe are prevented from finding other work due to being subject to exclusivity clauses.²⁸

²¹ Carlos Vacas-Soriano ‘Recent developments in temporary employment: Employment growth, wages and transitions’ (Eurofound, 2015) 4.

²² Ibid 9.

²³ Ibid.

²⁴ Broughton et al (2016) (n 10) 13.

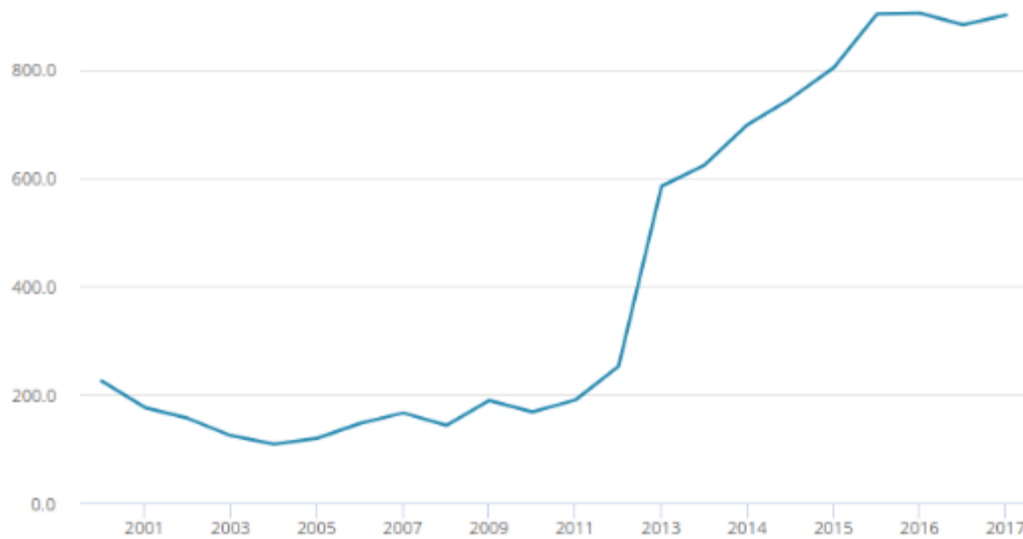
²⁵ SWD (2017) 478 final, (n 8) 13.

²⁶ COM (2017) 797 final, (n 9) 1.

²⁷ Small Business, Enterprise and Employment Act 2015 s.153.

²⁸ COM (2017) 797 final, (n 9) 1.

Figure 4.2: Number (thousands) of people in employment reporting they are on a ZHC, October to December 2000 to October to December 2017²⁹



Again, Broughton et al identify the UK has having higher than average level of ZHCs.³⁰ Figure 4.2 shows the rise of ZHCs in the UK, highlighting a particularly sharp increase since 2011.³¹ Overall, ZHCs are recorded as occupying around 2.5% of employment in the UK, a significant increase from 0.5% in 2008.³² The ONS reports approximately 900,000 workers report as working in ZHCs in the UK.³³

4.2.4 Agency work

Agency work, where an employee is contracted by an agency and temporarily supplied to an employer by that agency, is small but significant type of atypical work that appears to be increasing in both the European and UK labour markets. Across the EU, Eurostat records temporary agency work at around 2.2% of employed men and 1.5% of

²⁹ Yanitsa Petkova, 'Contracts that do not guarantee a minimum number of hours: April 2018' (Office for National Statistics, 23 April 2018) <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/april2018>> last accessed 5 May 2018.

³⁰ Broughton et al (2016) (n 10) 46.

³¹ Though this rise in reporting of ZHCs may be affected by an increased awareness of the term.

³² Clarke and Cominetti (n 15) 45.

³³ Chiripanhura (n 17).

employed women.³⁴ A range of studies analysed by the International Labour Organisation (ILO) indicate that agency work is a growing trend in most EU Member States.³⁵

While the Eurostat statistics show the UK's share of agency work to be lower than the majority of other EU countries, at around only 0.5%, a 2016 Resolution Foundation report considering a wider range of agency work, including temporary, permanent, those with second jobs and where individuals are recorded as self-employed, found that it could amount to approximately 3% of the UK workforce. This number equates to 865,000 workers, similar in size to the number of workers on ZHCs.³⁶ The presence of agency work in the UK has increased dramatically since the 1980s when there were only approximately 50,000 agency workers.³⁷ Between 2011 and 2016 agency work was found to be increasing at a rate of 30% and was expected to continue to increase to up to 1 million workers by the end of the decade.³⁸

Overall, studies indicate that nearly all forms of atypical work are increasing across Europe and more specifically in the UK. Where the numbers are not necessarily increasing in the UK, they have also not decreased to their pre-recession state.³⁹ The number of workers in atypical contracts is not insignificant and is likely to either continue to grow or, at least, remain a significant part of the European labour market. Considering that the 2008 financial crisis is identified as one of the drivers of the increase in atypical work,⁴⁰ it is possible that further fragmentation of the labour market

³⁴ 'Employment statistics' (Eurostat, May 2019) < https://ec.europa.eu/eurostat/statistics-explained/index.php/Employment_statistics > accessed 4 January 2020.

³⁵ Nicola Countouris, Simon Deakin, Mark Freedland, Aristeia Koukiadaki and Jeremias Prassl, 'Report on temporary employment agencies and temporary agency work' (ILO Governance and Tripartism working paper series, 2017) 23.

³⁶ Lindsay Judge and Daniel Tomlinson, 'Secret Agents: agency workers in the new world of work' (The Resolution Foundation, 2016) 17.

³⁷ Chris Forde, Gary Slater and Francis Green, 'Agency Work in the UK: What do we know?' (Centre for Employment Relations Innovation and Change, 2008) 9.

³⁸ Judge and Tomlinson (n 36) 17.

³⁹ Clarke and Cominetti (n 15) 45.

⁴⁰ Broughton et al (2016) (n 10) 10.

can be anticipated in the wake of the recession from the Covid-19 pandemic. As the number of atypical workers in the European labour market increases, so too will the number of EU migrant workers in atypical contracts. The accuracy of the definition of worker will therefore be relevant to an increasing number of EU migrants.

For EU migrant workers, it is necessary that the EU definition of work reflects the reality of this labour market. Failing to adapt to these changes could see a growing number of atypical workers unable to access equal treatment rights in another Member State. This shift may also undermine the ‘fundamental-but-market citizenship’ claims of EU citizenship, by increasing the number of economic actors who face exclusions from free movement rights.

Just as the definition of work fails to reflect this shift away from traditional work, it does not sit easily with new and emerging areas of work such as the gig economy. The rise of gig work and how it transcends some of the traditional ways we view work is worth closer inspection.

4.3 The rise of the gig economy

The gig economy acquires its name from workers taking on ‘gigs’ or trading in on often ‘low value, one-off exchanges’ and tending to be paid for the set tasks.⁴¹ Gig work can overlap with other types of atypical work, but is worth distinguishing.⁴² Rather than working in a single type of employment and receiving an hourly rate such as the case with ZHCs, they are working situations which are, as Webster describes it, ‘as temporary as is possible for them to be.’⁴³

Gig work takes on many different forms. Its most common uses are for ‘the delivery of electronically transmittable’ work or to assist in the organisation of ‘physical labour-

⁴¹ Eurofound, ‘Aspects of non-standard employment in Europe’ (Publications Office of the European Union, 2017) 21.

⁴² Ursula Huws Neil H. Spencer, Dag S. Syrdal and Kaire Holts, ‘Work in the European Gig Economy: Research results from the UK, Sweden, Germany, Austria, The Netherlands, Switzerland and Italy’ (Foundation for European Progressive Studies, November 2017) 50.

⁴³ Juliet Webster ‘Micro-workers of the Gig Economy: Separate and Precarious’ (2016) 25(3) New Labor Forum 56.

intensive services’.⁴⁴ Cherry states that the ubiquity of the internet and reliance on it developed ‘new ways to buy and sell not only objects, but also time, effort, and labo[u]r’.⁴⁵ Work under a gig economy template can therefore cover skilled and low-skilled work, manual and intellectual labour, short and longer term projects, on-call style set ups and flexible hours, in sectors as varied as transportation, housekeeping, delivery services, web development, translation and data inputting.

Degryse argues that this new form of work presents ‘a severe disruption to the organisation of national labour markets’ affecting ‘their regulations, their social dialogue, their social rights financed by their social contributions and their taxes’.⁴⁶ Therefore, it is necessary to analyse the extent to which the gig economy is growing, the risks faced by gig workers to their working conditions and social rights⁴⁷ and whether gig workers exercising free movement can access the necessary rights in host Member States to mitigate some of these risks.

Huws et al describes the attempt to define and measure the gig economy as like “nailing jelly”.⁴⁸ One issue in defining the gig economy lies in the many terms and labels used to describe it. This can include, but is not limited to, ‘the ‘sharing economy’, the ‘collaborative economy’, ‘crowd-employment or crowd-working’ and ‘the ‘on-demand economy’”.⁴⁹ There is also an array of terms for gig workers.⁵⁰ On top of this, contractual classifications as employed or self-employed, part or full time, temporary or

⁴⁴ Cristiano Codagnone, Fabienne Abadie, Federico Biagi, ‘The Future of Work in the ‘Sharing Economy’: Market Efficiency and Equitable Opportunities or Unfair Precarisation?’ (European Commission, Joint Research Centre, 2016) 10.

⁴⁵ Miriam A Cherry, ‘Beyond Misclassification: The digital transformation of work’ (2017) 37(3) *Comparative Labor Law & Policy Journal* 577.

⁴⁶ Christophe Degryse, ‘Digitalisation of the economy and its impact on labour markets’ (European Trade Union Institute Working Paper, 2016) 50.

⁴⁷ Jeremias Prassl, *Humans as a Service: The promise and perils of work in the gig economy* (Oxford University Press, 2018).

⁴⁸ Huws et al (n 42).

⁴⁹ Codagnone et al (n 44) 10; Broughton et al (2016) (n 10) 115-116.

⁵⁰ Including, but not limited to “micro-entrepreneurs’, ‘gigs’, ‘contractors’, ‘on-demand workers, freelancers” and platform workers’ in Codagnone et al (n 44) 10-11.

permanent, vary, with some misclassification ('bogus self-employment') thrown in.⁵¹ This can create confusion for researchers seeking to understand the full scale of the gig economy.⁵² [Notwithstanding these difficulties in measurement](#),⁵³ there are several indications of scale and growth. A 2019 Joint Research Centre report found that 'around 11%... across the 16 EU Member States surveyed had provided services via online platforms at least once'.⁵⁴ A 2017 Commission impact assessment for the Directive on transparent and predictable working conditions, analysed various studies to conclude that workers 'active on platforms currently represent 0.5-2% of the workforce'.⁵⁵ The number of workers relying on the gig economy is not marginal.⁵⁶ There is also agreement among studies that the frequency of gig work has significantly increased over the last 5 years and, as technology advances, that trend is expected to continue.⁵⁷

Estimates of the proportion of those in employment in the UK who engage with the gig economy range from 4%,⁵⁸ to 9%,⁵⁹ or 12.8% engaged in platform work⁶⁰ or 11% (or 5 million workers) engaged in the crowd economy.⁶¹ The percentage of total workers reporting that they rely on gig work for their main source of income also varies

⁵¹ Eurofound (n 41) 22.

⁵² Huws et al (n 42) 14; Eurofound (n 41) 21.

⁵³ SWD (2017) 478 final, (n 8) 13.

⁵⁴ Joint Research Centre (JRC) 'The Changing Nature of Work: and skills in the digital age' (Publications Office of the European Union, 2019) 58.

⁵⁵ SWD (2017) 478 final, (n 8) 13.

⁵⁶ JRC (n 54) 58.

⁵⁷ SWD (2017) 478 final, (n 8) 13.

⁵⁸ The Chartered Institute of Personnel and Development (CIPD), 'To gig or not to gig? Stories from the modern economy' (March 2017) 4.

⁵⁹ Huws et al (n 42) 26.

⁶⁰ JRC (n 54) 60-61.

⁶¹ Ursula Huws and Simon Joyce, 'Crowd Working Survey: Size of the UK's gig economy revealed for the first time' (Foundation for European Progressive Studies, February 2016).

between 1.5% to around 3%⁶² (or around 1,330,000 workers).⁶³ In the three years, between 2016 and 2019, participation in the UK's gig economy has reportedly doubled in size.⁶⁴

The presence of this type of work is 'statistically non marginal' and has grown over the last five years to such an extent that 'it is an empirically consequential hypothesis that they could encroach on traditional and long-term forms of employment.'⁶⁵ Importantly, the growing presence of atypical and gig work impacts the stability of workers' lives, who must now navigate fluctuating income, hours and availability of work. As the world of work evolves, without an explicit revisiting of the EU free movement framework, a growing number of EU migrant workers engaged in atypical forms of work could find themselves holding an inferior type of EU citizenship which deprives them of the protection of vital free movement and equal treatment rights.

4.4. Flexibility, risk and precarity

The Confederation of British Industry has found that countries with flexible labour markets 'enjoy higher employment rates and lower unemployment than those with more rigid approaches'.⁶⁶ But higher aggregate employment is coupled with fewer individual rights. Damien Green MP, then UK Work and Pensions Secretary, announced in 2016 that ideas of 'a proper job' with 'a fixed monthly salary, with fixed hours, paid holidays, sick pay, a pension scheme and other contractual benefits' have all changed.⁶⁷ While Green suggested that gig work nevertheless gave people more

⁶² 1.5% in JRC (n 54) 58; 3.2% or 29% of the full 11% of workers in the gig economy in Huws and Joyce (n 61).

⁶³ Huws et al (n 42) 26.

⁶⁴ Statistical Services and Consultancy Unit, 'Platform Work in the UK 2016-2019' (Foundation for European Progressive Studies, 26 June 2019); Gig work is also likely to increase CIPD (n 58) 7.

⁶⁵ Codagnone et al (n 44) 5-6.

⁶⁶ Confederation of British Industry, 'Submission to the Taylor review: Work that Works For All: Building a fair and flexible labour market that benefits everyone' (2017) 1
<<https://www.cbi.org.uk/articles/cbis-response-to-the-governments-consultation-on-the-taylor-review/>> last accessed 20 September 2019.

⁶⁷ Damien Green MP, 'Keynote Speech: A Welfare System that Works for All' (Reform Welfare Conference, 16 November 2016) <<https://reform.uk/research/welfare-system-works-all-rt-hon-damian-green-mp-secretary-state-work-and-pensions>> accessed 3 November 2019

ownership and control over their work,⁶⁸ atypical contracts can lead to a financial insecurity or irregularity, little real flexibility and less control.

Workers in the atypical labour market must plan their life around short-term contracts, periods of unemployment and resulting unstable income. The EU Commission has recognised that with the increase in non-standard employment⁶⁹ there is a risk that a growing part of the working population in the EU will be left without essential social protection.⁷⁰ The report builds on the 12th principle in the European Pillar of social rights which calls for social protection for workers ‘regardless of the type and duration of their employment relationship’.⁷¹ Those in precarious employment are reported to not be ‘granted access to social protection on a par with workers in standard contracts’⁷² jeopardizing the welfare of workers and their families.⁷³ These risks can affect workers’ ability to prepare for potential times of unemployment, health needs and ultimately pensions, all of which puts them at a disadvantage to other workers in permanent or full-time work.

In the UK, the Taylor Review, while largely positive about the benefits of atypical work, warns that workers face ‘one way flexibility’ where they are required to be available for any hours, often at short notice and with no reciprocation of this flexibility or no guarantee that hours will be provided.⁷⁴ Often this one-way flexibility is accompanied with a fear that future hours will be withheld if any work is turned down, if a worker raises legitimate complaints about conditions, or makes reasonable requests. In these circumstances, responsibility and risk has shifted from the employers, platforms,

⁶⁸ *ibid.*

⁶⁹ Commission, ‘First phase consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights.’ SWD (2017) 205, 2.

⁷⁰ *ibid* 4.

⁷¹ ‘European Pillar of Social Rights’ (2017) <https://ec.europa.eu/commission/publications/european-pillar-social-rights-booklet_en> accessed 1 September 2020.

⁷² SWD (2017) 205 (n 69) 5.

⁷³ *ibid* 8.

⁷⁴ Matthew Taylor et al, ‘Good Work: The Taylor Review of Modern Working Practices’ (July 2017) 2443.

intermediaries and corporations to workers while employers focus on the most effective extraction of profits.⁷⁵

MacDonald and Giazitzoglu argue that increasing precarity goes hand in hand with the degradation of workers' rights and the UK benefits system, in the shift towards more client responsibility to take on work.⁷⁶ They argue that precarity and risk have long been increasing, with early signs becoming apparent in the 1970s with the increase of subcontracting and neoliberal policies. The increase in atypical work with limited job security, lower levels of income, lack of career progressions, long periods without employment and unpredictable and irregular income and hours promotes further individualism and ultimately leaves workers in an ever more precarious position.⁷⁷ This section will therefore examine some of the main risks faced by those in more flexible work focusing on the impact of being underemployed, the pay penalty, loss of employment rights and the risks to health. This will provide more detail into why EU migrant atypical workers' access to welfare is necessary to mitigate some of these disadvantages in a host Member State.

4.4.1 Underemployment

One issue faced by those on atypical contracts is inadequate hours of work. While part-time work can be, to use the CJEU's own words, an 'effective means of improving their living conditions',⁷⁸ this will only be the case if the hours worked and the regularity of those hours are enough to improve a workers' living conditions and if part-time work is a voluntary decision.

A report for the European parliament found that the 2008 financial crisis was a driver of precariousness in Europe,⁷⁹ creating an environment in which businesses wanted

⁷⁵ Prassl (n 47) 85-86; see also Jacob Hacker, *The Great Risk Shift: The New Economic Insecurity and the Decline of the American Dream* (2nd edition, Oxford University Press 2019).

⁷⁶ Robert MacDonald and Andreas Giazitzoglu, 'Youth, enterprise, and precarity: or, what is, and what is wrong with, the 'gig economy'?' (2019) 55(4) *Journal of Sociology* 724.

⁷⁷ Broughton et al (2016) (n 10) 66.

⁷⁸ Case C-53/81 *Levin v Staatssecretaris van Justitie* EU:C:1982:105, [1982] ECR I-1035, para 15.

⁷⁹ Broughton et al (2016) (n 10) 10.

more flexible employment arrangements to financially suit them in unstable times,⁸⁰ justified with the belief that those seeking work could choose to either accept or refuse these offers of employment. However, the choice here is something of an illusion. In the UK, for example, increasing conditionality punishes unemployment; failing to search for work or take up an offer of paid work can result in a high-level sanction.⁸¹

A significant number of atypical workers are considered to be involuntarily working under these types of contracts. Statistics from the European Central Bank, utilised in the Commission impact assessment for the Directive on transparent and predictable working conditions, records that 3% of the total working population, are ‘working fewer hours than they would like’.⁸² The Commission recognised that, while this number has declined in the past two years, this has been ‘only very modestly’ and ‘despite robust employment growth’.⁸³ Around a quarter of part-time workers in Europe are recorded as involuntarily working part-time with income levels lower than they need.⁸⁴

With regard to temporary contracts, Broughton et al also found that a large share (53%) of individuals were involuntarily on fixed-term contracts.⁸⁵ The chance of transitioning to permanent contracts has also decreased, meaning that many workers may find themselves stuck in rolling fixed-term contracts or being involuntary unemployed at the end of periods of fixed term contracts.⁸⁶ The Resolution Foundation has also reported

⁸⁰ Prassl (n 47).

⁸¹ Peter Dwyer and Sharon Wright, ‘Universal Credit, ubiquitous conditionality and its implications for social citizenship’ (2014) 22(1) *Journal of Poverty and Social Justice* 27.

⁸² SWD (2017) 478 final, (n 8) 20.

⁸³ *ibid.*

⁸⁴ Involuntary part-time work has also increased in Europe to 28% by 2016 in COM (2017) 797 final, (n 9) 1; 1 in 4 are recorded as underemployed in Broughton et al (2016) (n 10) 70; Eurostat have also recorded that around 9 million part-time workers in the EU-28 would prefer to work more ‘Underemployment and potential additional labour force statistics’ (Eurostat, May 2018).

⁸⁵ Broughton et al (2016) (n 10) 103.

⁸⁶ The chance of transitioning to permanent contracts decreased from 27.3% in 2007 to 22.8% in 2013 in Broughton et al (2016) (n 10) 13.

that those in the atypical labour market have been more likely to lose hours, be furloughed or lose their job during the Covid-19 crisis.⁸⁷

In the UK, the Taylor Review found that since 2004 the number of ‘underemployed’, or workers who want more hours, has sharply risen.⁸⁸ Two thirds of those on ZHCs would prefer to be in a job with guaranteed hours.⁸⁹

While the gig economy might be presented as a means to flexibly top-up wages from a more permanent job or plug a gap between employments,⁹⁰ ‘as many as 60%’ of gig workers in the UK were found to utilise multiple platforms at a time to build an income, rather than supplementing a main (more stable) job.⁹¹

That some workers are involuntarily stuck in atypical indicates that the profitability of contracting part-time, fixed-term and casual work may be being prioritised over worker welfare and ‘choice’. The statistics covered in this section suggests that a significant number of workers struggle to find suitable permanent, regular or full-time work that meet their needs let alone ‘improve their living conditions’.

4.4.2 Pay penalties

Work in the atypical labour market is likely to mean that workers take home less income and income that is unstable or fluctuating. Fixed-term and agency work are also more likely to earn less *per hour* than those in full-time and permanent employment. The Resolution Foundation that in 2018, on average, atypical workers earned less (£9.20 per hour) than those in full-time employment (£12.80 per hour).⁹² After controlling for key variables relating to personal and job characteristics, the average pay penalty in the UK between 2011-2018 equates to around 66p per hour for temporary workers (-6 per

⁸⁷ Laura Gardiner and Hannah Slaughter, ‘The effects of the coronavirus crisis on workers: Flash findings from the Resolution Foundation’s coronavirus survey’ (The Resolution Foundation, May 2020) 3.

⁸⁸ The Taylor Review (n 74) 20.

⁸⁹ TUC ‘Great Jobs with Guaranteed Hours: What do workers really think about ‘flexible’ zero-hours contracts?’ (TUC, 4 December 2017).

⁹⁰ CIPD (n 58) 7.

⁹¹ Codagnone et al (n 44) 6.

⁹² Clarke and Cominetti (n 15) 51.

cent), 45p per hour for ZHC workers (-5 per cent), and 29p per hour for part-time workers (-3 per cent).⁹³ These findings can be seen in figure 4.3.

Figure 4.3: The pay penalty attached to atypical employment⁹⁴

Hourly pay in selected atypical categories – raw differentials and differentials after controlling for person and job characteristics: 2011-18



Notes: The pay penalty for part-time workers is only significant at 10 per cent level ($p=0.052$).
Source: RF analysis of ONS, *Labour Force Survey*.

There is also a trend, in most EU countries, that agency,⁹⁵ fixed-term, seasonal employment is more available in low-skilled, low-income work ‘in mostly labour-intensive sectors, such as retail, industrial cleaning, the care sector and agriculture’.⁹⁶ In 2002, workers in Belgium under a temporary contract were recorded as earning 5% less than permanent contract workers with comparatively similar experience and education.⁹⁷ Thus there is a double-penalty – firstly being concentrated in low income sectors, and then receiving less pay than ‘typical’ workers in the same sector.

⁹³ *ibid* 52.

⁹⁴ *ibid*.

⁹⁵ Agency workers in the UK earned on average £2.57 less per hour than the non-agency workforce in Judge and Tomlinson (n 36) 34.

⁹⁶ Sweden and Denmark are specifically excluded from this as they legislate against it in Andrea Broughton, Isabella Biletta and Mats Kullander, ‘Flexible forms of work: ‘very atypical’ contractual arrangements’ (Eurofound, 4 March 2010) <<https://www.eurofound.europa.eu/publications/report/2010/flexible-forms-of-work-very-atypical-contractual-arrangements>> last accessed 27 July 2019.

⁹⁷ Broughton et al (2010) (n 96); Broughton et al (2016) (n 10) 109.

There is also a gig work pay penalty. Earnings in the digital labour market tend to ‘range from very low to modest, with only a small minority of workers making above middle-level incomes’.⁹⁸ Huws et al found that, in the UK, earnings of gig workers are ‘generally modest’ with 42% of gig workers earning a total income (before tax and other deductions) of less than £20,000 a year and 30% earn between £20,000 and £35,000.⁹⁹ The issue of low income in gig work is made more significant by the fact that 81% of total crowd workers in the UK are recorded as the main ‘breadwinners’ in their households.¹⁰⁰ Unlike in more traditional forms of work where income may be expected to increase over time, gig economy jobs reach a pay ceiling, meaning that many gig workers are likely to be trapped in low-income work.¹⁰¹

Atypical workers are therefore at greater risk of ‘in-work’ poverty and being unable to prepare a personal financial safety net for breaks in employment or periods of low hours. Despite an increasing employment rate,¹⁰² the proportion of UK households deemed as being in ‘in-work’ poverty has risen from 37% in 1994-95 to 58% in 2017-18,¹⁰³ with this figure increasing by over one million in the most recent three years.¹⁰⁴ The Joseph Rowntree Foundation (JRF) attribute this increase to the widespread conditionality prevalent in the UK welfare system and the rise in more insecure flexible employment which traps workers in low-income jobs.¹⁰⁵

⁹⁸ Codagnone et al (n 44) 6.

⁹⁹ Huws and Joyce (n 61).

¹⁰⁰ *ibid.*

¹⁰¹ Meghan Benton and Liam Patuzzi, ‘Jobs in 2028: How will changing labour markets affect immigrant integration in Europe?’ (Migration Policy Institute Europe, October 2018) 2.

¹⁰² Bob Watson, ‘Employment in the UK: August 2020’ (Office for National Statistics, August 2020) <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/employmentintheuk/previousReleases>> accessed 2 September 2020.

¹⁰³ Pascale Bourquin, Jonathan Cribb, Tom Waters, and Xiaowei Xu, ‘Why has in-work poverty risen in Britain?’ (Institute for Fiscal Studies Working Paper W19/12, 2019) 2.

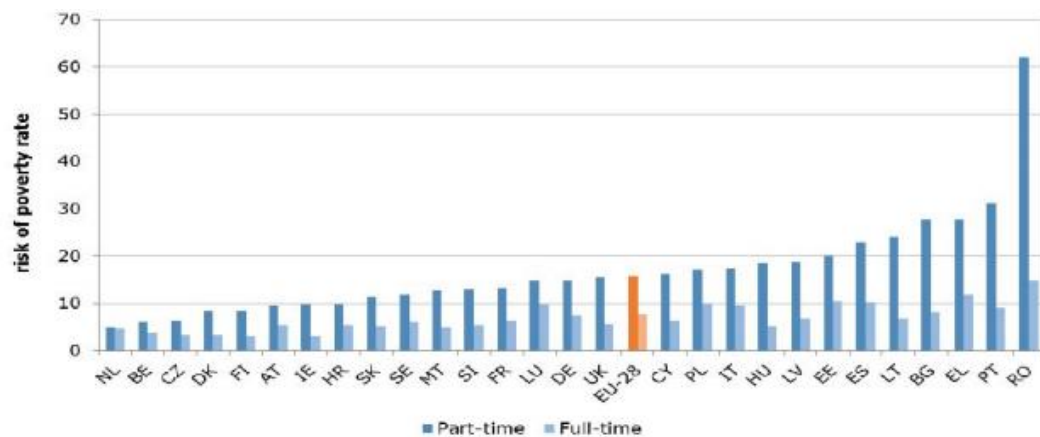
¹⁰⁴ JRF, ‘Budget 2018: tackling the rising tide of in-work poverty’ (Joseph Rowntree Foundation, 2018).

¹⁰⁵ *ibid*; Dave Innes, ‘What has driven the rise of in-work poverty?’ (Joseph Rowntree Foundation, February 2020).

‘In-work’ poverty across Europe has not gone unnoticed by the Commission, which adopted the promise of ‘[a]dequate minimum wages’ and the prevention of ‘in-work’ poverty as the 6th principle in the 2017 European Pillar of Social Rights.¹⁰⁶ A report for the European Parliament highlights the clumsy and rigid ‘interaction of... social security systems with low pay’ as a driver of precarity.¹⁰⁷ The report goes on to recommend that, as atypical forms of employment are increasing, national welfare systems need to be amended to support individuals in these types of employment ‘in order to avoid poverty traps due to inadequate social security coverage’.¹⁰⁸

The extent of ‘in-work’ poverty has been recorded by Broughton et al, who provided data showing that lower incomes among part-time workers put them at greater risk of ‘in-work’ poverty across all EU countries as shown in Figure 4.4 below.

Figure 4.4: In-work at risk of poverty rate by working time, 2014: risk of poverty if higher for part-time workers¹⁰⁹



Broughton et al also shows that the risk of ‘in-work’ poverty is significantly higher for temporary workers compared to permanent workers as shown in Figure 4.5 below.

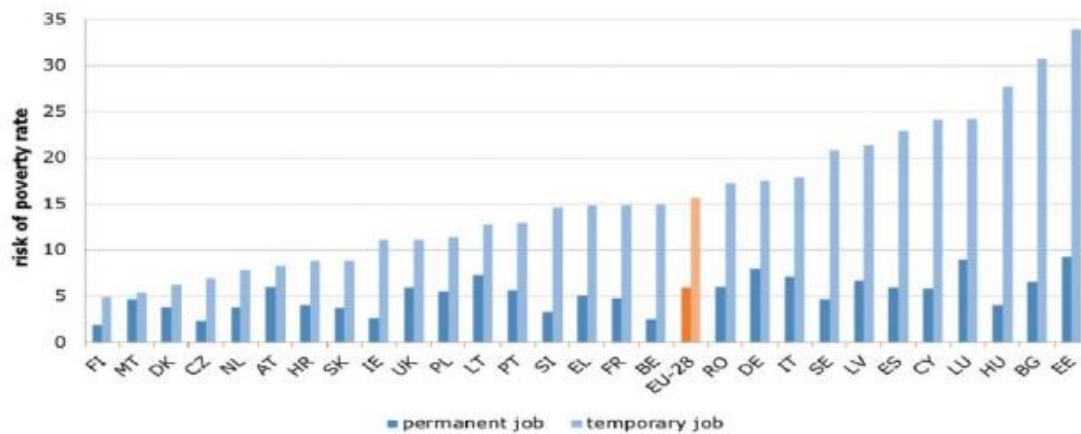
¹⁰⁶ ‘European Pillar of Social Rights’ (n 71) 15.

¹⁰⁷ Broughton et al (2016) (n 10) 10.

¹⁰⁸ *ibid* 14.

¹⁰⁹ *ibid* 65.

Figure 4.5: In-work at risk poverty rate for permanent and temporary employees, 2014: greater risk for temporary employees¹¹⁰



Financial insecurity also comes with a cost. Citizens Advice recorded that households with volatile incomes are ‘five times more likely to turn to high-cost credit’ including payday loans and rent to own schemes.¹¹¹ Reliance on such schemes will often only exacerbate financial problems and lead to a spiralling debt.

Pay-per-gig

When gig workers are paid per task or job, rather than hourly, their income can be sporadic, hard to predict and low - often equivalent to less than the national minimum wage. High-profile examples of gig work such as Uber have attracted specific research exploring the income levels of their registered workers. Research conducted by the Independent Union Workers of Great Britain into the income of Uber workers in the UK found that the average income equated to about £5 an hour, far below the national minimum wage in the UK¹¹² (which was £8.21 for workers aged 25 and over at the time of the Union’s research). This amount is disputed by Uber pointing to research using their own data showing that the average hourly rate for their drivers in London is close

¹¹⁰ *ibid* 66.

¹¹¹ Gwennan Hardy and Joe Lane, ‘Walking on thin ice: The cost of financial insecurity’ (Citizens Advice, February 2018) 23.

¹¹² ‘Uber drivers plan national shutdown on 8 May before Uber IPO’ (Independent Union Workers of Great Britain, 3 May 2019) <<https://iwgb.org.uk/en/post/5ccbedcee58ac/uber-drivers-plan-national-shu>> accessed 20 December 2019.

to £11 an hour.¹¹³ However, this research does not consider drivers based outside of the London area. Similarly, Deliveroo records their average hourly rate as £10,¹¹⁴ but as 87% of ‘riders’ are paid per delivery, income can vary greatly from nothing per hour to £17.¹¹⁵ Additionally, a CIPD survey into gig work found that the median self-reported hourly rate for gig workers providing rides or deliveries was £6.¹¹⁶ For gig workers performing short-term often digital tasks, and usually expected to be the higher earners among gig workers, the median rate only increases to £7 or £7.70.¹¹⁷ For those (mis)classified as self-employed, there is also often a need to cover expenses including commuting, equipment or insurance in these earnings.¹¹⁸

As a result of low pay, pay-per-gig models can also result in long hours being necessary to make up for the income shortfall. Uber report that that 30% of their drivers are logged in to the app, waiting for rides, for over 40 hours a week, with 6% logged in for over 60, 2.6% for 70 and 0.8% for 80 hours.¹¹⁹ A *New Statesmen* article found that, since Deliveroo switched to a pay per delivery system, drivers ‘making one delivery per hour would have to work nearly 74 hours to cover the average UK rent for a single room’.¹²⁰ Those in atypical and gig work are at risk of working longer hours than is recommended (for example, the Working Time Directive limits weekly working hours to 48 hours per

¹¹³ Thor Berger, Carl Benedikt Frey, Guy Levin, Santosh Rao Danda, ‘Uber Happy? Work and Wellbeing in the “Gig Economy” (Working Paper for the 68th Panel Meeting of Economic Policy, October 2018).

¹¹⁴ ‘Your Earnings with Deliveroo’ (Deliveroo) <<https://roocommunity.com/your-earnings/>> last accessed 20 December 2019.

¹¹⁵ Frank Field and Andrew Forsey, ‘Delivering Justice: A report on the pay and working conditions of Deliveroo riders’ (July 2018) <<http://www.frankfield.co.uk/latest-news/press-releases/news.aspx?p=1021645>> accessed 20 December 2019.

¹¹⁶ CIPD (n 58).

¹¹⁷ *ibid.*

¹¹⁸ Cherry (n 45).

¹¹⁹ Letter from Andrew Byrne (Uber Head of Public Policy) to Rachel Reeves MP (Chair of Business, Energy and Industrial Strategy Committee) (08 November 2017).

¹²⁰ Julia Rampen, ‘A Deliveroo driver would need to work 74 hours to cover the average UK rent for a single room’ (New Statesmen, 18 August 2016) <<https://tech.newstatesman.com/business/deliveroo-disaster>> last accessed 27 December 2019.

week for the protection of the health and safety of workers).¹²¹ Cherry highlights the ‘temporal chaos’ of working in the gig economy, where a gig worker may face the cancellation of tasks before completion or jobs being double booked,¹²² which result in additional costs for the worker and extra, unpaid hours of work. While this is hard to measure, gig workers face extra tasks and pressures that are likely to increase the hours they do, and therefore potentially decrease their average hourly salary.

Beyond the risks of poverty and long hours, workers facing a low or volatile income will often be unable to prepare for the fluctuating hours and gaps in work which are ubiquitous with the atypical labour market, and even more so in the time of Covid. The impact of insecure work is likely to bite harder when income is low to begin with.

4.4.3 Loss of employment rights

The increase in flexible and atypical working arrangements can erode the employment rights of workers. Broughton et al raise the concern that many of the rights and protections available to workers in national and EU law have been built around the concepts of ‘standard’ full-time or permanent contracts.¹²³ New and emerging models of work are not necessarily covered by legal frameworks established for a more traditional labour market. Atypical workers sometimes lack protection ‘in the areas of working conditions, protection against discrimination and dismissal’.¹²⁴

EU legislators have taken steps to ensure some recognition of atypical work in relation to employment rights. On the one hand, casual work was specifically excluded from the coverage of some protective legislation, such as Directive 1997/81 which concerns the employment rights of part-time workers.¹²⁵ On the other, fixed-term work was acknowledged by the EU as a type of employment in need of protection from

¹²¹ Commission ‘Proposal for a Directive of the European Parliament and of the Council concerning certain aspects of the organisation of working time’ COM (2002) 0336 final, 10.

¹²² Cherry (n 45)..

¹²³ Broughton et al, (2010) (n 96).

¹²⁴ *ibid* 10.

¹²⁵ Directive 1997/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1997] OJ L 14/9, clause 2 (2).

discrimination as early as 1999.¹²⁶ Additionally, rights to non-discrimination were recognised for temporary agency work in Directive 2008/104.¹²⁷ This Directive also gave Member States the choice to include agency workers in social security schemes such as ‘pensions, sick pay or financial participation schemes’.¹²⁸ Rights and entitlements can thus vary between Member States, with the UK fairly conspicuously not opting for greater protections. The Organisation for Economic Co-operation and Development (OECD) 2015 employment protection index rates the UK’s regulations for temporary employment as the least strict in all recorded European countries.¹²⁹ A Trade Union Congress (TUC) reported that 82% of workers on ZHCs did not have access to sick pay, 63% did not have maternity or paternity rights, 70% were not able to receive redundancy pay and 46% did not get holiday pay.¹³⁰

Atypical workers are also at risk of being misclassified as self-employed, and so excluded from a range of rights reserved for employees. As a cost-saving technique,¹³¹ it appeals to employers who can avoid paying traditional employee benefits, compensation and insurance.¹³² A Work and Pensions Committee inquiry into the gig economy and self-employment in the UK, found evidence that ‘some companies are using self-employed workforces as cheap labour’ as it frees them from ‘both responsibilities towards their workers and from substantial National Insurance liabilities, pension auto-enrolment responsibilities and the Apprenticeship Levy’.¹³³ The inquiry

¹²⁶ Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L 175/43.

¹²⁷ Directive 2008/104/EC of 19 November 2008 on temporary agency work [2008] OJ L 327/9.

¹²⁸ *ibid*, art 3(2).

¹²⁹ ‘OECD Indicators of Employment Protection’ <<https://www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm>> last accessed 20 September 2019.

¹³⁰ TUC (n 89) 5.

¹³¹ ‘In the US, for example, this can lead to savings of up to 30% on labour costs in comparison with traditionally recruited workers’ in Hunt and Samman (n 132) 10.

¹³² Abigail Hunt and Emma Samman, ‘Gender and the gig economy: Critical steps for evidence-based policy’ (ODI Working Paper 546, 2019) 10.

¹³³ House of Commons Work and Pensions Committee, *Self-employment and the gig economy* (HC 2016-17, HC 847) 3.

concludes that ‘Profit, not flexibility is the motive for using self-employed labour in these cases.’¹³⁴

Several court cases have tackled the misclassification of gig workers as self-employed on high-profile platforms.¹³⁵ Globally, judges have sought to ensure that the classification of worker, employee and self-employed status, irrespective of what any written terms may dictate, reflects the reality of the working situation.¹³⁶ While digital platforms’ ‘tight control over many aspects of service delivery’ will often result in a finding of employment status, Prassl notes that this line of cases is far from settled.¹³⁷ Many are still pending, including Uber’s appeal to the UK Supreme Court, and changes to platforms’ policies, business models and litigation strategies ‘make it difficult to paint a consistent picture’.¹³⁸

Some commentators suggest that gig economy jobs sit in a grey area of work, where the situation does not fit well in ‘the existing employee–independent contractor dichotomy’.¹³⁹ The 2017 Taylor Review looking into the state of work in the UK recommends renaming the category of people who are eligible for worker rights who are not employees as ‘dependent contractors’.¹⁴⁰ Others propose introducing a new definition which sits between these two statuses called Dependent Self-Employed

¹³⁴ *ibid* 13.

¹³⁵ *Autoclenz Limited v Belcher and others* [2011] UKSC 41 [35]; *Uber BV and others v Aslam and others* [2018] EWCA Civ 2748; At the time of writing Uber have been given leave to appeal this decision to the UK Supreme Court; Katie Scott, ‘Employment Tribunal rules in favour of Hermes couriers in employment status case’ (Employee Benefits, 26 June 2018) <<https://employeebenefits.co.uk/issues/june-2018/employment-tribunal-hermes-employment-status/>> last accessed 4 November 2019; *Addison Lee Ltd v Lange & Ors* [2018] UKEAT/0037/18/BA; In 2018, Deliveroo settled an employment rights case brought by 50 couriers on their status as workers; see Sarah Butler, ‘Deliveroo couriers win six-figure payout in employment rights case’ (The Guardian, 28 June 2018) <<https://www.theguardian.com/business/2018/jun/28/deliveroo-couriers-win-six-figure-payout-in-employment-rights-case>> last accessed 4 November 2019.

¹³⁶ Prassl (n 47) 96.

¹³⁷ *ibid* 99-100.

¹³⁸ *ibid*.

¹³⁹ Seth D Harris and Alan B Kreuger, ‘A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”’ (The Hamilton Project, 2015) 8.

¹⁴⁰ The Taylor Review (n 74) 35.

Workers (DSEWs).¹⁴¹ This definition has already been adopted as a category of work in Portugal, Slovenia and Spain, with similar formulations adopted in a number of other Member States.¹⁴² DSEW's include those who do not have an employer but are in a position of dependence on a main or exclusive firm and with limited autonomy, while receiving the fiscal and social protection of self-employed workers. However, drawing the boundaries between independent contractors and dependent contractors may cause unnecessary exclusions or fail to distinguish between those who choose to be a DSEW from those who are forced.¹⁴³ Instead, Codagone et al argue that already existing and regulated concepts of workers and self-employed persons should be interpreted broadly to be inclusive of dependent workers and be adaptable to potential changes in the future of work.¹⁴⁴

While a proper solution is beyond the scope of this research, it is still necessary to recognise the extra precarity faced by those sitting in these grey areas. EU migrant workers in this situation may struggle to access important employment rights, be unaware of their registration and tax responsibilities and could be vulnerable to exploitation. Access to welfare could mitigate this risk.

4.4.4. Risks to health

Precarity in atypical work does not only carry financial risks, but also creates risks to well-being and health. Job insecurity, financial instability and long hours can all increase the risk of mental health problems.¹⁴⁵ Workers face further stress where they are engaged in temporary contracts or gig work from regularly, or sometimes constantly, having to work. Additionally, Bambra et al found that those in 'tiring working positions'

¹⁴¹ The Organisation for Economic Co-operation and Development (OECD) 'OECD Employment Outlook 2014' (OECD, 3 Sept 2014) 146.

¹⁴² Charlotte O'Brien, Eleanor Spaventa, and Joyce De Coninck, 'Comparative Report 2015: The concept of worker under Article 45 TFEU and certain non-standard forms of employment' (FreSsco, European Commission, 2016) 53.

¹⁴³ Werner Eichhorst et al, 'Social protection rights of economically dependent self-employed workers.' (Brussels: European Parliament 2013).

¹⁴⁴ Codagnone et al (n 44).

¹⁴⁵ Richard Dunstan and Doug Anderson, 'Vulnerable workers: preliminary findings from the Citizens Advice client research' (Department for Business, Enterprise and Regulatory Reform, 2008) 9.

and ‘temporary work’ were ‘the most strongly associated with worse self-rated health in Europe’.¹⁴⁶

Cherry also highlights the additional pressures of work in the gig economy from constant ratings and surveillance, sometimes with public ranking where ‘workers are expected to out-achieve each other.’¹⁴⁷ Workers face increased pressure from ratings which can determine whether you will be selected to future work or, in the case of Uber drivers with an average rating below 4.6 out of 5, suspension from the platform.¹⁴⁸ Over half of skilled gig workers have reported that their work is often stressful.¹⁴⁹ Without access to sick pay, gig workers who must take time off for their health have little by way of a safety net. For example, Deliveroo riders who get injured in a cycling accident, whether during the course of their work or not, have no right to sick pay nor an entitlement to be re-hired. In these circumstances, workers must rely on emergency payments from trade unions or the social security system.¹⁵⁰

4.4.5 Precarity and free movement of atypical workers

There is a significant chance that workers relying on atypical employment may be vulnerable to destitution and ‘in-work’ poverty, unstable employment, exploitation and excessive strain on health. As such, reliance on social services and welfare benefits to provide a safety net can be necessary to alleviate some of the temporary and permanent precarity in atypical workers’ lives. EU migrant workers in these positions face additional risks to security, in barriers to accessing support in a host Member State.

This highlights the importance of migrant worker status for the purposes of Article 45 TFEU. Should a definition of work be too narrow, equal treatment rights will not be

¹⁴⁶ Clare Bambra, Thorsten Lunau, Kjetil A. Van der Wel, Terje A. Eikemo and Nico Dragano, ‘Work, Health, and Welfare: The Association between Working Conditions, Welfare States, and Self-Reported General Health in Europe’ (2014) 44(1) *International Journal of Health Services* 113, 130.

¹⁴⁷ Cherry (n 45) 601.

¹⁴⁸ James Cook, ‘Uber’s internal charts show how its driver-rating system actually works’ (Business Insider, 11 February 2015) <<https://www.businessinsider.com/leaked-charts-show-how-ubers-driver-rating-system-works-2015-2?r=US&IR=T>> accessed 28 December 2019.

¹⁴⁹ JRC (n 54) 9.

¹⁵⁰ Homa Khaleeli, ‘The truth about working for Deliveroo, Uber and the on-demand economy’ (The Guardian, 15 June 2016) <<https://www.theguardian.com/money/2016/jun/15/he-truth-about-working-for-deliveroo-uber-and-the-on-demand-economy>> accessed 28 December 2019.

meted out to EU migrant atypical workers, who are then exposed to all the risks of precarity, without any of the protections. This could be a significant barrier to free movement and residence in a host Member State.

The precarity associated with atypical work also undermines the logic by which free movement and equal treatment rights are reserved for economically active EU citizens. For Nic Shuibhne, the justification for this focus is lost ‘when it cannot be taken for granted that work or self-employment produces financial self-subsistence.’¹⁵¹ The CJEU has typically recognised work as an important form of integration in a host Member State, whether or not it provides enough income to be self-sufficient. It must also recognise that atypical work still illustrates participation in a host Member State’s labour market.¹⁵² This participation justifies the extension of social solidarity with EU migrant workers. For De Witte, it is essentially part of ‘a quid pro quo’, where economic and functional engagement of migrant workers with a host Member State society is exchanged for access to welfare benefits.¹⁵³

Reliance on some social assistance is no longer a phenomenon just for non-workers. As such, the division in treatment between ‘recipients of support and non-recipients of support is’ as Davies suggests, ‘no longer viable.’¹⁵⁴ If nationals of a Member State can utilise access to welfare to allow flexible working options to be viable, but such support is withheld from EU workers in the same position, their ability to sustain a life in the host Member State, including continuing in their employment, is compromised. Risks are shifted onto workers, and due to the make-up of the atypical work sectors, those risks are disproportionately borne by workers vulnerable to discrimination and exclusion on the grounds of sex, age, disability, care and nationality.

¹⁵¹ Nic Shuibhne, (n 5) 502.

¹⁵² Research conducted over 16 countries reported that flexible working would contribute more than \$10 trillion to the economies analysed by 2030, this includes £148 billion to the UK economy, Steve Lucas, ‘Flexible working solid facts: A summary review of the socio-economic benefits of flexible working in 16 countries’ (Regus, July 2018).

¹⁵³ Floris De Witte, ‘Transnational Solidarity and Conflicts of Justice’ (2012) 18(5) *European Law Journal*, 705.

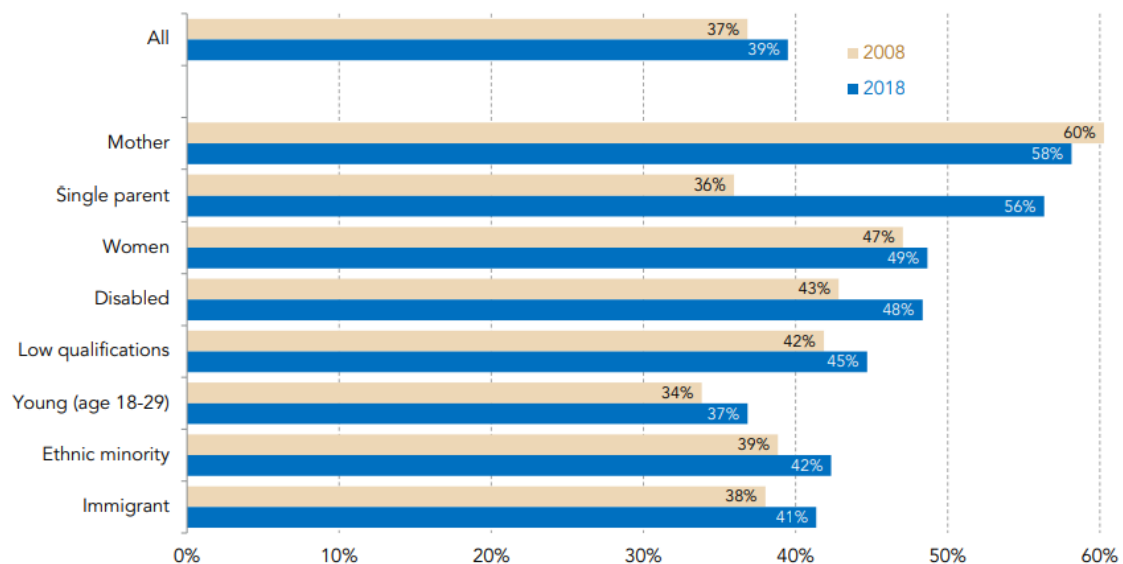
¹⁵⁴ Davies (n 4) 5.

4.5 A brief equality impact assessment

This section will examine how some groups of workers are affected disproportionately by the growth of the atypical labour market. Firstly, it will examine the over-representation of certain groups occupying atypical work and how that shifts the burden and precarity disproportionately. It will then analyse the specific discrimination faced by these groups in atypical work.

As can be seen in figure 4.6 below, the burden of atypical work (including part-time work) can fall disproportionately on those demographics at risk of exclusion from the labour market, meaning those same groups are disproportionately more likely to be exposed to the risks this type of work entails discussed above.

Figure 4.6: Share of those employed that are in atypical work¹⁵⁵



Notes: Only includes age 18 to 69. Immigrant is defined as those born outside the UK. Both mother and single parent groups include those with dependent children only.

Source: RF analysis of, ONS, *Labour Force Survey*

4.5.1 Women in the flexible labour market

Women are far less likely to be in full-time, standard employment than men.¹⁵⁶ In 2018, the labour force survey found that across the EU 30.8% of women worked on a part-

¹⁵⁵ Clarke and Cominetti (n 15) 50.

¹⁵⁶ Broughton et al (2016) (n 10) 33.

time basis compared to and only 8% of men.¹⁵⁷ This finding is repeated in the UK statistics where, in 2017 to 2018, women were estimated to make up 73.5% of the part-time work force.¹⁵⁸ As can be seen above in figure 4.6, 49% of working women in the UK are in forms of atypical forms of work, which is significantly more likely than the total share of workers in atypical contracts (39%).¹⁵⁹

Women's over-representation in gig work is not as clear cut. Women are reported as making up just over half of the European digital labour market population¹⁶⁰ and 54% of UK crowd workers.¹⁶¹ As women make up less than half of the labour force in the UK (46.8%),¹⁶² this suggests that women are more likely to be in gig employment than men. On the other hand, the Joint Research Centre found that, when covering a wider range of platform work, men occupy around two thirds of gig employment.¹⁶³ But it is generally recognised (including in the JRC report)¹⁶⁴ that women's involvement in this area of the labour market is increasing, particularly if they have dependent children.

Women's growing participation in the atypical workforce could reflect the increase in jobs offering fewer than 20 hours a week, supposedly accommodating primary carer

¹⁵⁷ 'Employment Statistics' (Eurostat, May 2019) < https://ec.europa.eu/eurostat/statistics-explained/index.php/Employment_statistics#Precarious_employment >

¹⁵⁸ Richard Clegg 'UK Labour market April 2018: Estimates of employment, unemployment, economic inactivity and other employment-related statistics for the UK.' (Office for National Statistics, 17 April 2018) <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/latest>> last accessed 5 May 2018

¹⁵⁹ Clarke and Cominetti (n 15) 50.

¹⁶⁰ Codagnone et al (n 44) 6.

¹⁶¹ Huws and Joyce (n 61).

¹⁶² 'Labor force, female (% of total labor force) - United Kingdom' (The World Bank, September 2019) <<https://data.worldbank.org/indicator/SL.TLF.TOTL.FE.ZS?locations=GB>> last accessed 5 December 2019; less women (71.8%) than men (80.3%) are recorded as being in employment in the UK: Debra Leaker, 'Labour market overview, UK: November 2019' (Office for National Statistics, 12 November 2019) <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/november2019>> last accessed 20 November 2019

¹⁶³ JRC (n 54) 62.

¹⁶⁴ *ibid.*

roles.¹⁶⁵ The Joint Research Centre found that ‘platform workers are considerably more likely than offline workers to have dependent children’.¹⁶⁶ The rate of mothers engaging in freelancing work has increased by 79% between 2009 and 2017, which is drastically faster than other forms of growth in the gig economy and self-employment.¹⁶⁷ Figure 4.6 also shows the likelihood of atypical work increasing further for women if they have any dependent children (58%) and if they are a lone parent (56%).¹⁶⁸

This overrepresentation of women amongst part-time workers can leave them at a disadvantage. Women are expected to reconcile their career and family life, yet, this reconciliation more closely resembles an assimilation into an unequal male-centric work of work.¹⁶⁹ Commonly these jobs are contracted in ‘female-dominated sectors’ and limited to low-wage, low-skilled and precarious employment.¹⁷⁰ This means that ‘women pay the price of reconciling work and family’ as they must often downgrade

¹⁶⁵ Almost 3 in 10 mothers (28.5%) with a child aged 14 years and under said they had reduced their working hours because of childcare reasons. This compared with 1 in 20 fathers (4.8%)’ Tim Vizard, ‘Families and the labour market, UK:2019’ (ONS, 24 October 2019) <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/familiesandthelabourmarketengland/2019>> accessed 4 January 2020; ‘Of the 2.9 million lone parent families in the UK in 2016, the majority (86%) were headed by a female lone parent’ In Emily Knipe ‘Families and Households: 2016’ (Office for National Statistics, 4 November 2016) <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2016>> last accessed 11 May 2018; 72% of those receiving carers allowance in the UK are women Carers UK, ‘The Importance of Carers Allowance: Recognising and supporting family care’ (July 2015) 9.

¹⁶⁶ JRC (n 54) 62.

¹⁶⁷ Andy Chamberlain, ‘The Taylor review overlooks the big issue – clarifying what self-employment is’ (The Guardian, 12 July 2017) <<https://www.theguardian.com/law/2017/jul/12/matthew-taylor-overlooks-the-big-issue-clarifying-self-employment-review-modern-working-practices>> last accessed 2 December 2019.

¹⁶⁸ Clarke and Cominetti (n 15) 50.

¹⁶⁹ Charlotte O’Brien, *Unity and Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Bloomsbury, 2017) 94-95.

¹⁷⁰ Broughton et al (2016) (n 10) 69.

their career,¹⁷¹ perpetuating ‘current patterns of income inequality.’¹⁷² The compromise of pay and job security that supposedly ensures women have more flexibility for caring responsibilities is also exposed by Shultz, who finds that the sectors with a higher proportion of women in the workforce are ‘not on the whole more family-friendly than male jobs’.¹⁷³

As the participation of women with caring responsibilities increases, the flexibility of the jobs they occupy should not justify paying women less. Nor should it be used to rationalise an expansion of casualisation and atypical contracts, to the degradation of permanent, fixed hour contracts, in female-dominated areas of work, especially if the flexibility is ‘one-way’. The discrimination already faced by women across all types of employment, and extra barriers for those with family responsibilities,¹⁷⁴ will only be further exacerbated by their over-representation in atypical work.

4.5.2 Disabled workers

Disabled workers are often over-represented in “non-standard” work. In the UK 34% of disabled workers are in part-time employment compared to 23% of non-disabled workers.¹⁷⁵ Also, as can be seen in Figure 4.6 above, 48% of disabled workers in the UK are recorded as working atypical jobs, compared to 39% of total workers in 2018.¹⁷⁶

Just as the burden on reconciliation of work and caring responsibilities falls on women, disabled workers are also expected to reconcile their disability with a world of work that

¹⁷¹ Mary Gregory and Sara Connolly, ‘The Price of Reconciliation: Part-Time Work, Families and Women’s Satisfaction’ (2008) 118(526) *The Economic Journal* F1, F7.

¹⁷² Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (Routledge, 1997) 27-33 cited in Vicki Shultz ‘Life’s Work’ (2000) 100(7) *Columbia Law Review* 1881, 1916-1917.

¹⁷³ Shultz (n 172) 1895.

¹⁷⁴ ‘Median pay for all employees was 17.3% less for women than for men at April 2019’ Brigid Francis-Devine and Doug Pyper, ‘The Gender Pay Gap’ (House of Commons Library Briefing Paper 7068 2020); Monica Costa Dias, Robert Joyce and Francesca Parodi, ‘Wage progression and the gender wage gap: the causal impact of hours of work’ (The Institute of Fiscal Studies Briefing note BN223, 2018); Laura Jones, ‘Women’s Progression in the Workplace’ (Government Equalities Office, October 2019); JRF (n 104) 2.

¹⁷⁵ Andrew Powell, ‘People with disabilities in employment’ (House of Commons Library, Number 7540, 2020) 9.

¹⁷⁶ Clarke and Cominetti (n 15) 50.

previously ‘designed out ‘nonstandard’ people’.¹⁷⁷ This expectation does not challenge the ableist ‘hegemonic constructions of productive value’¹⁷⁸ and therefore, disabled workers are often expected to compromise by working in low-paid,¹⁷⁹ low-progression, insecure, and often poorly adapted work.¹⁸⁰ Workplace adjustments that have been secured can be effectively lost when moving between temporary roles and organisations.¹⁸¹

Disabled workers on ZHCs or performing platform work are faced with the precarity associated with the gig economy discussed above. Alongside this, disabled gig workers are at risk of facing discriminatory ratings systems which are subject to customer biases.¹⁸² They are also at risk of disciplinary systems in gig work which penalise days off for illness, being late, not hitting strenuous targets, or taking too long for breaks.¹⁸³

4.5.3 Young workers

Younger workers are more present in specific areas of atypical work, such as part time work, seasonal and casual work. A report on precarious employment in Europe found that 50% of European workers aged between 15 and 24 work in part-time or temporary employment, compared to just 16% in those aged 25-54 years old.¹⁸⁴ The higher proportion could be, at least partly, explained by the likelihood that workers aged 15-24 year olds are balancing employment and education. In the UK, a 2014 report found that for workers aged 18-21, a third of women and one in five men were working part-

¹⁷⁷ Alan Roulstone, ‘Disability, work and welfare’ in Chris Grover and Linda Pignott, *Disabled people, work and welfare: Is employment really the answer?* (Policy Press, 2015) 257, 260.

¹⁷⁸ *ibid.*

¹⁷⁹ In 2019, the disability pay gap for all employees stood at 15.5%. This equated to disabled workers not being paid for two months of the year in ‘Disability Pay Gap Day: disabled people work 2 months of the year for free, says TUC’ (Trade Union Congress, 4 November 2019; Simonetta Longhi, ‘The disability pay gap’ (Equality and Human Rights Commission: Research report 107, 2017).

¹⁸⁰ Liz Sayce, ‘Switching Focus: Whose responsibility to improve disabled people’s employment and pay’ (London School of Economics, November 2018) 31.

¹⁸¹ *ibid* 51.

¹⁸² Prassl (n 47) 62.

¹⁸³ James Bloodworth, *Hired: Six Months Undercover in Low-Wage Britain* (Atlantic Books, 2018).

¹⁸⁴ Broughton et al (2016) (n 10).

time.¹⁸⁵ This study also found that ‘a significant proportion of young adults work less than 30 hours a week’ which it found was consistent with ‘the rise of short hours and [ZHCs].’¹⁸⁶

In 2017 42% of seasonal and casual workers were aged between 16 and 19 years old, and a further 24% between 20 and 24 years old.¹⁸⁷ Alongside this, around a third of agency workers were recorded as aged between 16 and 24.¹⁸⁸

Figure 4.7: Characteristics of agency, other temporary and permanent employees in the UK (2017)¹⁸⁹

	Agency	Fixed term	Seasonal/casual	Other temp.	Permanent <i>per cent</i>
Gender					
Female	43	58	55	55	48
Male	57	52	47	45	42
Age					
16-19	10	8	42	16	5
20-24	24	17	24	19	10
25-29	17	14	7	11	11
30-39	17	24	8	16	25
40-49	17	20	7	20	27
50-59	13	15	9	15	20
60-64	2	3	2	4	3

The Office for National Statistics in the UK has also recorded the distribution of ZHCs amongst age groups, revealing that 36% of workers aged 16-24 are on ZHCs compared to just 18.2% and 19.8% of 25-34 year olds and 35-44 year olds respectively. This can be seen in Figure 4.8.

Figure 4.8: Comparison of percentages (%) of people who are in employment on a ZHC and who are not on a ZHC by age, October to December 2017¹⁹⁰

¹⁸⁵ Ann Berrington, Peter Tammes, Steven Roberts, Teresa McGowan and Genna West, ‘Measuring Economic Precarity among UK Youth during the Recession’ (University of Southampton, ESRC Centre for Population Change Briefing Paper, 2014).

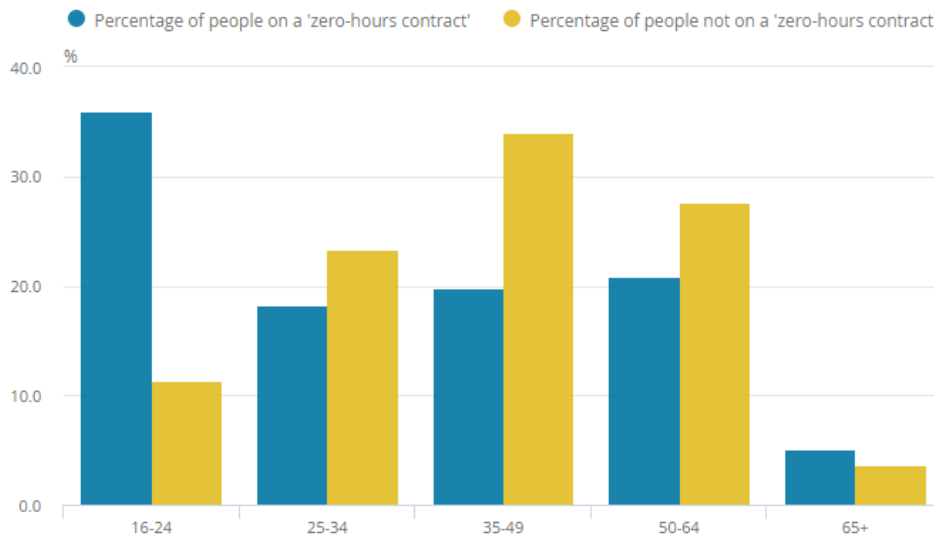
¹⁸⁶ *ibid.*

¹⁸⁷ Forde et al (n 37).

¹⁸⁸ *Ibid.*

¹⁸⁹ Forde et al (n 37) 12.

¹⁹⁰ Petkova (n 29).



Young workers are also over-represented among gig workers. The Joint Research Centre has found that those working in digital labour markets across Europe tend to be younger and more educated.¹⁹¹ The average age of platform workers in this study was found to be just under 34, with those aged 16-25 accounting for a disproportionate percentage of 'over 26% of all secondary platform workers and 23 % of main platform workers.'¹⁹² Similarly, Huws et al argued that younger workers are more likely to work in the UK gig economy; crowd workers under 35 make up 51% of the workforce.¹⁹³ While it could be claimed that these figures are distorted by the prevalence of students picking up jobs alongside their studies, only 10% of digital platform workers are recorded students.¹⁹⁴

Atypical work is often disproportionately occupied by younger workers, creating extra and distinct precarity. For example, younger workers are less likely to have built a sufficient personal safety net from previous employment and earnings. Due to their age, younger workers are also more likely to be in the early stages of their career or an entrance job and may face lower wages because of this. They may also face a significant disadvantage if a country's minimum wage is tiered based on the age of the worker. In the UK, for example, a worker is only entitled to the full amount of 'national living

¹⁹¹ Codagnone et al (n 44) 6; JRC (n 54) 63.

¹⁹² JRC (n 54) 62.

¹⁹³ Huws and Joyce (n 61).

¹⁹⁴ Codagnone et al (n 44) 6.

wage' once they are aged over 25.¹⁹⁵ Workers aged below 25 are only eligible for lower rates of national minimum wage. Young workers may also face lower wages if working as an apprentice, where the UK national minimum wage is just £4.15 per hour. The additional hurdles for younger workers make the precarity faced in the atypical and gig employment markets potentially more overwhelming and will only be intensified by the insecurity of hours, income and availability of work.

4.5.4 Migrant workers

Migrant workers are also more likely to be in atypical employment and so experience precarity. Eurostat record that EU migrant workers, on average across the EU, occupy a larger percentage share of part-time work and temporary work compared to nationals of the Member States.¹⁹⁶ In the UK, the Migration Observatory's analysis shows that EU national workers are more likely than UK nationals to be in non-permanent, shift and ZHCs.¹⁹⁷ Further to this, figure 4.6 above shows migrant workers to be slightly more likely to be in all types of atypical work than national workers.¹⁹⁸

Migrant workers are over-represented in the gig economy. Their increased exposure to precarity and insecurity often results, as warned by the Migration Policy Institute, in migrants ending up with a raw deal'.¹⁹⁹ They also face additional discrimination through the system of customer ratings and reviews which are 'highly likely to be subject to either explicit or implicit bias'.²⁰⁰

¹⁹⁵ 'National Minimum Wage and National Living Wage rates' (Gov.uk) < <https://www.gov.uk/national-minimum-wage-rates> > accessed 27 December 2019.

¹⁹⁶ 'Migrant integration statistics - employment conditions' (Eurostat, May 2019) <https://ec.europa.eu/eurostat/statistics-explained/index.php/Migrant_integration_statistics_-_employment_conditions#Youth_part-time_employment> accessed 28 December 2019.

¹⁹⁷ Mariña Fernández-Reino and Cinzia Rienzo, 'Migrants in the UK Labour Market: An Overview' (Migration Observatory, 15 July 2019) 13.

¹⁹⁸ Clarke and Cominetti (n 15) 50.

¹⁹⁹ Benton and Patuzzi (n 101) 2.

²⁰⁰ Abigail Hunt and Fortunate Machingura, 'A good gig? The rise of on-demand domestic work' (Development Progress Working Paper 07, 2016) 27.

Across Europe, foreign-born workers make up over 50% of workers who rely on platform work as their main economic activity.²⁰¹ The gig economy can be less exclusionary than local labour markets. Some types of gig work have less stringent language requirements where platforms handle communication with the requester and can be operated in any language of choice.²⁰² Gig work is also more accessible to migrant workers as it reflects ‘a breakdown of traditional word-of-mouth methods of finding work’.²⁰³ Platforms are accessible anywhere with internet access and there is often only the need to register on a platform, rather than go through a hiring process and the hurdles of employer discrimination.²⁰⁴ EU nationals who have moved to a new Member State will be among those over-represented foreign-born gig workers; they face precarity and may require access to the necessary welfare safety nets.

While the flexibility of atypical work has increased accessibility for those who may be have traditionally been isolated from work, this has come with a cost. The disadvantages of the atypical labour market - increased instability of income, irregular hours and job insecurity - fall disproportionately on women, migrant, young and disabled workers; groups that are often in a more vulnerable position to begin with. The interplay between this over-representation and the risk of exclusion from the rights provided by EU worker status means that women, disabled and young EU citizens are likely to face further barriers to effectively exercising free movement.

4.6 Summary

This chapter has detailed how the world of work has changed with the growth of different types of atypical work, increasing precarity in workers’ lives, making access to welfare in a host Member State essential for many EU migrant atypical workers. As the number of atypical workers in the European labour market increases, so too will the number of EU migrant workers in atypical contracts, making it all the more important

²⁰¹ JRC (n 54) 62.

²⁰² Demetrios Papademetriou and Meghan Benton, ‘Towards a Whole-of-Society Approach to Receiving and Settling Newcomers in Europe’ (Migration Policy Institute Europe, November 2016) 16.

²⁰³ Huws et al (n 42) 50.

²⁰⁴ Meghan Benton, Madeleine Sumption, Kristine Alsvik, Susan Fratzke, Christiane Kuptsch and Demetrios G. Papademetriou, ‘Aiming Higher: Policies to Get Immigrants into Middle-Skilled Work in Europe’ (Migration Policy Institute Europe, November 2014) 7.

for the definition of EU migrant worker, as a gateway to free movement and equal treatment rights, to accurately reflect the changes in the make-up of the labour market.

Additionally, section 4.4 detailed the extra precarity in the lives of atypical workers, and disadvantages including lower incomes, underemployment, lack of employment rights and any poorer health. In the face of increasing in-work poverty, reliance on social assistance is no longer reserved for non-workers. EU migrant atypical workers, in particular, may require access to welfare support to effectively exercise their free movement rights. This is especially so for EU migrants who face cumulative disadvantages and discrimination; the detrimental impacts of atypical work also fall disproportionately on women, disabled, carers, the young, and migrant workers.

By outlining both the growing prevalence of atypical work and the importance of social rights to alleviate temporary and permanent insecurity in the flexible labour market, this chapter sets the context for the variety of work that will need to be included in the EU legal concept of ‘worker’. It also illustrates the risk of exposure to discrimination and precarity that EU migrant workers could face, especially if they are excluded from the definition of ‘worker’ and equal treatment rights. An insufficient definition of ‘worker’ can mean that, for EU migrant workers, precarious employment is met with precarious residence status. As Thym puts it, ‘[u]nion citizens with scarce resources or with an instable employment position live in a grey zone with a precarious residence status and without much legal certainty.’²⁰⁵ This can establish substantial barriers to exercising free movement, including the opportunity to access the flexible labour market at all. The next chapter will therefore look at how the EU determines who is a ‘worker’ and whether this takes an inclusive approach which allows for the various forms of atypical work.

An insufficient definition for worker, which fails to capture the reality of work in Europe, could result in a growing number of economic actors being excluded from rights and essentially holding an inferior type of EU citizenship. The following chapters examining the definition of worker will also analyse the extent to which this problem has materialised in EU law and specifically in its application in the UK, revealing a

²⁰⁵ Daniel Thym, ‘The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens’ (2015) 52 (1) Common Market Law Review 17, 41.

considerable risk of exclusion of EU citizens *even* when they are engaged in atypical work in the internal market.

Chapter 5: Schrodinger's worker: When is a worker not a worker?

5.1 Introduction

EU citizenship, as examined in previous chapters, can be described as, at best, a form of market citizenship.¹ The rights provided to remove obstacles to free movement are reserved for those EU citizens who are deemed to be economically active *enough*.

This chapter seeks to establish what “economically active enough” means. For EU migrants in atypical work, classification as economically active will fall to the determination of their status as a worker or self-employed person. If established, worker status provides free movement rights enshrined in Article 45-48 TFEU and Regulation 492/2011² and grants a right of residence.³ EU migrant workers have the right to equal treatment with nationals of the host Member State.⁴ As such, EU migrants with worker status can access the majority of welfare rights available in the host Member State.

Previous chapters have established that EU citizenship provides limited rights for those who are deemed economically inactive and that the labour market across Europe is becoming increasingly fragmented. The definition of worker is a gatekeeping mechanism, limiting the access of mobile citizens in atypical work to free movement and equal treatment rights. The Commission, in a proposal seeking to tackle the barriers to social protection for workers in non-standard employment, has recognised that ‘[t]he gaps in access to social protection, due to labour market status... may hinder the take-up of opportunities to move from one labour market status to another, if this means losing entitlements’.⁵ Similarly, gaps in access to social protection, due to the inadequate

¹ See chapter 2, section 2.6 Summary and Beyond a market citizenship?

² Regulation (EU) No 492/2011 of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance [2011] OJ L141/1, (Regulation 492/2011).

³ Also relevant for Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (Directive 2004/38), Article 7.

⁴ Directive 2004/38, art 24.

⁵ Commission, ‘Proposal for a Council Recommendation on access to social protection for workers and the self-employed’ COM (2018) 0132 final.

coverage of the EU concept of work, could hinder EU nationals' take-up of opportunities to move for work in another Member State.

It is also necessary to delineate the boundaries of this research. It examines the equal treatment rights of EU national workers who both reside and work in a host Member State. It does not address social security coordination rights, the specific rights of frontier workers,⁶ or the definitions of work used in aspects of EU law not concerned with free movement.⁷

This chapter will explore the definition of worker status and its value to EU migrants, to assess whether its coverage of atypical employment is adequate. Through this analysis it will seek to answer research question 4: *How does the EU concept of worker ensure the protection of equal treatment rights for atypical migrant workers and what are the potential gaps in this protection?* By detailing and analysing the scope and limitations of the definition of worker, the chapter provides the framework for this thesis's test of the UK's implementation of the definition and analysis of whether it is compatible with EU law. It also highlights gaps in EU case law that could lead to the exclusion of atypical workers from free movement rights.

To address the research question this chapter will first consider, in section 5.2, the value of worker status in relation to the social and residence rights it bestows on EU workers and other individuals. Section 5.3 will then provide the starting point for analysing the definition of worker, located in EU case law. Section 5.4 will provide a more in-depth analysis of where the Court has considered and included non-traditional forms of work in this definition. Finally, section 5.4 will discuss the limitations of this definition, including where atypical workers may be left out and the problematic approach of adopting a vague definition to be interpreted by Member States.

5.2 The value of worker status

Under EU free movement law, a substantial divide exists between the rights available to those who acquire 'worker' status and those who do not. Moving to another Member

⁶ Case C-212/05 *Hartmann v Freistaat Bayern* [2007] ECR I-6303; Case C-287/05 *Hendrix* [2007] ECR I-06909.

⁷ Martin Risak and Thomas Dullinger, 'The concept of 'worker' in EU law: status quo and potential for change' (European Trade Union Institute Report 140, 2018) 17; Herwig Verschueren, 'Being Economically Active: How it Still Matters' in Herwig Verschueren (ed.) *Residence, Employment and Social Rights of Mobile Persons: On how EU Law defines where they belong* (Intersentia, 2016) 187, 194.

State as a worker guarantees some of the most robust EU rights for individuals. As Dougan and Spaventa write, work as ‘a direct contribution to the economic life of the host community enables the foreign worker to overcome the exclusive nature of the group identity, and to benefit from the assimilation model as regards access to (even non-contributory, non-employment related) social benefits.’⁸ As such, work is seen as breaking the barrier of territorial restrictions to national welfare systems and extends social solidarity through the recognition of the economic contribution made to the host Member State. The value of a worker status under EU law and the subsequent rights attributed to those with the status is worth exploring to understand its importance and definition.

5.2.1 Present Work

Before EU Citizenship emerged in the Maastricht Treaty as a status granting free movement rights to all EU citizens,⁹ the rights of workers to move and reside in another Member State were protected.¹⁰ This allowed for EU citizens to freely accept offers of employment in other Member States and to move and reside there to work and included a prohibition on discrimination based on nationality in matters of employment, remuneration and conditions of work.

Free movement for workers and protection from discrimination based on nationality is now found in Article 45 TFEU.¹¹ Under Regulation 492/2011,¹² EU migrant workers must have access to the same social and tax advantages as national workers (Article 7(2)), access to trade unions (Article 8) and education for their children (Article 10). What falls under ‘social and tax advantages’ is interpreted broadly,¹³ including social

⁸ Michael Dougan and Eleanor Spaventa, ‘Wish You Weren’t Here...’ New Models of Social Solidarity in the European Union’ in Michael Dougan and Eleanor Spaventa, *Social Welfare and EU Law* (Hart Publishing 2005) 190.

⁹ Consolidated Version of the Treaty on European Union [1992] OJ C 325/5 Article 8 (Maastricht Treaty) and Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) art 21.

¹⁰ Previously in Treaty Establishing the European Community [1957] art 39.

¹¹ TFEU arts 45.

¹² Previously Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/2 (Regulation 1612/68) which was codified into Regulation 492/2011 after many amendments.

¹³ ‘social advantages in this context includes all advantages ‘which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as

assistance benefits.¹⁴ Nic Shuibhne identified that CJEU case law has established a ‘deep-rooted bond between work, equal treatment and access to social advantages’,¹⁵ including benefits guaranteeing a minimum means of subsistence as a social advantage.¹⁶

An EU national with worker status fulfils the requirements of Article 7(1)(a) Directive 2004/38. This provision grants a right to reside in the host Member State beyond the initial 3 months and without the condition to have sufficient resources not to become a burden on the social assistance system of the host Member State or to hold comprehensive sickness insurance.¹⁷ Article 24 Directive 2004/38 also provides that EU migrants will have equal treatment to nationals of the host Member State provided they have a right to reside under Article 7.¹⁸

Although there are other options for acquiring a right to reside under Article 7, these often require the individual to meet extra criteria. Classification as a self-sufficient person requires the individual to have sufficient resources not be an unreasonable burden on the social assistance system of the host Member State and to have comprehensive sickness insurance.¹⁹ This can require providing evidence of the necessary resources to cover their and family members living expenses.²⁰ The amount required for self-sufficiency cannot exceed ‘the threshold below which nationals of the host Member State become eligible for social assistance’²¹ and resources can come from

workers or by virtue of the mere fact of their residence on the national territory...’ Case C-207/78 *Even* [1976] ECR I-2019, para 22.

¹⁴ Case C-249/83 *Hoeckx* [1985] ECR I-973.

¹⁵ Niamh Nic Shuibhne, ‘Reconnecting free movement of workers and equal treatment in an unequal Europe’ (2018) 43(4) *European law Review* 477, 485; Case C-235/87 *Matteucci v Communauté française of Belgium* [1988] ECR I- 5589, para 16.

¹⁶ Case C-249/83 *Hoeckx* (n 14) para 22.

¹⁷ Directive 2004/38, art 6 and 7.

¹⁸ *ibid* art 24.

¹⁹ *ibid* art 7(1)(b).

²⁰ Home Office ‘European Economic Area nationals: qualified persons: Version 6.0’ (20 November 2018) 31.

²¹ Directive 2004/38, art 8(4)

a TCN family member.²² In contrast, those wishing to have a right to reside as a student must only make a declaration of self-sufficiency, rather than evidence it.²³ Both those wishing to rely on a right to reside as a self-sufficient person or a student must also show that they have comprehensive sickness insurance. In countries with nationalised free health care this can be an extra and unusual hurdle for an EU citizen to meet. In the UK, the Court of Appeal found that having access to free healthcare through the National Health Service (NHS) was not enough to meet this requirement.²⁴ Instead, self-sufficient persons and students must have comprehensive private health insurance or a European Health Insurance Card (EHIC) issued by another Member State.²⁵ However the EHIC requires a declaration that they do not intend to stay in the host Member State permanently. Those who fail to meet these requirements will struggle to rely on the equal treatment provisions in the Directive.

As discussed in chapter 3, while the introduction of EU Citizenship developed the free movement of ‘people’, rather than solely workers, it is subject to significant ‘limitations and conditions laid down in the Treaties and the measures adopted to give them effect’.²⁶ Despite mobile citizens theoretically being protected from discrimination on the grounds of nationality,²⁷ this has more recently been limited to citizens residing within the scope of Directive 2004/38,²⁸ effectively excluding those who are deemed economically inactive and have not acquired permanent residence.²⁹ The right to equal treatment, which secures access to social rights and welfare, has been reserved for those who are economically active.

²² Case C-218/14 *Singh v Minister for Justice and Equality* EU:C:2015:476, para 76; Case C-93/18 *Bajratari v SSHD* EU:C:2019:809, para 31.

²³ Directive 2004/38, art 7(1)(c).

²⁴ *Ahmad v SSHD* [2014] EWCA Civ 988 [70-71].

²⁵ Home Office (n 20) 36-40.

²⁶ TFEU, art 21.

²⁷ *ibid* art 18.

²⁸ Niamh Nic Shuibhne, ‘Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship’ (2015) 52(4) *Common Market Law Review* 889, 937; Case C-333/13 *Dano v Jobcenter Leipzig* EU:C:2014:2358.

²⁹ See section 5.2.2 Long-term resident workers.

Rights for family members

Alongside the rights conferred to workers, under Article 7(1)(d), EU and third country national family members can derive a right to reside in a host Member State from an EU migrant who meets the requirements of Article 7(1) Directive 2004/38. A finding of worker status can therefore provide an EU national the ability to secure rights for family members in the host Member State. This includes:

- spouse or registered partner;³⁰
- children, grandchildren or great-grandchildren (etc.) of the worker or his or her spouse or registered partner who are under 21 years old;³¹
- grandparents, great grandparents (etc.) or children, grandchild or great-grandchildren (etc.) over 21 (provided they are dependent).³²

A family member receives equal treatment on the same basis as workers and can include third country nationals.³³ There are some limited rights available to ‘facilitate’ the residence of non-married partners in a ‘durable relationship or extended family members’.³⁴

Family rights derived from an EU worker are particularly valuable in the case of children as ‘[c]hildren are not on the radar of the directive’.³⁵ EU children, even if born in the host Member State, cannot benefit from having a direct right to reside unless they

³⁰ Directive 2004/38, art 2(a)-(b); Case C-267/83 *Diatla v Land Berlin* EU:C:1985:67 finds that marriage is subsisting until the point of divorce, therefore separated partners can still benefit from a right to reside as a family member.

³¹ Directive 2004/38, art 2(c); Joined Cases C-401/15 to C-403/15 *Depesme and others* EU:C:2016:955 finds that step-children are also included and that the parent-child relationship is based on economic terms rather than legal i.e. whether the step-parent contributes to the maintenance of the child.

³² Directive 2004/38, art 2(c)-(d); Dependency can be shown through receiving ‘material’ support which includes providing financial support, meals, accommodation or providing informal care if the relative is disabled or ill; see Case C-316/85 *Lebon* [1987] ECR I-2811 para 21-23; Case 200/02 *Zhu and Chen v SSHD* [2004] ECR I-09925, para 43; The UK Upper Tribunal has found that translation, emotional support and social support are not included in the definition of dependency in *SSWP v MF* (SPC) [2018] UKUT 179 (AAC).

³³ Directive 2004/38, art 24(1).

³⁴ Directive 2004/38, art 3.

³⁵ Charlotte O’Brien, ‘The rights of EU nationals in the UK post-Brexit – five pessimistic predictions’ (Free Movement Blog, 19th February 2018) <<https://www.freemovement.org.uk/rights-eu-nationals-uk-post-brexit-five-pessimistic-predictions/>> last accessed 12th June 2019

fulfil the criteria in Article 7 of the citizens directive.³⁶ As rights under the Directive are often reliant on economic activity or wealth and comprehensive sickness insurance, this matter is often ‘out of the child’s hands’³⁷ and reliant on an EU adult’s activity.³⁸ While this can be problematic, as children’s rights should be recognised in EU law,³⁹ as it stands children are reliant and therefore directly benefiting from a parent’s status of worker under EU law.

While worker status can benefit family members of workers, it is also worth noting that such rights are focussed entirely with ‘reference to market ideology.’⁴⁰ The CJEU has made clear that family members’ rights are parasitic on and derive from the rights of the worker⁴¹ and are established in recognition of the need to relieve workers of an obstacle to exercising free movement to access to the market.⁴² This is despite many ‘non-traditional’ contributions made to the market, through domestic work, and caring roles to the benefit of workers and their employers alike,⁴³ but which without payment do not, according to the CJEU, constitute work.⁴⁴ The traditional economic model of work leaves family members dependent on the status of their ‘economically active’ relative; this is a gendered dependence. The definition of work therefore, plays an important role for more than the individual worker.

³⁶ For derivative rights see 5.2.3 Rights acquired from previous work

³⁷ Charlotte O’Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Bloomsbury, 2017) 74

³⁸ Case C-115/15 *Secretary of State for the Home Department v NA* EU:C:2016:487 para 78

³⁹ See O’Brien (2017) (n 37) 74-77.

⁴⁰ Tamara K Hervey, ‘Migrant workers and their families in the European Union: the pervasive market ideology of Community Law’ in Jo Shaw and Gillian More, *New Legal Dynamics of European Union* (Oxford University Press, 1995) 91, 110.

⁴¹ Case C-157/84 *Frascona v Caisse des dépôts et consignations* [1985] ECR I-1739, para 15.

⁴² Regulation 1612/68 stated that ‘Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that... obstacles to the mobility of workers shall be eliminated, in particular as regards the worker’s right to be joined by his family...’

⁴³ Hervey (n 40) 105.

⁴⁴ Case C-77/95 *Züchner v Handelskrankenkasse (Ersatzkasse) Bremen* [1996] ECR I-5689, para 14-15.

5.2.2 Long-term resident workers

Beyond the right to equal treatment, including as regards the access to benefits and services, the adequacy of the definition of worker can also affect the lives of EU national atypical workers when seeking to establish more secure rights after long-term residence.

The right to permanent residence can be acquired by EU citizens after 5 continuous years of “lawful residence” in a Member State.⁴⁵ As covered in chapter 3, lawful residence in this context is now considered, predominantly, through the lens of Directive 2004/38, not simply through rights as a EU citizen exercising free movement rights.⁴⁶ As their right of residence is covered by Directive 2004/38, family members can also acquire permanent residence on the same basis as the EU national they are deriving their rights from.⁴⁷ Fulfilment of residence under these categories must be for a continuous period of five years, if an EU citizen loses their right of residence for even a short period of time, the 5 year period will restart and all previous years of lawful residence are lost.⁴⁸ The time can be made up from time before the implementation of Directive 2004/38.⁴⁹ Temporary absences from the Member State are permitted provided they do not combine to over 6 months in any 12 month period.⁵⁰ A single absence of up to 12 months is also permitted for an important reason, examples given are pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.⁵¹

As a ‘key element to social cohesion’,⁵² once permanent residence has been acquired, an EU national is entitled to equal treatment without having to show that they are

⁴⁵ Directive 2004/38, art 16.

⁴⁶ Joined cases C-424/10 and C-425/10 *Ziolkowski and Szeja v Land Berlin* [2011] ECR I-14035, para 47.

⁴⁷ See Section 5.2.1

⁴⁸ Charlotte O’Brien, ‘The pillory, the precipice and the slippery slope: the profound effects of the UK’s legal reform programme targeting EU migrants’ (2015) 37(1) *Journal of Social Welfare and Family Law* 111, 118

⁴⁹ Case C-162/09 *SSWP v Lassal* [2010] ECR I-9217.

⁵⁰ Directive 2004/38, art 16(3).

⁵¹ *ibid.*

⁵² Case C-162/09 *Lassal* (n 49) para 32; referring to Directive 2004/38, preamble recital 17.

exercising any other right to reside under the Directive,⁵³ meaning that they are treated as ‘nationals in all but name’.⁵⁴ Once permanent residence is acquired, EU free movement rights are no longer conditional on economic activity or self-sufficiency. An EU citizen holds the right to permanent residence indefinitely, unless they are absent from that Member State for ‘a period exceeding two consecutive years’,⁵⁵ or the status is revoked on ‘serious grounds of public policy or public security’ as part of an expulsion measure.⁵⁶

Article 17 of the Directive also provides for important reductions to the residence requirement for some workers and their family members. These provisions reflect the EU’s pursuit of removing risks to exercising free movement and further highlights the salience of work in accessing rights. A worker can receive permanent residence after three years of residence if they have reached the age of entitlement for an old age pension or take an early retirement, and they have been working in the Member State for the preceding twelve months.⁵⁷ Only two years residence is required where a worker has had to cease work as a result of permanent incapacity.⁵⁸ There is no ‘period of residence’ requirement at all if the worker is permanently incapacitated as the result of an accident at work or occupational disease. Provision is also made for workers who, after three years residence in the host Member State, take up work in another Member State, provided they maintain their place of residence and return at least once a week.⁵⁹ A permanent right of residence is also safeguarded for surviving family members of deceased EU workers, if the worker had either resided in the host Member State for at least two years, or died as a result of an accident at work.⁶⁰

⁵³ Directive 2004/38, art 24.

⁵⁴ Catherine Barnard, *The Substantive Law of the EU* (6th edn, Oxford University Press 2019) 440.

⁵⁵ Directive 2004/38, art 16(4)

⁵⁶ *ibid*, art 28(2).

⁵⁷ *ibid*, art 17(1)(a).

⁵⁸ *ibid*, art 17(1)(b).

⁵⁹ *ibid*, art 17(1)(c).

⁶⁰ *ibid*, art 17(4).

5.2.3 Rights acquired from previous work

The definition of worker can also play a role in EU citizens' lives after they have stopped working, including the ability to retain worker status and access further derivative rights.

Retained worker status

An EU migrant worker can also benefit from the provisions in place to ensure they retain the status of worker when they stop working due to a variety of circumstances, including when it is beyond their control. These circumstances, of course, require the EU national to prove that they met the requirements for worker status at the time of work, before it can be retained. Retaining worker status during gaps in employment can be vital '[f]or those who move in and out of work – possibly due to the rise in flexible and atypical contracts'.⁶¹

The circumstances where an EU national can retain their worker status are provided for in Article 7(3) of the Citizens Directive including where an EU national is temporarily unavailable for work due to illness or accident, involuntarily unemployed, or embarking on vocational training.⁶² Importantly, for those in atypical work, involuntary unemployment does not require the worker to have been dismissed but also covers situations where a worker reaches the end of a fixed-term or temporary contract.⁶³

The CJEU have also found that this list is not exhaustive, and have included circumstances where workers must take time away or leave work due to the late stages of pregnancy in *Saint Prix*⁶⁴ and *Gusa* which extended this to self-employed persons.⁶⁵ These cases require return to work or self-employment within a reasonable period after the birth of the child, taking account of 'the applicable national rules on the duration of maternity leave'.⁶⁶ In the UK, this 'reasonable period of time' has been interpreted by the Upper Tribunal as 52 weeks after the birth of the child and can include re-entering

⁶¹ Charlotte O'Brien, Eleanor Spaventa, and Joyce De Coninck 'Comparative Report 2015: The concept of worker under Article 45 TFEU and certain non-standard forms of employment' (FreSsco, 2016) 9.

⁶² Directive 2004/38, art 7(3).

⁶³ Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, para 32.

⁶⁴ Case C-507/12 *Saint Prix v SSWP* EU:C:2014:2007.

⁶⁵ Case C-442/16 *Gusa v Minister for Social Protection* EU:C:2017:1004.

⁶⁶ Case C-507/12 *Saint Prix* (n 64) para 42.

the employment market, making reasonable arrangements to return with reduced hours or to become a jobseeker.⁶⁷ However, some causes of interruptions to work are not explicitly covered, and therefore unlikely to be generously protected by Member States, including the need to leave employment to provide informal care.⁶⁸

The length of time for which an EU national can retain their worker status, in circumstances of illness, accident or involuntary unemployment where the EU national had been employed for over one year, is not specified. As such, some Member States have interpreted this as being up to the discretion of a national decision maker.

However, for EU nationals who have been employed for less than 1 year and are involuntarily unemployed,⁶⁹ the Directive ‘sets a floor’ requiring worker status to be retained for no less than 6 months.⁷⁰ This has left Member States with room for restrictive interpretations.⁷¹ The UK, for example, treats this ‘floor’ as a ‘ceiling’,⁷² by only allowing the retention of worker status in this situation for a maximum of 6 months.⁷³ This approach is also taken by Germany and was seemingly endorsed by the CJEU in *Alimanovic*.⁷⁴

Further UK case law has determined that the basis on which worker status is retained can change over time, for example, an individual can retain their worker status first by being involuntarily unemployed and then from being temporarily unavailable for work due to illness.⁷⁵

⁶⁷ *SSWP v SFF* [2015] UKUT 0502 (AAC).

⁶⁸ Charlotte O’Brien, ‘Social blind spots and monocular policy making: the ECJ’s migrant worker model’ [2009] 46(4) *Common Market Law Review* 1107.

⁶⁹ The CJEU have found that this includes completion of a fixed term contract of less than a year and after leaving employment, other than that of a fixed-term nature, in less than a year Case C-483/17 *Tarola v Minister for Social Protection* EU:C:2019:309.

⁷⁰ O’Brien, Spaventa, and De Coninck (n 61) 9.

⁷¹ Verschueren (2016) (n 7) 208.

⁷² O’Brien (2017) (n 37) 145.

⁷³ The Immigration (European Economic Area) Regulations 2016, SI 2016/1052, Reg 6(3).

⁷⁴ Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* EU:C:2015:597.

⁷⁵ *GE v SSWP* [2017] UKUT 145 (AAC) [41].

Derivative rights

As well as providing rights to family members, as discussed above, the benefits of acquiring worker status in the past can outlive the economic activity and activate a form of derivative right of residence. As EU citizens, children have a right to free movement.⁷⁶ The CJEU has recognised that for EU children to be able to fully enjoy their right to free movement, it is also necessary to impart a right of residence to their primary carers. However, these derivative rights are limited to specific circumstances.

The key derivative right concerning workers is established in the CJEU cases *Baumbast*⁷⁷ and *Teixeira*.⁷⁸ These cases concern EU migrant workers' right to bring their family to the host Member State and for their child to access education in that State (Article 10 of Regulation 492/2011, previously Article 12 Regulation 1612/68). In *Baumbast*, the CJEU found that this must also include a right to remain in that education should the worker cease economic activity and that the primary carer of the child must also acquire a right to reside.⁷⁹ This decision relied on the potential obstacle to movement for workers should their child's access to education be withdrawn if economic activity ends.⁸⁰ It is therefore still embedded in the free movement of work. To ensure that the right to continue education in the host Member State is protected, the CJEU found in *Teixeira* that this derivative right of residence was 'not even implicitly' conditional on self-sufficiency.⁸¹ Establishing a *Teixeira* right of residence therefore provides primary carers with access to welfare benefits.⁸² This route can be a very useful alternative if worker status cannot be established at the time, providing that it has been found or can be proven at some point in the past.

However, it is not useful for EU migrants wishing to establish permanent residence. The CJEU have specifically excluded time spent with this derivative right to reside from

⁷⁶ TFEU art 21.

⁷⁷ Case C-413/99 *Baumbast and R v SSHD* [2002] ECR I-07091.

⁷⁸ Case C-480/08 *Teixeira v London Borough of Lambeth and SSHD* [2010] ECR I-01107.

⁷⁹ Case C-413/99 *Baumbast* (n 77).

⁸⁰ *ibid* para 52.

⁸¹ Case C-480/08 *Teixeira* (n 78) para 67.

⁸² Case C-480/08 *Teixeira* (n 78); Case C-310/08 *London Borough of Harrow v Ibrahim* [2010] ECR I-01065 para 57.

contributing to the 5 years continuous ‘lawful residence’ required for permanent residence.⁸³ Also, due to this right being dependent on the EU migrant parent of the child having had worker status in the past, this derivative right is dependent on a positive finding of worker status at some point when the child was also resident. The worker, in this case, must be an EEA national (rather than a third-country national family member or a host Member State national).

Other forms of derivative rights do not currently offer clear access social benefits. It is not clear whether a derivative right to reside as a *Chen* parent would create entitlement given that it is premised on self-sufficiency.⁸⁴ *Zambrano*⁸⁵ residence rights (for TCN primary carers of children who would otherwise have to leave the territory of the EU)⁸⁶ have been found by the UK Supreme Court in *HC* to not confer equal access to welfare benefits.⁸⁷ However, the CJEU has not yet had an opportunity to rule on this question.⁸⁸

5.2.4 Post-Brexit residence rights in the UK

EU citizens in the UK may still have to rely on the status of worker to grant them residence and social rights after the UK leaves the EU. As the case studies informing my research are gathered from EU and EEA nationals living in the UK, it is useful to consider the ongoing importance for worker status in relation to Brexit.

One goal of the UK’s departure from the EU is the plan to ‘end free movement’. To achieve this the UK plans to adopt a new ‘skills-based’ system.⁸⁹ While the UK remains

⁸³ Case C- 529/11 *Alarape and Tijani v SSHD* EU:C:2013:290, para 40.

⁸⁴ Case C-200/02 *Chen* (n 32); see chapter 3 section 3.5.2 The reality of a free movement limited to Directive 2004/38 for analysis of how this right to reside is seemingly not available to those who wish to establish self-sufficiency through work; Case C-86/12 *Aloka and Others v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2013:645.

⁸⁵ Case C-34/09 *Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-1177.

⁸⁶ Case C-256/11 *Dereci and others v Bundesministerium für Inneres* [2011] ECR I-11315, para 66.

⁸⁷ *R (on the application of HC) v SSWP and others* [2017] UKSC 73.

⁸⁸ For the argument that this was the incorrect outcome see Charlotte O’Brien, ‘Acte cryptique? Zambrano, welfare rights, and underclass citizenship in the tale of the missing preliminary reference’ (2019) 56(6) *Common Market Law Review* 1697.

⁸⁹ HM Government, ‘The UK’s future skills-based immigration system’ (White Paper, Cm 9722, December 2018); Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019-21.

in the transition period, and for a potential six months afterwards,⁹⁰ EEA nationals can rely on their rights under EU law.⁹¹ After this period of time, the rights of EU nationals currently in the UK must rely on the EU Settlement Scheme (EUSS) to establish residence rights.⁹² However, status under this scheme does not guarantee access to welfare benefits.

The scheme works by providing either ‘settled status’ to EEA nationals who have resided for more than five years in the UK or ‘pre-settled status’ to EEA nationals if they have resided for less than five years.⁹³ Individuals do not have to provide evidence of having a right to reside under Directive 2004/38 for this period of time; unlike the status of permanent residence, it depends only on factual residence.⁹⁴ While worker status is not necessary, establishing worker status (or permanent residence, in turn usually reliant on worker status) makes this process significantly easier. This approach is more generous than the Withdrawal Agreement provisions, which permit post-Brexit residence rights to be conditional on a lawful residence grounded in EU law.⁹⁵ However, this leaves EU nationals in the UK potentially vulnerable to any changes under domestic rules which may adjust the conditions on residency.⁹⁶

Worker status will still be relevant for those with pre-settled status if they need to access welfare benefits. As will be covered in more detail in chapters 6 and 7, the UK requires a right to reside to access most welfare benefits. Those who have ‘Settled status’ automatically pass a right to reside test, but those with ‘pre-settled’ status do not and therefore must prove an additional right to reside and will continue to rely on the EU

⁹⁰ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C 384I/01 (Withdrawal Agreement), Art 19.

⁹¹ Explanatory Notes to the Immigration and Social Security Coordination (EU Withdrawal) Bill 2020, para 10; Withdrawal Agreement, Art 18(2).

⁹² Home Office, *EU Settlement Scheme: Statement of Intent* (21 June 2018) para 1.3.

⁹³ Where an EEA national can evidence that they have resided in the UK for over five years they will receive settled status, an indefinite leave to remain. Any EEA nationals who has not lived in the UK for five years or those who cannot provide the evidence for this, are provided with “pre-settled” status, a temporary leave to remain; Immigration Rules; Appendix EU, Rule EU14.

⁹⁴ Immigration Rules, Appendix EU, Rule EU11.

⁹⁵ Withdrawal Agreement, Art 13(1).

⁹⁶ Michael Dougan, ‘So Long, Farewell, Auf Wiedersehen, Goodbye: The UK’s Withdrawal Package’ (2020) 57(3) Common Market Law Review 631, 670.

rules on this for the time being.⁹⁷ These provisions have been challenged in the UK courts⁹⁸ as placing further discriminatory conditions on access to welfare for those with a confirmed *constitutive* residence status in national law similar to that seen in *Trojani*.⁹⁹

As it stands, this cohort of migrants with ‘pre-settled’ status, which represents a significant number of EEA nationals and family members,¹⁰⁰ will still have to establish a right to reside. Many of them will find that worker status continues to be a substantial hurdle for accessing welfare benefits in the UK. There are also concerns that a significant number of applicants will be incorrectly awarded this less secure status¹⁰¹ and hold it for longer than they need to.¹⁰² The accuracy of the definition of worker will continue to act as a gatekeeper to social rights including welfare for EU nationals in the UK for potentially many years after it has left the EU.

Overall, this section has aimed to illustrate the value of worker status. It grants the most effective rights for EU nationals, allowing them equal treatment with nationals of a host Member State including access to many welfare benefits. The ability to establish worker status can therefore go a significant way to alleviate many of the risks that are created by the precarity of flexible employment, as identified in chapter 4.¹⁰³ Worker status can also open the door to both more permanent rights and rights that outlive the economic activity itself. Ultimately, the definition of worker determines who can access these rights and conversely excludes those who do not meet its requirements. The CJEU has recognised that systematic denial of benefits to workers is ‘tantamount to an outright

⁹⁷ Social Security (Income-related Benefits) (Updating and Amendment) (EU exit) Regulations 2019, SI 2019/872 Reg 8(3)(d) amending Universal Credit Regulations 2013 (UC Regulations), SI 2013/376, Reg 9(3)(c)(i).

⁹⁸ *R (Fratila & Tanase) v Secretary of State for Work and Pensions* [2020] EWHC 998 (Admin).

⁹⁹ Case C-456/02 *Trojani v Centre public d'aide sociale de Bruxelles* [2004] ECR I-7573.

¹⁰⁰ As of the end of June 2020, around 41% of those who have applied under the EUSS have received pre-settled status (1,427,070 applications); ‘EU Settlement Scheme quarterly statistics, June 2020’ (Home Office, 27 August 2020) <<https://www.gov.uk/government/publications/eu-settlement-scheme-quarterly-statistics-june-2020/eu-settlement-scheme-quarterly-statistics-june-2020>> last accessed 14 September 2020.

¹⁰¹ Madeleine Sumption, ‘Not Settled Yet? Understanding the EU Settlement Scheme using the Available Data’ (The Migration Observatory, April 2020).

¹⁰² The onus is placed on applicants to upgrade to ‘settled’ status. Immigration Rules, Appendix EU, Rule EU3.

¹⁰³ See chapter 4, section 4.4. Flexibility, risk and precarity.

negation of the freedom of movement for [Union] workers'.¹⁰⁴ Workers who are excluded from the definition of work are stripped of equal access to benefits, damaging their ability to move between States to work. It is therefore vital that the definition of worker under EU law encompasses a wide variety of work and does not limit these rights to full-time or permanent workers.

5.3 EU law: when work = work

As discussed above, a substantial divide exists between the rights available to those who acquire 'worker' status and those who do not. Without a sufficiently broad and inclusive test for worker status, that recognises the many varieties of economic activity, it is possible that many EU atypical workers may lose or never acquire worker status under Article 7 Directive 2004/38 and the rights accompanied with that status. This has implications for free movement more generally. It has been argued that equal treatment rights are often limited to only those EU migrants who are deemed to be economically active.¹⁰⁵ Therefore the definition of work must be carefully scrutinised; it plays an important role as the tool which determines if an EU citizen has been *sufficiently economically active* to access free movement rights.

The CJEU has declared the goal of establishing a common and unified definition of a worker for free movement purposes under EU law has been declared by the CJEU as "settled".¹⁰⁶ However, the use of vague concepts, such as 'genuine and effective' work, has created more unanswered questions about the precise boundaries of the definition. This section will detail the basic formulation of the EU definition of work, in order to then ask how inclusive it is of atypical work.

Worker Status

It is accepted that a 'worker' is a Union concept and therefore its scope is to be defined by the CJEU. While this is then left for Member States to interpret and apply, this should not be 'unilaterally fixed and modified by national law'.¹⁰⁷ The CJEU recognised

¹⁰⁴ Nic Shuibhne (2018) (n 15) 494; Case C-208/05 *ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit* [2007] ECR I-181, para 44.

¹⁰⁵ See 3.5.2 The reality of a free movement limited to Directive 2004/38.

¹⁰⁶ Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg* 900 [2009] ECR I-4585, para 26.

¹⁰⁷ Case C-75/63 *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR I-0177.

the importance of creating an EU definition of work as differing approaches by Member States could risk the effectiveness of EU law and could ‘jeopardize’ the achievement of the objectives of the Treaties.¹⁰⁸ For Mancini, giving the concept of worker a Community meaning established the Court as having a ‘hermeneutic monopoly’ to counteract potential ‘unilateral restrictions on the application of rules relating to the free movement of workers by the Member States.’¹⁰⁹ The Court has taken this responsibility on by offering a deliberately broad definition – but also a vague one. Leaving the implementation of the definition to Member States inevitably gives them the responsibility and power to refine the terms set by the CJEU. To avoid an abuse of this power, it is understood that the EU concept of worker cannot be undermined by national definitions.¹¹⁰ This can be important for certain types of atypical work where, even if a type of employment is considered as *sui generis* under national law, it cannot have any consequence on the determination of worker status under EU law.¹¹¹ With this in mind, it is necessary to examine the CJEU case law to understand the scope of the definition of worker with which Member States should comply.

The definition of worker under EU law has been established broadly in the cases of *Levin* and *Lawrie-Blum*. In the latter, a broad definition was offered:

‘for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.’¹¹²

This definition is regarded alongside the criteria offered in *Levin*, where the CJEU determined that a worker must be in pursuit of ‘genuine and effective’ activities that are not ‘on such a small scale as to be regarded as purely marginal and ancillary’.¹¹³

¹⁰⁸ Case C-53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR I-1035, para 15.

¹⁰⁹ Federico Mancini, ‘The Free Movement of Workers in the Case Law of the European Court of Justice’ in Diedre Curtin and David O’Keeffe (eds), *Constitutional Adjudication in European community and national law: essays for the Hon. Mr. Justice T. F. O’Higgins* (Butterworth, 1992) 68 cited in A.P. van der Mei, *Free Movement of Persons within the European Community: Cross Border Access to Public Benefits* (Hart Publishing, 2003) 35.

¹¹⁰ Case C-216/15 *Betriebsrat der Ruhrlandklinik gGmbH* [2016] EU:C:2016:883, para 43.

¹¹¹ Case C-116/06 *Kiiski v Tampereen kaupunki* [2007] ECR I-7643 para 26.

¹¹² Case C-66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121 para 17.

¹¹³ Case C-53/81 *Levin* (n 108) para 17.

Self-employed persons

While this thesis concerns the rights of atypical workers, some may be classified, perhaps incorrectly, as self-employed persons. It is worth noting that the definition for self-employment follows a similar approach to its definition.

In *Jany*, the CJEU identified that a self-employed person must perform services for a certain period of time for which they receive remuneration but must not be performed under the direction of another person or in ‘a relationship of subordination’.¹¹⁴ This also entails the condition that any services provided must be ‘genuine and effective’.¹¹⁵ Those who are considered self-employed persons must also establish genuine and effective activity.

The requirement of ‘genuine and effective’ work takes a deliberately vague approach to guaranteeing worker status, arguably to ensure that many different types of work are caught in the definition. An imprecise definition, while seemingly useful to mould around different circumstances, also leaves more room for Member States to refine the definition while interpreting and applying a ‘genuine and effective’ test.¹¹⁶ While, the CJEU has found that the concept of a ‘worker’ under EU law ‘must not be interpreted restrictively’¹¹⁷ by Member States, or modified to ‘eliminate at will the protection afforded by the Treaty to certain categories of person’,¹¹⁸ Member States are ultimately left to interpret and apply the rules that decide whether someone’s work is *enough* to have achieved ‘worker’ status and the rights this entails. As a result, Member States have tested the parameters of the definition, while the CJEU has often responded with judgments which are inclusive of atypical work. Nevertheless, the vague terminology of ‘genuine and effective’ work ‘still shape[s] the functioning and reach’ of the definition of work and subsequent free movement.¹¹⁹

¹¹⁴ Case C-268/99 *Jany and Others v Staatssecretaris van Justitie* [2001] ECR I-8615, para 33- 34.

¹¹⁵ *ibid.*

¹¹⁶ Frederick Schauer, ‘The Convergence of Rules and Standards’ (2003) (3) New Zealand Law Review 303, 305.

¹¹⁷ Case C-3/90 *Bernini v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1071, para 1.

¹¹⁸ Case C-75/63 *Hoekstra* (n 107).

¹¹⁹ Nic Shuibhne (2018) (n 15) 497.

5.4 The inclusion of non-traditional work

The case law dealing with part-time and non-traditional work reinforces the flexibility of the genuine and effective test. The CJEU has clearly stated that the test should be applied generously and inclusively, recognising that reserving rights ‘solely to persons engaged in full-time employment’ through a narrow definition would jeopardize ‘the objectives of the Treaty.’¹²⁰ This section will detail how the definition of worker is applied to non-traditional work in CJEU case law and what aspects are determined to be relevant to a finding of ‘genuine and effective’ work. This will ask whether the EU definition of worker is capable of including a large variety of atypical work.

5.4.1 Discrimination and part-time work

The CJEU has made clear that worker status cannot be denied merely because the work is part-time.¹²¹ In *Levin*, the CJEU identified that part-time work is ‘an effective means of improving the [...] living conditions’ of Union citizens.¹²²

However, a difference in treatment of part-time work has been permitted for frontier workers. The CJEU in *Geven* found that, even when work is recognised by the national court as ‘genuine and effective’,¹²³ insufficiently substantial part-time work can require a residency requirement, or a type of ‘genuine link’ test previously reserved for those deemed to be economically inactive,¹²⁴ to establish a right to social advantages under, what is now, Regulation 492/2011.¹²⁵ While the impact of this case may be limited to the rights of frontier workers, it demonstrates a willingness from the Court to discriminate on the basis that part-time work can be evidence of *insufficient* economic activity to warrant social and welfare rights.

¹²⁰ Case C-53/81 *Levin* (n 108) para 15.

¹²¹ Case C-106/91 *Ramrath v Ministre de la Justice* [1992] ECR I-3351, para 25.

¹²² Case C-53/81 *Levin* (n 108) para 15.

¹²³ Case C-213/05 *Geven v Land Nordrhein-Westfalen* [2007] ECR I-6347, para. 25-26.

¹²⁴ Siofra O’Leary, ‘Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship’ (2008) 27(1) Yearbook of European Law 167, 188-189; Herwig Verschueren, ‘Free Movement of EU Citizens: Including for the Poor?’ (2015) 22(1) Maastricht Journal of European and Comparative Law 10, 17.

¹²⁵ Case C-213/05 *Geven* (n 123) para. 25-26.

5.4.2 The CJEU and atypical work

The ‘genuine and effective’ criterion has consistently been interpreted broadly to encapsulate many varieties of work. This has included a consideration of the level of hours and pay along with other aspects of employment including consistency, longevity and formality of employment, various types of remuneration and distinctions for work designed to rehabilitate or (re)integrate individuals into the labour market.

Remuneration and Hours

Importantly, the CJEU takes a flexible approach to levels of remuneration, stating that a limited amount of remuneration cannot have ‘any consequence’ on the finding of worker status.¹²⁶ Member States cannot apply a strict threshold of hours or earnings to decide worker status, even though many do adopt a type of threshold as part of the decision process for worker status.¹²⁷ The UK for example has adopted a minimum earnings threshold (MET) as the first tier of the worker test, the consequences of which for the finding of worker status will be the main concern of chapters 6 and 7.

The CJEU has recognised the worker status of EU migrants where working hours are relatively low. This has consisted of examples where employment consists of 10 hours work a week,¹²⁸ including when the work is done for a relatively low income and the work completed on just 2 hours a day for five days a week.¹²⁹ The CJEU, in *Genc*, also found that someone working for as little as 5 hours a week should not be precluded from worker status and therefore could potentially meet the requirements of a genuine and effective test.¹³⁰ Other factors were considered relevant to the decision in *Genc* which will be discussed below.

¹²⁶ Case C-53/81 *Levin* (n 108) para 16; Case C-344/87 *Bettray v Staatssecretaris van Justitie* [1989] ECR I-1621, para 15; Case C-456/02 *Trojani* (n 99) para 16; Case C-188/00 *Kurç v Land Baden-Württemberg* [2002] ECR I-10691 para 32; Case C-14/09 *Genc v Land Berlin* [2010] ECR I-0931 para 20; Case C-10/05 *Mattern and Cikotic v Ministre du Travail et de l'Emploi* [2006] ECR I-3145, para 22; Joined Cases C-22/08 and C-23/08 *Vatsouras* (n 106) para 27.

¹²⁷ O'Brien, Spaventa, and De Coninck (n 61) 24-25; see chapter 6, section 6.2.3 Worker Status in other Member States.

¹²⁸ Case C-171/88 *Rinner-Kuhn v FWW Spezial-Gebäudereinigung GmbH* [1989] ECR I-02743.

¹²⁹ Case C-444/93 *Megner and Scheffel v Innungskrankenkasse Vorderpfalz* [1995] ECR I-4741.

¹³⁰ Case C-14/09 *Genc* (n 126).

Additionally, in *Kempf*, the CJEU clarified that part time work cannot be disregarded just because the remuneration derived from it is below the minimum means of subsistence and must be supplemented by public funds of the host State.¹³¹ Therefore, Member States cannot decide that an individual does not have ‘worker’ status on the basis that they rely on welfare support, so long as their work is genuine and effective.

Circumstances of long hours but with low pay have also been found to be potentially genuine and effective work, for example in *Birden* where the worker was employed for 38.5 hours a week but received a relatively low income.¹³² Progressive increases in remuneration have also been used by the CJEU as an ‘indication that the work performed... was of growing economic value to his employer’ and therefore a sign that the work is genuine and effective.¹³³

The concept of remuneration is also interpreted broadly. Many judgments of the CJEU refer to ‘remuneration’ rather than ‘pay’ or ‘wages’. This semantic choice is significant, as the CJEU have demonstrated that remuneration need not be monetary, as the ‘supply of ‘materials needs’ such as accommodation, food and living expenses has been accepted as an ‘indirect quid pro quo for’ genuine and effective work.¹³⁴

Further aspects characterising an employment relationship

Beyond hours and pay, the CJEU have instructed national courts making decisions on genuine and effective work to consider an array of factors which may indicate that the employment was genuine and effective even where remuneration hours are low. Among ‘the aspects characterising [an] employment relationship’¹³⁵ to consider are the length of time in work, an employment contract, contributions made and the nature of these contributions and whether the individual has working entitlements. These were raised as aspects of an employment relationship to consider when making a genuine and effective test in circumstances of low hours and pay (in *Genc* employment for 5.5 hours a week

¹³¹ Case C-139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECR I-1714 para 14.

¹³² Case C-1/97 *Birden v Stadtgemeinde Bremen* [1998] ECR I-7747 para 27-28. While this case concerned a Turkish national, the same principle assessment of ‘genuine and effective activity applied.

¹³³ C-188/00 *Kurç* (n 126) para 35. This case concerned a Turkish national, see above.

¹³⁴ Case C-196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR I-6159, paras 11-14.

¹³⁵ Case C-46/12 *L. N. v Styrelsen for Videregående Uddannelser og Uddannelsessstøtte* EU:C:2013:97 para 44.

and paid £7 an hour)¹³⁶ or to mitigate the short term nature of the employment (in *O v Bio Philippe Auguste* employment for 4 days).¹³⁷ Other normative measures to consider include whether the individual has completed enough time in employment to ‘familiarize [themselves] with the work’, but levels of productivity, in one case as a trainee,¹³⁸ must have no consequence in regard to the test of genuine and effective work.¹³⁹

Employment for rehabilitation or integration into the labour market

The CJEU has taken a less inclusive approach for rehabilitative work. In *Bettray*, an EU national was in remunerated, rehabilitative work after receiving support for drug addiction. The Court found that work which was specifically rehabilitative for reintegration into employment was not genuine and effective.¹⁴⁰ This finding threw into question the status of workers with disabilities in rehabilitative or integrational employment,¹⁴¹ not least as the Court suggested one of the features preventing the work from being genuine and effective was the adaptability of the work to cater to ‘the physical and mental possibilities’ of each person.¹⁴²

However, later judgements in *Birden* and then *Fenoll* saw the CJEU state that the judgment of *Bettray* was not a general trend and instead should be limited to the particular facts of the case.¹⁴³ In *Fenoll* the Court made it clear that rehabilitative work or employment intended to assist with the integration or reintegration of the disabled workers into the labour market was not necessarily marginal and ancillary, provided it had some ‘economic value’.¹⁴⁴ The Court re-asserted that levels of productivity should

¹³⁶ Case C-14/09 *Genc* (n 126) para 27.

¹³⁷ Case C-432/14 *O v Bio Philippe Auguste SARL* EU:C:2015:643 para 25.

¹³⁸ Case C-3/90 *Bernini* (n 117) para 16.

¹³⁹ C-188/00 *Kurz* (n 126) para 32.

¹⁴⁰ Case C-344/87 *Bettray* (n 126) para 17.

¹⁴¹ Mark Bell, ‘Disability, rehabilitation and the status of worker in EU Law: *Fenoll*’ (2016) 53(1) Common Market Law Review 197.

¹⁴² Case C-344/87 *Bettray* (n 126) para 17.

¹⁴³ Case C-1/97 *Birden* (n 132); Case C-316/13 *Fenoll v Centre d’aide par le travail ‘La Jovenne’* EU:C:2015:200.

¹⁴⁴ Case C-316/13 *Fenoll* (n 143) para 40; Case C-316/13 *Fenoll*, Opinion of AG Mengozzi, para 42.

not be relevant to the determination of worker status.¹⁴⁵ For Bell, the implication of the *Fenoll* judgment can also be assessed as ‘a substantive shift’ in the CJEU’s approach to the genuine and effective test and the concept of remuneration. In *Fenoll*, rather than focussing on the selection process, rehabilitation/integration dynamic, or the productivity level the court focussed on ‘whether the activity in question possessed “economic value”’.¹⁴⁶ In *Fenoll*, the determination of worker status was ultimately left to the national court. While confining the potential damage of *Bettray*, it still spells out potential extra barriers for disabled workers in integrational, rehabilitative or sheltered employment, as O’Brien identifies, alongside proving that their work meets the standard ‘genuine and effective’ criteria, they must also convince a decision maker or court ‘that they provide an economic benefit to others’, where non-disabled workers do not.¹⁴⁷

Given that the exclusion of part-time work would jeopardize the objectives of free movement, it is in the interest of the EU to ensure that Member States apply an inclusive approach to work and subsequently access to social rights. The CJEU’s broad definition of work is capable of including non-traditional forms of work with an expansive meaning of ‘genuine and effective’ work, and flexibility around remuneration (type and quantity) and hours, and the consideration of other employment relationship factors to offset some characteristics that may be deemed marginal and ancillary.

However, these cases have developed rather imprecise boundaries for the definition of worker. Verschueren suggests that this makes it difficult ‘to draw the line between “work” that falls under these definitions and “work” that does not’.¹⁴⁸ Leaving it to Member States to determine the exact limits of worker status could lead to different rules applying across the EU and ‘seemingly arbitrary outcomes’.¹⁴⁹ Vague inclusivity does not provide legal certainty.

¹⁴⁵ Case C-1/97 *Birden* (n 132) para 30-31; Case C-316/13 *Fenoll* (n 143) para 38; C-316/13 *Fenoll*, Opinion of AG Mengozzi, para 39; Case C-456/02 *Trojani* (n 99) para 19.

¹⁴⁶ Bell (n 141) 204.

¹⁴⁷ Charlotte O’Brien, ‘Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability’ in Dmitry Kochenov (ed) *EU Citizenship and Federalism: The role of rights* (Cambridge University Press 2017) 527.

¹⁴⁸ Verschueren (2015) (n 124) 15.

¹⁴⁹ Verschueren (2016) (n 7) 197.

To utilise Schauer's work on the 'tyranny of choice', Member States may opt to 'supplement' imprecise and vague CJEU case law 'with more specific "guidelines" or "rules of thumb" that in practice have all of the characteristics of rules'.¹⁵⁰ This might aim to ease administrative burdens, encourage consistency among street-level bureaucrats or to cynically narrow the scope of worker status and the access to welfare it entails. The UK authorities, for example, have used the vagueness of the EU concept to justify introducing an earnings threshold which 'will bring greater clarity and robustness to decision-making in this area'.¹⁵¹ The press release announcing the policy stated that the terms 'genuine and effective' and 'marginal and ancillary' are too vague and that 'there is not clear definition for what [these terms] mean,' resulting in some EU nationals benefiting from worker status 'even if, in reality, they do very little work'.¹⁵² While the validity of these claims can be disputed,¹⁵³ it is illustrative of how Member States may respond to the discretion bestowed on them. For Van der Mei, this transfer of power allows Member States to restrict access to benefits and is perhaps intentional.¹⁵⁴ Irrespective of the motive, excessive discretion can leave the outer edges of the definition of work to be, more or less, defined by the Member States.

This discretion can damage the rights of those in atypical work, even when their work exhibits criteria that have been expressly included by the CJEU in the definition of work.¹⁵⁵ However, many aspects of atypical work have not yet been expressly included (or excluded) in the CJEU's case law on the definition of work. The next section will consider these gaps in the definition of worker to identify where atypical workers may struggle to fit into the EU definition of work.

¹⁵⁰ Schauer (n 116) 316.

¹⁵¹ 'Minimum Earnings Threshold for EEA migrants introduced' (DWP, 21 February 2014) <<https://www.gov.uk/government/news/minimum-earnings-threshold-for-eea-migrants-introduced>> last accessed 9 May 2018.

¹⁵² *ibid.*

¹⁵³ See chapter 6, section 6.3 The intention and representation of the MET.

¹⁵⁴ van der Mei (n 109) 130.

¹⁵⁵ O'Brien (2017) (n 37) 156-160; See chapter 6 section 6.4 (In)compatibility of the MET with EU Law.

5.5 The case for more explicit inclusion of atypical work

While the EU case law on the definition of a worker has interpreted the concept as relatively broad and inclusive of a large variety of working conditions, the EU has not had the opportunity to extend the same attention to more volatile forms of atypical work.

Like the Directive on the employment rights of part-time workers, the preamble of Directive 1999/70 concerning fixed-term workers reiterates the need for national social security systems to ‘[adapt] to new patterns of work and [provide] appropriate protection to those engaged in such work’.¹⁵⁶ Additionally, the desire to update the Written Statement Directive raised the need to address the rising availability of casual and precarious work and recognised that, while they provide benefits to those looking for flexible employment, there is increased danger to working conditions.¹⁵⁷ The first consultation report for this update recommended using the opportunity to clarify a common EU definition of work,¹⁵⁸ which would recognise more casual and precarious employment. Risak and Dullinger argue that the differing contexts for these definitions of work make it unsuitable to transpose one to the other.¹⁵⁹ The free movement definition of work is supposedly broad to ensure the success of the single market and is arguably ‘efficiency-oriented’¹⁶⁰ or aiming for the ‘greatest possible freedom’¹⁶¹, yet matters of labour law tend to be concerned with safeguarding equity, voice and dependency.¹⁶² There is still the potential for the shared goal of an updated definition of worker to influence and inform positive and more expansive changes to the definition of migrant work.

¹⁵⁶ ‘Dublin European Council 13 and 14 December 1996 Presidency Conclusions: Annexes’ (European Parliament, December 1996) Annex II.

¹⁵⁷ Commission, ‘First phase consultation of Social Partners under Article 154 TFEU on a possible revision of the Written Statement Directive (Directive 1991/533/EEC) in the framework of the European Pillar of Social Rights’ SWD(2017) 205, 10-11.

¹⁵⁸ *ibid*, 8.

¹⁵⁹ Risak and Dullinger (n 7) 17.

¹⁶⁰ *ibid* 18.

¹⁶¹ Nic Shuibhne (2018) (n 15) 494.

¹⁶² Risak and Dullinger (n 7) 18.

Rather than establish an updated and bespoke definition, the newly adopted Directive 2019/1152 relies on the definition set by the CJEU in *Lawrie-Blum*.¹⁶³ It also makes explicit reference to atypical work in the context of the Directive's specific purpose of establishing transparent working conditions, stating that:

‘Provided that they fulfil those criteria, domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices could fall within the scope of this Directive.’¹⁶⁴

The directive also includes those who are in ‘bogus self-employment’ stating that ‘determination of the existence of an employment relationship should be guided by the facts... not by the parties’ description of the relationship.’¹⁶⁵ However, the adoption of the ‘genuine and effective’ definition here assumes that it is inclusive of these categories.

5.5.1 Requiring regularity and consistency from precarious work

The definition for work including its flexible yet vague concept of ‘genuine and effective’ work leaves a number of worrying gaps which can disadvantage those in forms of atypical work. Broadly speaking, an inclusive approach to remuneration, level of hours, levels of pay and consideration of aspects characterising an employment relationship, as detailed above, should benefit atypical workers. However, they are applied at the discretion of each Member State.

There is still a lack of explicit guidance from the Court on the features common in atypical employment, such as irregular remuneration, erratic hours, the layering of short-term contracts, gaps in work or difficulty identifying relationships of subordination. Without specific guidance from the Court, Member States may opt to view these features as indicative of marginal and ancillary work.

The CJEU has established that work that is temporary, short-term, casual, seasonal or ‘on-call’ should not be automatically precluded from worker status.¹⁶⁶ There is also no

¹⁶³ Directive 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union OJ L186/105, preamble, recital 8.

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

¹⁶⁶ Case C-413/01 *Ninni-Orasche* (n 63) para 25; Case C-357/89 *Raulin v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027, para 11; Case C-444/93 *Megner and Scheffcl* (n 129) para 18; Case C-3/90 *Bernini* (n 117) para 16.

requirement that work is completed for a specific period of time before worker status can be established.¹⁶⁷ However, certain features of atypical work such as short duration of contracts or irregularity have been expressly identified as potential indicators of marginal and ancillary employment. For example, in *Raulin*, which concerned a short-term, casual, ‘on-call’ employment (60 hours worked in 16 days), the CJEU advised national courts to take into account ‘the irregular nature and limited duration’ of the employment, stating that the ‘very limited number of hours in a labour relationship may be an indication that the activities exercised are purely marginal and ancillary.’¹⁶⁸

Atypical work that is irregular or inconsistent may fall through the gaps. It is also important to note that a requirement for some level of consistency can become problematic for atypical workers even after an initial finding of genuine and effective work; atypical workers may be more vulnerable to losing worker status on account of it being considered, even temporarily, marginal and ancillary.

The gaps in the definition of worker could lead to the exclusion of a growing number of economic actors from free movement rights. AG Szpunar’s opinion in *Tarola*, concerning the right to retain worker status after a period of less than a year employment, warned that distinguishing between different types of employment would ‘amount to unjustified difference in treatment’ and ‘would result in “reserving” ... the right to move and reside freely ... to workers who are in a more stable position’ at the exclusion of workers in more flexible contracts and ‘who are therefore in a clearly vulnerable position.’¹⁶⁹ The CJEU, while making no reference to unequal treatment, found that where worker status is identified by the national court, including in the circumstances of the case where work lasted only two weeks, the rights under Article 7(3)(c) to retain worker status for at least 6 months must also apply to those in fixed term work.¹⁷⁰ The Court did not rule on the relevance of the two week period of work for the genuine and effective test as the Irish Court of Appeal had already determined that Mr Tarola had worker status. The difference in treatment that could arise from an underinclusive definition of work could therefore be viewed as unjustified and reserving

¹⁶⁷ Case C-39/86 *Lair v Universität Hannover* [1988] ECR I-3161 para 42; Case C-197/86 *Brown v The Secretary of State for Scotland* [1988] ECR I-3205 para 22.

¹⁶⁸ Case C-357/89 *Raulin* (n 166) para 14.

¹⁶⁹ Case C-483/17 *Tarola v Minister for Social Protection* EU:C:2018:919, Opinion of AG Szpunar, para 46.

¹⁷⁰ Case C-483/17 *Tarola v Minister for Social Protection* EU:C:2019:309, para 54.

the rights of free movement to an exclusive group of more permanent or full-time workers. This different treatment can also be viewed as particularly unjust when considered alongside the data on who is most likely to occupy atypical work.

5.5.2 An equality case for inclusion

Free movement's inability to detach itself from a market ideology, as explored in chapters 2 and 3, means that the definition of work is a tool which assesses whether a migrant worker's level of economic contribution is sufficient to warrant equal treatment with nationals. This approach sets up EU nationals as competitors to demonstrate their worth to the host Member State, yet it fails to recognise the 'unequal starting points for the competitors.'¹⁷¹

This problem manifested itself in the initial focus on men's mobility. Writing in the mid-1990s, both Hervey and Ackers highlighted the persistent emphasis on ensuring men's mobility as a worthwhile commodity while 'policies such as child-care facilities, protection of atypical employees and flexible careers, which could increase women's mobility as workers', were pushed to the side-lines as a negligible investment.¹⁷² While some of these problems have been identified and attempts have been made to address them, such as extending more employment rights to atypical workers, the definition of work has not been updated and still relies on traditional conceptions of employment as its starting point.

As an alternative, a definition of work that is inclusive of various forms of part-time and atypical work could be put forward on the basis of equality law.¹⁷³ Eurofound argue that EU law presents an extension of equality law from first protecting equal treatment 'regardless of characteristics such as sex, race, age and disability', to the 'new dimension' of equal treatment of workers 'regardless of working hours, duration of employment, place of work or the nature of the employment relationship'.¹⁷⁴ This seems to be a

¹⁷¹ Hervey (n 40) 108.

¹⁷² Hervey (n 40) 107; Louise Ackers 'Women, Citizenship and European Community Law: The Gender Implications of the Free Movement Provisions' (1994) 16(4) *Journal of Social Welfare and Family Law* 391, 393-4.

¹⁷³ O'Brien (2009) (n 68).

¹⁷⁴ 'Atypical work' (Eurofound, 24 November 2017) <<https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/atypical-work>> last accessed 30/04/2018.

logical step as the two are intrinsically linked. It is well documented that gender, age, race and disability identities play a role in the likelihood of individuals being employed on an atypical basis - not necessarily as a matter of choice, but reflecting that these groups of workers tend to face significant barriers to the traditional labour market.¹⁷⁵ This also means that these workers are more likely to face the most precarity in their lives because of employment conditions. A traditional scope of work 'perpetuates particularism and inequality' for marginalised groups already facing exclusion from the labour market because of these societal presumptions.¹⁷⁶ This disadvantages women, ethnic minorities,¹⁷⁷ disabled workers¹⁷⁸ and those in 'low-skilled' and low-income work.¹⁷⁹ As such, where worker status acts as a significant gatekeeper to free movement rights and the concept of a worker, it has a discriminatory impact on these groups by making the exercise of free movement a greater risk.

Many workers in atypical employment will face precarious and erratic phases of work which could hinder their ability to pass the genuine and effective test. This section illustrates the gaps that exist in the current EU definition of worker and how characteristics of atypical work can synchronise with the understanding of what 'marginal and ancillary' work looks like. Therefore, while broad, the 'genuine and effective' test does not precisely cover common features of atypical employment. The EU's broad and vague approach to the definition of worker results in Member States being handed a significant amount of discretion, granting the power to tweak the finer details and ultimately restrict access to welfare and residence rights. How this power may be abused was discussed briefly above and will be considered in more detail in chapter 6 and 7 in relation to the UK's MET.

5.6 Summary

Acquiring worker status activates substantial free movement and equal treatment rights in relation to both immigration and welfare benefits. These rights can be essential for

¹⁷⁵ See chapter 4, section 4.5 A brief equality impact assessment.

¹⁷⁶ Hervey (n 40) 92.

¹⁷⁷ *ibid* 91.

¹⁷⁸ O'Brien, (2017) (n 147) 524-528.

¹⁷⁹ Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Law' (2016) 53(4) *Common Market Law Review* 937, 953

many workers in atypical work and can help balance periods of sporadic income, times of ill health and temporary unemployment or underemployment. They can also extend beyond the period of economic activity and beyond the individual worker by providing rights for family members. With the protections that this status offers, worker status can make free movement a realistic option for many EU nationals, especially as being deemed economically inactive can significantly hinder access to these rights, as discussed in chapter 3.

The CJEU has established worker status as a flexible concept where ‘genuine and effective’ activity can be moulded to fit a range of employment circumstances. While the EU concept of worker has the potential to be inclusive, it relies on vague concepts and does not set clear guidelines for Member States to follow. While the CJEU have referred to some aspects of atypical work, such as part-time hours, levels of remuneration and formal characteristics of employment, other common characteristics have either not been addressed or, as in the case of casual or irregular work, been labelled as potential indicators of marginal and ancillary work. The concept of migrant work in free movement law has therefore not yet been formally expanded to specifically meet the changing aspects of the labour market as covered in chapter 4.

By adopting a vague and imprecise definition, many EU citizens who are working will have to rely on a generous application of the definition by the host Member States to be able to claim equal treatment with nationals. As previous chapters have shown, EU citizenship appears to represent a status closer to a market membership where rights and protections are purchased through economic activity. For atypical workers, falling outside of the concept of worker, and therefore deemed economically inactive, could leave them to rely on the inadequate protection of rights for EU citizens as discussed in chapter 3. The potential exclusion of large groups of low paid workers therefore creates a substantial barrier to them being able to enjoy their free movement rights, instead it would result in, as O’Brien warns, ‘alienating the working poor, and effectively awarding rights on the basis of socio-economic class’.¹⁸⁰ Given that the number of mobile EU workers in these forms of employment is significant and will continue to grow,¹⁸¹ it would help if the EU legislature could make a clear determination on the scope of this

¹⁸⁰ O’Brien (2016) (n 179) 939.

¹⁸¹ See chapter 4, section 4.2 Atypical work in numbers.

status, to avoid the necessarily piecemeal and understandably imprecise approach of definition-by-case law. Any review of worker status and the free movement framework must consider the potentially discriminatory impact of a standard one-size-fits-all approach to work to those who face barriers to the ‘standard’ labour market.

The impact of the limits to the EU concept of work and the consequences of granting significant discretion to Member States to fine-tune and interpret the specific limitations of the status are explored next. Chapters 6 and 7 will analyse how the UK applies its test alongside case studies of EU atypical workers navigating these rules. Analysing worker status at the EU level in this chapter has established the standards which the UK definition should meet – it is now time to analyse the compatibility of the UK’s approach with EU law. This will also illustrate how the discretion provided to Member States essentially allows the reclassification of worker status, demanding that EU citizens not only work, but do ‘enough of the right type of work, with sufficient stability, and earning enough’.¹⁸² It will also provide evidence of atypical workers excluded from the concept of work and how this presents significant hurdles to moving to work in another Member State.

¹⁸² O’Brien (2016) (n 179) 939.

Chapter 6: Taking liberties: The UK's Minimum Earnings Threshold Narrows the EU Concept of Work

6.1 Introduction

The EU concept of worker, though theoretically uniform, is defined by reference to broad yet vague criteria and is susceptible to becoming 'lost in translation' as 'discretion is decentralised' and filtered down to benefit decision maker.¹ Member States are left to flesh out the broad concept of 'genuine and effective' work to apply to specific individual employment circumstances. Some of this task is inevitably delegated to front-line decision makers. Leaving open-ended definitions open to be refined can result in a reliance on shortcuts, such as setting limits and thresholds, which make the decision making process more efficient and standardised but can neglect the outer edges of the worker definition.² This loses much of the breadth and flexibility instilled in the EU definition of work and risks the exclusion of many EEA nationals who are factually working but not considered to be working *enough*.

In the UK, a two-tier test has been adopted. The first tier adopts a minimum earnings threshold (MET) to essentially fast-track decisions of worker status to those workers who earn above the threshold for the period of time required. The second tier allows for the further scrutiny of cases that fall below the threshold, which is meant to apply the 'genuine and effective' test set by the CJEU. The high level of the MET forces many atypical workers to bear the extra burden of having to demonstrate how their work is genuine and effective *despite* not meeting the threshold, who must rely on the correct and fair application of this test at this second tier. However, this process is accompanied with complex and often misleading decision maker guidance (DMG),³ which can fail to reflect and sometimes contrasts with EU law.

¹ Jessica Sampson Thierry and Dorte Sindbjerg Martinsen, 'Lost in translation: how street-level bureaucrats condition Union solidarity' (2018) 40(6) *Journal of European Integration* 819, 831.

² Frederick Schauer, 'The Convergence of Rules and Standards' (2003) (3) *New Zealand Law Review* 303.

³ This is referred to as 'advice for decision makers (ADM)' for Universal Credit guidance; Department for Work and Pensions (DWP) 'ADM International Issues Chapter C1: Universal Credit' (July 2015); the advice concerning worker status is the same in both. This chapter will therefore only refer to the DMG.

This chapter addresses research question 5 which asks: Is the application of the worker test to EU atypical workers in the UK compatible with the EU definition of worker? In order to do this, it adopts a mixed methods approach to this analysis, providing a doctrinal analysis of the compatibility of the UK's approach alongside an empirical critique of the MET by utilising qualitative data analysis from cases advised by the AIRE Centre. This chapter will demonstrate how the definition of worker is applied and identify some of the areas where the guidance is likely to exclude types of atypical work. The evidence provided in this chapter also contributes to the enquiry in research question 6: What does the UK's MET show about the availability of free movement and equal treatment rights in the changing labour market? This chapter highlights some aspects of the UK's approach which result in the exclusion of atypical workers. Chapter 7 will take this analysis further to highlight the indirectly discriminatory impact of the threshold and guidance.

Section 6.2 will examine the worker test in the UK, including the introduction of the MET in 2014 and how it compares to some other Member States. This will be followed by an examination of the purpose of the MET and the potential for restrictive signalling impacting decision makers in section 6.3. The compatibility of the MET will then be interrogated in section 6.4 and then in three analytical sections focusing on whether the threshold is applied as determinative of worker status (section 6.5), how the guidance reasserts the centrality of earnings to the genuine and effective test (section 6.6) and how it misleadingly directs decision makers with incorrect elements to consider (section 6.7).

Overall, this chapter will highlight how many aspects of the UK's approach to worker status is incompatible with EU law and applies a restrictive interpretation of the definition of work. Equal treatment with regard to access to social and welfare rights in the UK is therefore made conditional on an EU citizen 'earning access'. As a result, many low-paid and atypical workers are excluded from accessing welfare benefits in the UK, limiting the ability to realistically exercise free movement as a worker to only those who earn *enough* and in the right way.

6.2 The EU worker in UK law

6.2.1 Habitual residence test and worker status

In order to receive any means-tested benefits in the UK, an EEA migrant must first pass the Habitual Residence Test in the UK.⁴ This test has two parts. Firstly, they must demonstrate that have a right to reside. The Immigration (EEA) Regulations 2016 give effect to Directive 2004/38 and therefore transpose the requirement for EU nationals to meet one of the qualified residence categories,⁵ in these cases, as a ‘worker’.⁶ The second part requires applicants to be ‘habitually resident’, which looks at many different factors to determine how much of an applicant’s life is in the UK, for example work, property, length of time in the country, having family here and whether a bank account has been opened in the UK.

While both parts of the test must be met, the ‘right to reside’ requirement is trickier to demonstrate. Establishing a right to reside is an eligibility condition to access a wide range of benefits including Universal Credit, Pension Credit, Council Tax Reduction and many of the ‘legacy’ benefits such as Income Support, Employment and Support Allowance (ESA), Housing Benefit and Child Tax Credit. Therefore, a decision by a DWP caseworker on whether work meets the criteria for the right to reside as a ‘worker’ is vital to many EEA nationals’ wellbeing.

6.2.2 The MET

Before the introduction of the MET, the Court of Appeal approached worker status as a question of the genuine economic value of the work for the employer, for example: would another employee need to be found to do the work instead?⁷ A few years later the Upper Tribunal, in *JA* qualified its definition of worker to reflect closely the judgments of the CJEU, as services that have to be economic, genuine and effective and

⁴ This chapter will refer to EEA nationals, as the group which the UK rules apply to. The European Economic Area (EEA), in the UK rules, includes all Member States of the EU with the addition of EEA countries (Iceland, Liechtenstein and Norway) and Switzerland. As this research is concerned with the fundamental status of EU citizenship, EU nationals are the primary focus.

⁵ The Immigration (European Economic Area) Regulations 2016, SI 2016/1052 (EEA regulations).

⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (Directive 2004/38) art 7.

⁷ *Barry v London Borough of Southwark* [2008] EWCA Civ 1440 [23].

not marginal and ancillary.⁸ Judgments regarding worker status identified ‘genuine and effective’ work in a broad range of employment scenarios such as where the individual earned £65 a week⁹ and where someone had been employed for only two weeks,¹⁰ although this was after having worked in the UK already. The tribunal had also identified genuine and effective self-employment where work was part-time for 3-4 hours a week, despite having only been set up for 2 months and not yet making any profit.¹¹ However, decision making outside of courts did not necessarily reflect the same expansive approach. Sibley and Collins highlighted their experiences of the poor application of the genuine and effective test before the MET was introduced, reporting how decision makers were frequently ‘turning down EEA migrants even where they were working 11 or more hours per week.’¹²

In 2014, the UK introduced a new MET to adapt how worker status would be tested. This involved a two-tier test which required decision makers to establish if an EEA worker met either of the following criteria;

Tier 1 - Have an average gross earnings, currently set at no less than £183 a week, for the past three months,¹³

Tier 2 - Employment must be genuine and effective

Tier 1

To meet the first tier of the test an EEA national must earn above the set threshold. The earnings required is informed by the primary threshold used to trigger the payment of Class 1 National Insurance Contributions, and therefore increases in conjunction with that amount on a yearly basis. The current threshold for 2019/20 stands at £183 a week. This is equivalent to 21 hours a week at the national minimum wage for over

⁸ *JA v. SSWP* [2012] UKUT 122 (AAC).

⁹ *SS v Slough Borough Council* [2011] UKUT 128 (AAC).

¹⁰ *Barry* (n 7).

¹¹ *TG v SSWP* [2009] UKUT 58 (AAC).

¹² Eleanor Sibley and Rebecca Collins, ‘Benefits for EEA migrants’ (2014) 22(2) *Journal of Poverty and Social Justice* 165, 169.

¹³ DWP, ‘DMG Vol 2 Chapter 7 Part 3 Habitual Residence and Right to Reside – IS/JSA/SPC/ESA’ (Vol 2 Amendment 39, February 2018) [073038].

25s.¹⁴ A worker's average earnings must meet this threshold over a continuous period of three months immediately before the benefit application.¹⁵ If this first tier is met, the EEA national will be automatically deemed to have worker status. This threshold is applied strictly, meaning that even where earnings are close to requirements it will not pass and must instead be considered under the second tier.

The use of a threshold is immediately a threat to the compatibility of the UK's approach to worker status. The CJEU has determined that a limited level of remuneration for work cannot have 'any consequence' for the decision of worker status.¹⁶ The MET ignores this and runs directly against it by examining the level of earnings as a key indicator of worker status, fast-tracking those who have a high level of earnings and submitting any worker with limited remuneration under the threshold to additional scrutiny. Noticeably, the level of earnings required and the subsequent hours necessary to meet it when earning minimum wage are substantially higher than the level that EU case law seemingly recognises as genuine and effective work.¹⁷ Analysis by the New Economics Foundation shows that around 9% of the total workforce in the UK (roughly 2.4 million people) earn below this threshold.¹⁸ While this might not directly transfer on the EEA migrant worker population in the UK, there is likely to be a significant number of workers who do not meet the requirement of the first tier and therefore rely on the application of the second tier. Additionally, the requirement for EEA nationals to meet the threshold for a period of three months runs counter to

¹⁴ 'National Minimum Wage and National Living Wage rates' (Gov.uk) <<https://www.gov.uk/national-minimum-wage-rates>> last accessed 9 May 2018.

¹⁵ DWP (2018) (n 13) [073038].

¹⁶ See chapter 5, section 5.4.2 The CJEU and atypical work; Case C-53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR I-1035 para 16; Case C-344/87 *Bettray v Staatssecretaris van Justitie* [1989] ECR I-1621, para 15; Case C-456/02 *Trojani v Centre public d'aide sociale de Bruxelles* [2004] ECR I-7573 para 16; Case C-14/09 *Genç v Land Berlin* [2010] ECR I-0931 para 20; Case C-10/05 *Mattern and Cikotic v Ministre du Travail et de l'Emploi* [2006] ECR I-3145, para 22; 'a general and uniform minimum level of remuneration applicable throughout the Community cannot be given' in A. Pieter van der Mei, *Free Movement of Persons within the European Community: Cross Border Access to Public Benefits* (Hart Publishing, 2003) 37.

¹⁷ See chapter 7, section 7.2.1 Setting a steep and restrictive threshold.

¹⁸ 'The 2.4 million lowest paid employees would see no benefit from an increase in NICs threshold' (New Economics Foundation, 20 November 2019) <<https://neweconomics.org/2019/11/national-insurance-tax-cut-does-nothing-for-the-2-4-million-lowest-paid-employees>> accessed 10 March 2020.

judgments of the CJEU stating that the determination of worker status cannot be conditional on the completion of work for a specific period of time.¹⁹

The MET clearly strays from the guidance of the CJEU and in some cases runs counter to it. However, this is just the first stage of the test. The UK aims to comply with EU law by ensuring that all workers who cannot meet the requirements of the MET are examined by the second tier which should act as a catch-all and apply the CJEU case law consistently to ensure that genuine and effective work is granted worker status.

Tier 2

For the second part of the test, the Advice for Decision Makers (ADM) for Universal Credit eligibility or Decision Maker Guidance (DMG) for the legacy benefits directs decision makers to decide whether the work done was genuine and effective and not on such a small scale as to be regarded as purely ‘marginal and ancillary’.²⁰ This second tier requires decision makers to ‘examine each case as a whole, taking account of all circumstances’.²¹ This stage of the test is ostensibly in line with CJEU case law. However, the DMG makes specific reference to five relevant ‘secondary criteria’ referred to in the guidance:

1. whether the work was regular or intermittent,
2. the period of employment,
3. whether the work was intended to be short-term or long-term at the outset,
4. the number of hours worked and
5. the level of earnings.²²

These considerations represent the various ways that discretion can be exercised to find work that is below the MET as meeting the genuine and effective criteria. The list of considerations are broadly in line with CJEU case law.²³ However, the inclusion of the

¹⁹ Case C-39/86 *Lair v Universität Hannover* [1988] ECR I-3161 para 42; Case C-197/86 *Brown v The Secretary of State for Scotland*, [1988] ECR I-3205 para 22.

²⁰ DWP (2018) (n 13) [073040].

²¹ *ibid.*

²² DWP (2018) (n 13) [073050].

²³ For regularity and a short duration of employment see Case C-357/89 *Raulin* [1992] ECR I-1027, para 14; For number of hours see Case C-171/88 *Rinner-Kuhn* [1989] ECR I-02743, Case C-444/93 *Megner and Scheffcl v Innungskrankenkasse Vorderrpfalz* [1995] ECR I-4741 and Case C-14/09 *Genc* (n 16).

level of earnings is problematic as, like the threshold examined above, it does not reflect the CJEU's finding that a limited level of remuneration for work cannot have 'any consequence' for the determination of worker status.²⁴ The guidance stipulates that decision makers may balance the criteria against each other to determine worker status, for example, stating that they 'will have to weigh, for example, low hours against long duration of work as part of their overall assessment of whether work is genuine and effective'.²⁵ While this guidance seeks to reflect what is necessary to be compatible with EU law, section 6.6 will examine how it steers decision makers to give more weight to earnings and presume marginality for workers whose earnings fall below the threshold. The guidance also refers to a number of principles found in CJEU case law concerning the definition of work. Some of the problematic or incorrect references here will be discussed further in section 6.7. This chapter will conclude that the problems with the DMG's approach to the 'genuine and effective' test could lead to the exclusion of many atypical workers, unless they can demonstrate that their work is particularly exceptional.

6.2.3 Worker Status in other Member States

The UK is not the only Member State to have adopted an earnings threshold to determine when EU nationals have worker status. It is therefore useful to consider the MET with reference to the practices of other Member States to establish if it is an outlier or creating unique problems.

It is not uncommon for Member States to take a restrictive approach to applying free movement rights. In Martinsen et al's analysis of how domestic signals can impact front-line decision makers, all three of the Member States examined (Denmark, Austria and France) adopted more limited approaches than the CJEU 'towards EU migrants and their cross-border access to welfare benefits' which were fed through to street-level bureaucrats.²⁶ More specifically on worker status, a comparative report requested by the EU commission revealed that many Member States impose either formal or *de facto* thresholds, requiring that EU nationals meet either a minimum hours of work (Belgium, France, Lichtenstein, Cyprus and Malta), a minimum income (Italy, United Kingdom)

²⁴ See (n 16).

²⁵ DWP (2018) (n 13) [073050].

²⁶ Dorte Sindbjerg Martinsen, Michael Blauberger, Anita Heindlmaier and Jessica Sampson Thierry, 'Implementing European case law at the bureaucratic frontline: How domestic signalling influences the outcomes of EU law' (2018) 97(4) Public Administration 814, 826.

or a mixture of both (Finland, Greece, Netherlands and Poland).²⁷ Many of these thresholds impose higher limits in both hours worked and income (if working at the rate of national minimum wage) than the CJEU case law, which has identified potential genuine and effective work in circumstances of 10-12 hour work per week or even 5.5 hours per week.²⁸ Additionally, many of the rules in Member States would not adequately accommodate those on zero-hours, on-call or fixed term contracts as they often required a level of regular and consistent hours.²⁹ This is a particularly challenging criteria for atypical workers to meet where the very nature of the work is erratic or inconsistent. An atypical worker in a casual or zero-hours contract may work for the same overall hours and receive the same amount of earnings per year as an individual in more regular employment, but may not be found to have had worker status for that whole year if the bulk of economic activity is condensed into a few months. The issue of requiring consistency from atypical work is covered in more detail in chapter 7.³⁰ Overall, it is noticeable that the UK's threshold currently stands as the most demanding, in terms of the earnings required or the hours needed to meet those earnings with national minimum wage, among Member States.³¹

6.3 The intention and representation of the MET

Firstly, it is important to briefly note that the MET was not an isolated reform. It was introduced as part of a series of measures brought in by the coalition government in 2014 to address alleged abuse of free movement by EEA nationals supposedly moving to the UK to access welfare benefits. These were also brought in alongside the broader context of austerity and increased welfare conditionality as part of what the then prime minister David Cameron described as his 'moral mission'.³² This included, for example,

²⁷ Charlotte O'Brien, Eleanor Spaventa, and Joyce De Coninck 'Comparative Report 2015: The concept of worker under Article 45 TFEU and certain non-standard forms of employment' (FreSsco, 2016) 24-25.

²⁸ Case C-53/81 *Levin* (n 16); Case C-444/93 *Megner and Scheffcl* (n 23); Case C-14/09 *Genç* (n 16).

²⁹ O'Brien, Spaventa, and De Coninck (n 27) 25-26.

³⁰ See chapter 7, section 7.2.2 Calculating consistency in inconsistent work.

³¹ O'Brien, Spaventa, and De Coninck (n 27) 25-26.

³² David Cameron, 'Why the Archbishop of Westminster is wrong about welfare' (The Telegraph, 18th February 2014) <<https://www.telegraph.co.uk/news/politics/david-cameron/10646421/David-Cameron-Why-the-Archbishop-of-Westminster-is-wrong-about-welfare.html>> accessed 24 February 2020.

an increase in the use of sanctions, stricter health assessments, the ‘bedroom tax’ and a cap on the total amount of benefits received.

The welfare benefit reforms brought in to specifically impact EEA migrants included preventing jobseekers from accessing Housing Benefit,³³ restricting access to Jobseekers Allowance (JSA), Child Benefit and Child Tax Credit for the first three months of residence³⁴ and introducing a new cut-off for accessing benefits for jobseekers after six months (then reduced to 91 days in November 2014), unless they met the problematic evidence requirements in the ‘genuine prospects of work test’.³⁵ New policies were also introduced which directly impacted EEA nationals’ ability to access welfare such as withdrawing access to interpreters in jobcentres.³⁶

Overall, this package of reforms sought to limit EEA migrants’ and their families’ access to welfare benefits and attracted criticism from a number of commentators concerned about incompatibility with EU law, the impact of the measures on the lives of particularly vulnerable people and the motive of such reforms without evidential basis.³⁷ More of the intention of the MET can be drawn from the specific government press releases.

6.3.1 Domestic signalling

By including the genuine and effective criteria in the second part of the test, the UK’s approach appears, at least on paper, to be compliant with EU law. Yet if the introduction of the MET does not alter the actual test applied to EEA nationals, the purpose of the reform remains elusive, especially if the result is no different from the

³³ Housing Benefit (Habitual Residence) Amendment Regulations 2014, SI 2014/539.

³⁴ The Jobseeker’s Allowance Regulations 1996, SI 1996/20 as amended by the Jobseeker’s Allowance (Habitual Residence) Amendment Regulations 2013, SI 2013/3196, Reg 85A(2); Child Benefit (General) Regulations 2006, SI 2006/223 and the Tax Credits (Residence) Regulations 2003, SI 2003/654 as amended by the Child Benefit (General) and the Tax Credits (Residence) (Amendment) Regulations 2014, SI 2014/1511, Reg 23(5).

³⁵ EEA regulations reg 6(7), 6(8)(b).

³⁶ DWP ‘Further curbs to migrant access to benefits announced’ (April 2014) <<https://www.gov.uk/government/news/further-curbs-to-migrant-access-to-benefits-announced>> accessed 24 February 2020.

³⁷ Charlotte O’Brien, ‘The pillory, the precipice and the slippery slope: the profound effects of the UK’s legal reform programme targeting EU migrants’ (2015) 37(1) *Journal of Social Welfare and Family Law* 111; Martin Williams, ‘Kapow to GPOW: The “Genuine Prospect of Work Test”’ (Child Poverty Action Group, November 2015); Matthew Evans ‘EU migrants, abuse and access to welfare’ (2015) 29 *Journal of Immigration, Asylum and Nationality Law* 273.

previous worker status decisions. The context and announcement of the threshold sheds some light on the reform's purpose to cut migration and welfare. This purpose for the policy matters as it steers the discretion of decision makers.

For example, in an article for the *Financial Times*, titled 'Free movement within Europe needs to be less free', David Cameron argues that the EU needs to introduce qualifications to free movement to prevent vast migrations. He uses the article to introduce the new policies adopted in the UK, including the MET:

*'We are also toughening up the test which migrants who want to claim benefits must undergo. This will include a new [MET]. If they don't pass that test, we will cut off access to benefits...'*³⁸

This suggests that the purpose of the MET is to prohibit certain migrants from claiming benefits. It also suggests that the new threshold will be determinative for deciding worker status, as those who 'don't pass the test' will have their access to benefits 'cut off'.

When the MET was introduced in February 2014, the DWP press release asserted the policy's necessity for reducing migration and benefit claimant numbers and preventing abuse, stating that:

'...in order to help ensure benefits only go to those who are genuinely working a [MET] will be introduced as part of the government's long-term plan to cap welfare and reduce immigration so our economy delivers for people who actively contribute and want to work hard and play by the rules.'

...

*'Currently European Union case law means the definition of a 'worker' is very broad, meaning some people may benefit from this even if, in reality, they do very little work.'*³⁹

Not only does this statement signal the main intentions of the MET as capping welfare and reducing immigration, but it also closely ties the need to earn above the threshold

³⁸ David Cameron, 'Free movement within Europe needs to be less free' (*Financial Times*, 26 November 2013) <<https://www.ft.com/content/add36222-56be-11e3-ab12-00144feabdc0>> last accessed 9 May 2018.

³⁹ DWP 'Minimum Earnings Threshold for EEA migrants introduced' (February 2014) <<https://www.gov.uk/government/news/minimum-earnings-threshold-for-eea-migrants-introduced>> last accessed 9 May 2018.

to whether an EEA migrants work is 'genuine'. By situating the MET as a tool to catch people out who are not genuinely working or who 'do very little work', the DWP is implying that those who do not earn above the threshold are abusing the system. This implication is repeated more plainly in other press releases stating that 'abuse and clear exploitation of the UK's welfare system will not be tolerated' and how the new 'tough' rules were, in the DWP's words, aiming to 'stop people abusing Britain's benefit system' and to 'stop rogue EU benefit claims'.⁴⁰ O'Brien argues that the adoption of accusatory language 'conjugates up the association of threat with EU nationals'.⁴¹ Based on the press coverage and language of the government during the introduction of the MET it seems that the 'only possible, logical reason for introducing the threshold is to reduce the number of people who are defined as workers', and as a result deny them access to welfare benefits.⁴² It is understandable that decision makers may presume, from this signalling, that introduction of a threshold should operate as the entirety of the worker status test.

In a different DWP press release, the future implementation of the MET was said to ensure that EEA migrants 'who claim to be in work or self-employed in order to gain access to a range of benefits... face a more robust test, which includes satisfying a [MET]'.⁴³ This statement could be easily construed as introducing a new test where, among other requirements, EEA nationals must satisfy the MET. O'Brien warns that the presentation of the MET in this way misrepresents the threshold as 'definitive of *genuine* work'.⁴⁴

Clearly stating the intention of the MET is to cut welfare in conjunction with the misrepresentation of the threshold as an overall assessment of genuine and effective work acts as strong domestic and political signals that can limit or steer the discretion of decision makers.⁴⁵ Just as Martinsen et al identified significant signalling for decision

⁴⁰ DWP (April 2014) (n 36).

⁴¹ Charlotte O'Brien, *Unity and Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Bloomsbury, 2017) 119.

⁴² O'Brien (2017) (n 41) 155.

⁴³ DWP (April 2014) (n 36).

⁴⁴ O'Brien (2017) (n 41) 155.

⁴⁵ Martinsen et al (n 26) 816.

makers through negative politicisation of free movement and ‘welfare tourism’ in Denmark, Austria and France,⁴⁶ the government’s assertion of the MET as a tool to stop welfare abuse is likely to trickle down to decision makers. This is even more pertinent in the application of EU rules, where complexity and ambiguity can push decision makers to domestic guidance and signals more.⁴⁷

Additionally, the overall package of restrictions on EEA nationals’ access to welfare, alongside David Cameron’s ‘moral mission’ of cutting welfare more generally,⁴⁸ will no doubt cultivate an increase in salience and intensify these signals to decision makers.⁴⁹

6.3.2 Justifications for reform

The evidence concerning the impact of EU migration to the UK runs counter to the concerns raised in the press announcements for the MET. A report compiled for the EU Commission in 2013 shows that EU nationals in the UK are more likely to be employed and less likely to access welfare benefits than nationals.⁵⁰ The higher employment rate for EU nationals in the UK than UK nationals is also corroborated by evidence from the Migration Observatory.⁵¹ Overall, EU nationals are found to contribute far more to the UK in payment of taxes than what is received in benefits or public services,⁵² while any negative impact on wages is reported as either minimal or non-existent.⁵³ Even at the time the policy changes were made, while there was some

⁴⁶ *ibid* 826.

⁴⁷ *ibid*.

⁴⁸ Cameron (2014) (n 32).

⁴⁹ Martinsen et al (n 26) 816.

⁵⁰ ICF GHK Milieu, ‘A fact finding analysis on the impact on the Member States’ social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence’ (2013).

⁵¹ ‘Among the working-age EU population, 81% were in employment. This compares to 75% among the UK born...’ in Carlos Vargas-Silva and Mariña Fernández-Reino, ‘Briefing: EU Migration to and from the UK’ (The Migration Observatory, September 2019) 7.

⁵² European migrants pay ‘substantially more’ in taxes than they receive in benefits or public services, with total contribution in 2016-17 at £4.7 billion see Migration Advisory Committee ‘EEA migration in the UK: Final report’ (September 2018) 73; Oxford Economics ‘The Fiscal Impact of Immigration on the UK: A report for the Migration Advisory Committee’ (June 2018) 21; Jonathan Wadsworth, Swati Dhingra, Gianmarco Ottaviano and John Van Reenen, ‘Brexit and the Impact of Immigration on the UK’ (Centre for Economic Performance, London School of Economics, 2016) 13.

⁵³ ‘lower-skilled workers face a negative impact while higher-skilled workers benefit, however the magnitude of the impacts are generally small.’ in Migration Advisory Committee (n 52) 2; alternatively low

belief that limiting access to in-work benefits may discourage some migration, the Migration Observatory doubted ‘how significant the effects of such a policy would be on the number of people choosing to migrate.’⁵⁴ Research completed for the EU Commission also found little evidence that ‘the main motivation of EU citizens to migrate and reside in a different Member State is benefit-related as opposed to work or family-related.’⁵⁵ Introducing new policies which aim to cap EU migration to the UK and access to welfare claims appears to lack justification and necessity. It also echoes the lack of evidence to support the four-year brake on in-work benefits featured as part of the, now defunct, 2016 settlement between the UK and EU.⁵⁶

The free movement of workers should allow EEA nationals to engage in other Member States’ labour markets and integrate into their solidarity systems. However, in seeking to reduce the number of EEA nationals who claim welfare benefits, the UK opted to limit the scope of the definition of worker with the risk of falling foul of EU requirements.

6.4 (In)compatibility of the MET with EU Law

The MET’s compatibility with EU law is questionable.⁵⁷ A decision on worker status based entirely on an earnings threshold would not be compatible with EU law. The UK Government insist as the MET includes a general assessment of whether work is ‘genuine and effective’ in its second tier it ‘is compatible with EU law’.⁵⁸ However, the introduction of the policy sparked concern from the Commission, with reports quoting a spokesperson revealing that they intended to scrutinise the new policy closely, stating that ‘a definition of a worker’ which ignored case law and was assessed ‘according to the

wages have been found to be the result of the 2008 recession rather than EU migration in Wadsworth et al (n 52).

⁵⁴ ‘...the number of people whose initial migration decision might be affected by the immediate availability of tax credits is only a small share of the total’ in Madeleine Sumption and William Allen ‘Election 2015 Briefing – Migration and Welfare Benefits’ (Migration Observatory, May 2015).

⁵⁵ ICF GHK Milieu (n 50) 14.

⁵⁶ Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union OJ C691/1 Annex VI; see chapter 3, section 3.4.2 The EU’s sensitivity to free movement concerns.

⁵⁷ O’Brien (2015) (n 37).

⁵⁸ Bruno Waterfield, ‘Earnings threshold for European migrants to get benefits ‘illegal’ under EU law’ (Telegraph, 19 February 2014) <<https://www.telegraph.co.uk/news/uknews/immigration/10648866/Earnings-threshold-for-European-migrants-to-get-benefits-illegal-under-EU-law.html>> accessed 26 February 2020.

amount [a worker] earns is not compatible with EU law'.⁵⁹ Additionally, in May 2020, the Commission launched infringement proceedings against the UK, believing it to be in breach of Directive 2004/38, Article 21 TFEU, Article 45 TFEU and Article 49 TFEU. This includes concern that national legislation 'limits the scope of beneficiaries of EU free movement law in the United Kingdom'.⁶⁰ While the specific details of the infringement are not currently available, the UK's MET may be one of the Commission's concerns as a limitation of the scope of working EU nationals who can benefit from equal treatment in the UK.

Additionally, the CJEU has found that the concept of 'worker' in this context relates to the definition under EU law and not national law and that it would be inappropriate to allow a Member State 'to modify the meaning of the concept of 'migrant worker' and to eliminate at will the protection afforded by the Treaty to certain categories of person'.⁶¹ If applied as conclusive of the workers status test, the UK's earnings threshold would be clearly incompatible with EU law and would result in the exclusion of many low-paid atypical EEA workers from the protections of the free movement regime. Equally, by setting such a high threshold that requires at least over 21 hours a week at minimum wage, many workers who would be expected to have worker status under EU law will be relying on the application of the second tier genuine and effective test. Therefore, the MET's compatibility with EU law can be separated into two key considerations. Firstly, that the threshold must not applied determinatively. Secondly, that the second tier must correctly reflect the breadth and flexibility of the worker definition under EU law.

6.5 What second tier? The determinative threshold

It is vital for compatibility with EU law, and for good administrative decision making, that the threshold is not used to treated as entirely determinative of worker status. The CJEU have been clear that a low level of earnings cannot be the sole basis used to withhold worker status.⁶²

⁵⁹ *ibid.*

⁶⁰ 'May infringements package: key decisions' (European Commission, 14 May 2020) <https://ec.europa.eu/commission/presscorner/detail/en/inf_20_859> 18 September 2020.

⁶¹ Case C-75/63 *Hoekstra* [1964] ECR I-0177.

⁶² Case C-53/81 *Levin* (n 16); Case C-139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECR 1714, para 14.

Street-level bureaucrats, or decisions makers, may seek to simplify the process of decision making to overcome the gap in demands on them and the lack of resources, workforce, time and information.⁶³ Schauer identifies that, for decision makers, ‘more choice is not always better than less’.⁶⁴ To increase efficiency for more open-ended decisions, he argues that it may be ‘highly appealing’ to gravitate towards tools that narrow the factors to be considered.⁶⁵ An earnings threshold may provide this opportunity for decision makers. Additionally, given the domestic signalling detailed above which could influence decision makers into treating the threshold as the conclusive.

It is therefore not entirely surprising that case studies examined for this thesis found multiple examples of the MET being applied as the only tier involved in the consideration of genuine and effective work. In these cases, the second tier ignored entirely with decision makers declaring individuals’ work to be not genuine and effective on the basis that they did not meet the earnings threshold.

Tomas

Tomas began working in a food production company from June 2014. He was working a part-time contract for 10 hours but often worked between 20-24 hours a week. He earned minimum wage which was £5.50 an hour at the time.

In November 2014 he applied for Housing Benefit from Leicester City Council, which was denied as he had not provided enough evidence to show consecutive earnings over three months. He applied again and brought in payslips showing his income for the previous 3 months. While this income fluctuated, it averaged out at £135 a week. His highest income during this period was recorded at £175 and his lowest income during this period was £56. The MET at the time was £153 per week.

⁶³ Anita Heindlmaier, ‘Social Citizenship’ at the Street Level? EU Member State Administrations Setting a Firewall’ (2020) 58(5) *Journal of Common Market Studies* 1252; Michael Lipsky, ‘Toward a Theory of Street-Level Bureaucracy’ (IRP Discussion Paper No. 48–69, Institute for Research on Poverty, 1969).

⁶⁴ Schauer (n 2) 316.

⁶⁵ *ibid.*

The council refused his application again. The reasoning of the decision maker is outlined in the short letter from Leicester City Council which states:

“Unfortunately, your income, although is now consecutive and over three months, does not meet the [MET] Criteria – you are not entitled to Housing Benefit and Local Council Tax Reduction Scheme.”

It does not mention the second tier or any other aspects of Tomas’ work being considered under a genuine and effective test.

This strict application of the MET here meant that, as Tomas’ average earnings fell below the MET, he was not a worker. It did not matter that some of his weekly earnings were over the MET. Nor did any of the other aspects of his work merit consideration. This approach to worker status is highly problematic as it takes an arbitrary and strict reading to an otherwise relatively nuanced and broad EU definition.

While the level of Tomas’ earnings were fluctuating, the hours required to meet these earnings (based on his hourly rate of £5.50) often fell above hours considered by the CJEU as potentially genuine and effective.⁶⁶ Even his lowest earning work was the equivalent of 9 hours on minimum wage at the time. The same approach to the MET can be seen in other local authority decisions including assessing whether self-employment is genuine and effective.

Naomie

Naomie applied for Housing Assistance in October 2016. She is a full-time carer for her mother and has worked as a self-employed housekeeper for three years. This job involves working around 3.5 hours a day, 5 days a week, and is paid £6.50 an hour.

⁶⁶ See chapter 5, section 5.4.2 The CJEU and atypical work; 10 hours in Case C-171/88 *Rinner-Kuhn* (n 23); Case C-444/93 *Megner and Scheffél* (n 23); 5 hours in Case C-14/09 *Genc* (n 16).

Naomie also tried to make ends meet by taking on extra employment. However, she could only find informal and flexible work distributing leaflets due to her care responsibilities and self-employment. She had no official evidence of this income.

Naomie's application applied to her local council requesting Housing Assistance was refused. The decision letter takes account of Naomie's earnings from self-employment, showing between £104 and £125 a week and therefore not meeting the MET.

*"The income you claim to get from your self-employment is below the stipulated [MET] of £155 a week for self-employed persons. **I am therefore of the view** that your employment is not genuine and effective" (emphasis added)*

The decision letter also retrieved evidence from HMRC of Naomie's earnings from her work distributing leaflets. They identified income varying from £429 to £4427 per annum but stated that:

"The income you earn falls below the MET of £153 for National Insurance Contribution."

No further consideration is given to whether Naomie had a right to reside as a worker.

Yet again, Naomie's case illustrates a failure to consider or mention the second tier of the test for both worker and self-employed status. Naomie's combined income from employment and self-employment may have met the threshold, but it is considered separately. The problem of assessing co-existing periods of work separately will be discussed in more detail in chapter 7.

While no consideration is given to the second tier, the decision maker mentions the need for employment to be 'genuine and effective', instead determining that earning below the threshold is conclusive of this concept. Failing to examine the second tier

criteria meant that relevant aspects of Naomie's self-employment are ignored, such as regularity, 3 years of employment and 17.5 hours of work a week.

Laura

Laura has lived in the UK since September 2016. She is a lone parent caring for her 13-year-old daughter who struggles with periods of ill health and has been taken out of school. Laura was taken on a variety of employed and self-employed work but has struggled balancing this with her caring responsibilities for her daughter.

Laura's application for Housing Benefit and Council Tax Reduction in May 2018 was refused by the local Council on account of her not having a right to reside. A mandatory reconsideration was requested by Laura and the decision upheld. The reconsideration decision letter from the Council considered Laura's work, finding that:

'As an employed/ self employed EEA national, you are required to be earning above the [MET]. You have informed us that you returned to work on 27/ 10/ 17, however your average earnings are below the [MET] and there were periods where you did no work at all ...' As a result, you are treated as a Person from Abroad and therefore you have no entitlement to Housing Benefit/ Council Tax support at this time.' (emphasis added)

Shortly after receiving this refusal, Laura faced the threat of a possession order for her house.

This decision is illustrative of local authorities relying on the MET. The decision maker states that to be a worker, an individual is 'required to be earning above the MET', reducing the test to only its first tier. It is notable that this strict application of the MET comes from the first stage of the appeal process (mandatory reconsideration) where it might be expected that an error is corrected.

These three cases are a snapshot of some of the examples found in this research. Out of the total 15 cases of worker status decisions examined for this thesis, 8 included a failure of decision makers to consider or mention the second tier of the test. While this

thesis is unable to make quantitative claims about worker status decisions, it is notable that the most common issue encountered with the MET in this research was the failure to examine an EEA worker's status under the genuine and effective definition. Of the cases received by the AIRE Centre, worker status decisions based entirely on the MET were not an anomaly, nor are these decisions limited to one particular region.⁶⁷ All these instances involved local authority decision makers. O'Brien's research on EU migrants rights in the UK highlighted advisers' experience of worker status tests made at local authority where the second tier is ignored altogether.⁶⁸

Further to the case studies, evidence from a freedom of information request shows that Sandwell Metropolitan Borough Council could identify where worker status was not given to applicants because they failed to meet the MET. This request, identified on a freedom of information request database, was sent in May 2017 and asked Sandwell Metropolitan Borough Council for the number and proportion of Housing Benefit applications that had been rejected based on failing the MET. The response, provided a table setting out the data requested, including a clearly stated proportion of applications refused *due to* them failing to meet the threshold.

Table 6.1: Data from Freedom of Information request to Sandwell Metropolitan Borough Council⁶⁹

<i>Period</i>	<i>Number of claims by EEA nationals</i>	<i>Refused due to [MET]</i>	<i>Percentage</i>
<i>18.02.2015 to 31.03.2016</i>	<i>1855</i>	<i>92</i>	<i>4.95%</i>

⁶⁷ Not all cases showed which local council made the decision. Of the cases recorded involving these decisions local councils applying the test as determinative spanned from inside the London area, the East Midlands, South Yorkshire, Berkshire and the West Midlands.

⁶⁸ Advice workers reported that worker status was often refused without even 'cursory consideration of whether their work was genuine and effective' and that 'anyone earning less than the threshold is automatically refused Housing Benefit' in O'Brien (2017) (n 41) 158.

⁶⁹ Letter from Chris Comely, Benefits and Awards Team Manager at Sandwell Metropolitan Borough Council to Ranjit Bains (26 May 2017)
<https://www.whatdotheyknow.com/request/housing_benefit_minimum_earnings#incoming-984473> accessed 26 February 2020.

<i>01.04.2016 to 31.03.2017</i>	<i>1342</i>	<i>25</i>	<i>1.86%</i>
<i>01.04.2017 to Date</i>	<i>178</i>	<i>3</i>	<i>1.68%</i>

While there it is not possible that this data reflects decisions where the second tier was ignored entirely, there appears to be an issue with local councils opting to view the threshold as a reason why an application would be refused. It is perhaps an indication that the problem could be more systematic than the individual case studies examined.

The fact that this issue was present almost exclusively in local government decisions could reflect some of the constraints on local councils. Firstly, they may lack the level of expertise required for complex right to reside decision making, especially as the DWP had, until recently, utilised a specialist EU decision-making team.⁷⁰ Secondly, local councils in the UK face budgetary and resource pressure stemming from the ‘fetishizations’ of localism alongside with the programme of austerity, which has led to more responsibilities being decentralised to local government than resources.⁷¹ Local authorities may therefore be more likely to rely on shortcuts which can produce quick and binary results.

Should this problem be isolated to local authorities, arbitrary decisions on the MET will result in the withholding of necessary benefits such as Housing Benefit and Council Tax Reduction. While the introduction of Universal Credit (UC) should take some of these decisions away from local councils, the long delay in the roll-out of UC⁷² means that local authority decision practices are still relevant for many. Even after the completion

⁷⁰ O’Brien (2017) (n 41) 215.

⁷¹ Christian Schwab, Geert Bouckaert and Sabine Kuhlmann, ‘Conclusion: Lessons and Advice for Future Local Government in Europe’ Christian Schwab, Geert Bouckaert and Sabine Kuhlmann (eds), *The Future of Local Government in Europe Lessons from Research and Practice in 31 Countries* (Baden-Baden: Nomos, 2017) 101, 103; Vivien Lowndes & Lawrence Pratchett, ‘Local Governance under the Coalition Government: Austerity, Localism and the ‘Big Society’’ (2012) 38(1) *Local Government Studies* 21; David Featherstone Anthony Ince Danny Mackinnon Kendra Strauss Andrew Cumbers, ‘Progressive localism and the construction of political alternatives’ (2012) 37(2) *Transactions of the Institute of British Geographers* 177.

⁷² House of Commons Deb 4 February 2020, Volume 671, Col 175.

of the rollout, decisions on Housing Benefit are unlikely to phase out entirely and decision regarding Council Tax Reduction will remain in the remit of local authorities.

In *RF*, the Upper Tribunal ruled that the MET could be applied determinatively.⁷³ It concerned a refused Housing Benefit application for an EEA worker on the basis that their work was marginal and ancillary *solely because* it did not meet the MET. Judge Jacobs identified that the MET was ‘read as a rule of law’ and the second tier was ignored entirely.⁷⁴ The UT therefore set aside the decision for the First tier Tribunal to rehear. However, the route of this case to the Upper Tribunal showed that this misapplication was replicated through both the administrative and First tier Tribunal appeals.⁷⁵ Ignoring the second tier of the test is clearly not *just* a local authority problem. The Upper Tribunal judgment in *DD*, addressed the inaccuracy of the HMRC guidance, unavailable to the public, used to determine right to reside.⁷⁶ While the case concerns a decision on the genuine prospect of work test, Judge Wright addressed the general inaccuracies of the HMRC guidance, including ‘one particular flaw in the HMRC guidance put before me, earnings below the MET are not decisive.’⁷⁷ The guidance is not available to the public so the exact information provided to decision makers cannot be analysed and the UT were notified that this guidance was being amended in 2019.⁷⁸ However this case shows that HMRC decision makers had, until at least 2019, been applying guidance that had been stating that the threshold was decisive in the finding of worker status.

The case studies provide examples of local authority decision makers abandoning EU case law, instead choosing to give preference to perceived domestic rules. This approach is clearly incompatible with EU law. By failing to recognise the existence of the second tier, work is reduced to a sum of earnings, neglecting the many aspects of work identified in EU law that are relevant to the genuine and effective test. This discredits the value of low-income work and fails to recognise the disparity between the

⁷³ *RF v London Borough of Lambeth* [2019] UKUT 52 (AAC).

⁷⁴ *ibid* [4].

⁷⁵ *ibid* [5].

⁷⁶ *DD v HMRC and SSWP (CB)* [2020] UKUT 66 (AAC).

⁷⁷ *ibid* [26].

⁷⁸ *ibid* [24].

value of work and the income attached to it. It is an exclusionary approach that will likely impact vulnerable groups overrepresented in low paid atypical work.⁷⁹ Workers who expect to rely on the second tier instead find that their work is automatically classified as marginal and ancillary. Rather than workers, they are treated as economically inactive and subsequently as a burden on the Member State, becoming disentitled to welfare benefits.

6.6 The pervasiveness of earnings in the second tier

The EU concept of worker, while neither precise nor adequately inclusive of some characteristics common in atypical employment, is broadly available to all types of work (provided it is genuine and effective).⁸⁰ Additionally, there is nothing to prevent a Member State from adopting more inclusive rules. At the very least, the UK guidance must ensure worker status decisions are reflect the broad approach adopted by EU law.

Martinsen et al's research on applying EU rules in Member States found that when decision makers must consider 'rather opaque and ambiguous rules, they turn to their domestic superiors for instructions'.⁸¹ Additionally, a FreSsco report comparing Member State approaches to non-standard work found that, while national rules did not often overtly ignore EU law, in practice it was the national restrictions that were decisive.⁸² Therefore national guidance for decision makers plays a crucial role in directing the process of applying the worker test and decision makers are unlikely to turn to other resources on the EU legal framework to fill any gaps or correct mistakes.

6.6.1 Genuine and 'exceptional' part-time work

Crucially, adopting an earnings threshold as the first-step of worker status tests could steer decision makers. O'Brien argues that setting an income threshold, especially one that is introduced in a package to prevent abuse of the welfare system, can inevitably create 'a presumption of marginality for those who fall below the threshold'⁸³. This establishes a higher standard of proof for EEA workers who must now evidence that

⁷⁹ See chapter 7, section 7.4 Worker status and the diverse workforce.

⁸⁰ See chapter 5, section 5.3 EU law: when work = work.

⁸¹ Martinsen et al (n 26) 826.

⁸² O'Brien, Spaventa, and De Coninck (n 27) 8.

⁸³ O'Brien (2017) (n 41) 156.

aspects of their work are compelling enough to offset the fact that they have not earned enough to meet the MET.⁸⁴ This is a different test to that required by EU law, that simply requests that EEA workers show that their work is ‘not on such a small scale as to be considered marginal and ancillary’, not to compensate for failing to meet the highest earnings threshold.

For example, the guidance steers decision makers towards presumption of marginality is in its treatment of part-time or low-paid work. Decision makers are told that ‘work below the [MET] that is part time or low paid is not necessarily always marginal and ancillary’.⁸⁵ The suggestion that part-time or low paid work ‘*is not necessarily always* marginal and ancillary’ could easily be replaced with ‘*is usually* marginal and ancillary’, ‘*frequently* marginal and ancillary’ or ‘*is almost always* marginal and ancillary’. O’Brien reminds us that ‘[a]ny language pertaining to probability is important in guiding decision makers...’;⁸⁶ as it ‘operates from an assumption that the reader would be inclined to treat part time work as ‘necessarily always’ marginal’.⁸⁷ This provides a strong steer for decisions makers to start from a position of marginality when considering work that is part-time or low-paid leaving genuine and effective work of this kind to be the exception.

The suggestion that part-time or low paid work must be the exception to be genuine and effective ignores the judgments of the CJEU which have sought to ensure that part-time work is included in the concept of a ‘worker’ as ‘an effective means of improving the [...] living conditions’ of Union citizens’.⁸⁸ The CJEU has also handed down rulings on the non-conclusive role that earnings play in examining genuine and effective work, finding that low levels of remuneration⁸⁹ cannot have ‘any consequence’ in regard to worker status,⁹⁰ even when ‘their remuneration is largely provided by subsidies from

⁸⁴ O’Brien (2017) (n 41) 156.

⁸⁵ DWP (2018) (n 13) [073052].

⁸⁶ O’Brien (2015) (n 37) 119.

⁸⁷ O’Brien (2017) (n 41) 156.

⁸⁸ Case C-53/81 *Levin* (n 16) para 15.

⁸⁹ Case C-188/00 *Kurz v Land Baden-Württemberg* [2002] ECR I-10691, para 33.

⁹⁰ *ibid* para 32.

public funds.’⁹¹ Additionally, part-time and limited hours does not prevent work from being ‘genuine and effective’.⁹² By emphasising that part-time and low paid work is likely to be marginal and ancillary, the UK guidance is in conflict with these judgements.

6.6.2 Re-examination of earnings

The pertinence of income is reiterated in the guidance by requiring a re-examination of earnings in the second tier. Repeating aspects already considered under the first tier of the test, or features that are a proxy for earnings such as hours, re-asserts its importance. Considering the level of earnings a second time, immediately after a EEA worker has been found to fail the MET, could negatively steer decision maker discretion, especially when the guidance fails to indicate the level of earnings relevant to the second tier, which, if provided, could benefit those who only just miss the threshold. At worst, this reassessment could be conflated to mean that anything below the MET is, in fact, an indication that work is marginal and ancillary. And at best, it may encourage decision makers to give further significance to their initial finding under the MET, particularly when balanced against other factors that indicate genuine and effective work.

Alongside earnings, hours are to be assessed in the second tier of the test. Those who have failed to meet the threshold, unless earning less than NMW, will usually be working less than 21 hours a week. The concern here is that hours may be treated as a proxy for earnings. The assessment of hours could steer decision makers into assuming that working less than the hours necessary for the threshold at a minimum wage is consequently a sign of marginal and ancillary work.

Stephan

In August 2015 Stephan made an application for State Pension Credit after he had become homeless. The application was refused on the grounds that he did not have a right to reside as a self-employed person. Stephan was a 72 year old German national who had lived in the UK with his wife since at least February 2014. At this time he began self-employment as a Big Issue seller. He reported working an average of 20-25 hours a week and earning around £23 a week.

⁹¹ Case C-344/87 *Betray* (n 16) para 15.

⁹² Case C-3/90 *Bernini v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1071, para 16.

In assessing whether Stephan's self-employment was genuine and effective, the decision maker only referred to Stephan's earnings as reason that he had no right to reside as a self-employed person.

"your work as a Big Issue seller was on such a small scale, and your earnings were on average £23.12 per week for 25 hours work, that your earnings were considered as marginal and ancillary and therefore were not considered to be genuine and effective employment".

With the help of the AIRE Centre, Stephan requested a mandatory reconsideration arguing that full consideration of his work should be taken account of. The reconsideration decision letter upheld the original decision. Again, his earnings were the only cited reason for the finding that his work was marginal and ancillary:

"Your work is not considered to be genuine and effective because your employment yields an income on such a small scale as to be regarded as purely marginal and ancillary... Your employment yields an income lower than the minimum required for subsistence. In the present context this would not be considered as "effective" employment..."

This decision was appealed and the First tier Tribunal upheld the finding that Stephan's self-employment was not genuine and effective.

The decision makers, for both the initial decision and reconsideration, explicitly reference Stephan's earnings as marginal and ancillary, rather than his work as a whole. The hours, regularity and length of time in self-employment are all elements that could have shown genuine and effective work. Instead the other criteria were almost ignored entirely, with hours mentioned merely as exemplary of how low his earnings were. Stephan's earnings may have been so low that even a correct application of EU law could result in a finding that his work was marginal and ancillary. Nevertheless, failing to consider and balance aspects beyond income reduces the second tier of the test to a duplication of the MET.

The decision maker in Stephan's case also incorrectly applies EU concepts. The decision maker highlights that Stephan's earnings are *'lower than the minimum required for*

subsistence’, despite the judgments in *Levin and Kempf*, which directly recognised that this did not preclude work from being genuine and effective.⁹³ Additionally, the decision maker in this case relied on the everyday understandings of the relevant terms rather than their legal meaning. An example of this is when Stephan’s self-employment is found to be ‘genuine’ but his income means that the employment is not ‘effective’. This incorrect interpretation of the EU test relies on a general definition and understanding of what work is ‘effective’; in this case whether it yields enough income. It also highlights how unhelpful broad terms can be in a worker definition without clear guidance. The MR decision maker misquotes EU law, switching the terms so that ‘income’, rather than ‘activity’, cannot be ‘on such a small scale as to be regarded as purely marginal and ancillary’, perhaps revealing some of the invasiveness of the MET into the EU worker test.⁹⁴ These issues closely reflect findings in O’Brien’s research on EU rights in the UK, where confusion and steers from the guidance have generated decisions where work was declared ‘genuine but not effective’ and decision makers resorted to dictionary definitions to apply EU concepts like ‘marginal and ancillary’.⁹⁵

Worker status cannot be withheld based on low earnings alone. However, the guidance encourages decision makers to view part-time work, low earnings, and potentially any earnings under the MET, as proof of marginality. With this steer, extra hurdles are put in place for part-time and low-earning workers who must seek to offset this finding and demonstrate that *despite* their earnings their work is still genuine and effective. This is further exacerbated by the re-assessment of earnings, especially when no further guidance is provided on how this is to be distinguished from the MET. This approach to part-time and low paid work is incompatible with the approach taken in EU law and risks decisions, like Stephan’s, where income alone is prioritised. For many part-time and low-earning workers, this second tier is reduced to a performative step, with the true test ending at the earnings threshold.

⁹³ Case C-53/81 *Levin* (n 16) para 15-18; Case C-139/85 *Kempf* (n 62) para 14.

⁹⁴ This also ignores the CJEU ruling that remuneration does not need to be monetary see Case C-196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR I-6159, para 11-14.

⁹⁵ O’Brien (2017) (n 41) 156-160.

6.7 Incorrect considerations and misleading guidance

Potential concerns about compatibility with EU law can also stem from some worrying examples in the guidance of misleading or incorrect interpretations of EU law. Even where aspects beyond income are examined in the second tier of the worker test, decision makers are misguided by the DMG to take restrictive approaches to the worker test.

Martinsen et al found that some more detailed matters discussed in CJEU case law do not get a lot of attention from decision makers and ‘consequently remain obscure and rather remote from the day-to-day application.’⁹⁶ With this in mind, the DMG should aim to make elements of the genuine and effective test discussed in CJEU case law as clear and accessible as possible. This section will explore the confusing or misleading explanations and the incorrect assertions that can be found in the DMG.

6.7.1 Earnings to meet subsistence

EU case law is clear that neither earnings below a minimum level of subsistence⁹⁷ nor seeking to supplement earnings with public funds such as welfare benefits⁹⁸ preclude an individual from having worker status. While the DMG mentions both principles, they are not always clear or followed by decision makers.

Regarding the irrelevance of whether the workers earnings meet a minimum level of subsistence, the DMG states that:

‘as long as the work is ‘genuine and effective’ it is irrelevant whether it yields an income lower than the amount considered the minimum required for subsistence in the host Member State’.⁹⁹

This statement could be viewed as technically correct, as particularly low earnings could form part of a justification for a decision that work is marginal and ancillary. However, the assertion that the level of earnings are only irrelevant ‘*as long as* the work is genuine and effective’ could lead to confusion over whether there is a point at which this factor

⁹⁶ Martinsen et al (n 26) 827.

⁹⁷ Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg* 900 [2009] ECR I-4585, para 28, Case C-53/81 *Levin* (n 16) paras 15-16.

⁹⁸ Case C-139/85 *Kempf* (n 62) para 14.

⁹⁹ DWP (2018) (n 13) [073043].

is relevant to a worker status determination. On the other hand, guidance on the supplementing remuneration from work with public funds is much clearer with the guidance opting to closely reflect the language in the *Kempf* judgment.¹⁰⁰ Nevertheless, even the matter of access to public funds has been misapplied by decision makers. O'Brien's research reported decision makers 'suggesting that work can only be genuine and effective where a worker poses no 'burden on the state'.¹⁰¹ Additionally, a case from my own research saw a decision maker use this as a relevant factor for consideration when assessing whether self-employment was genuine and effective.

Stephan

The details of this case are discussed in section 6.3.2.

The MR decision letter of Stephan's refused Pension Credit refers to worker and self-employed status as requiring enough income to support himself and his family. The decision maker says:

"When looking at a person's self-employment, the Decision Maker has to determine if the work is genuine and effective... i.e. that the work is active enough to support you/your wife and not low paid, with slight earnings."

The decision letter also cites a repealed residence directive (replaced by Directive 2004/38) suggesting that it requires work to earn enough to not be a burden on a Member State, when this requirement would have only come into effect if Stephan was relying on his rights as a self-sufficient person.

"Although you are registered as self-employed and may be genuine, Directive 90/364/EEC states that Member States can require of nationals of other states who wish to reside within their territory that they have sufficient resources to avoid becoming a burden on their social assistance system... Your employment yields an income lower than the minimum required for subsistence"

¹⁰⁰ *ibid*; Case C-139/85 *Kempf* (n 62) para 14.

¹⁰¹ O'Brien (2017) (n 41) 158.

When this case was appealed to the first tier tribunal, the Judge corrected the mistake by the DWP decision letter:

“[12] [Stephan] did not have to show that his self-employment was sufficient to meet all of his needs but he does have to show that it is effective...”

In Stephan’s case, the requirement for him to earn enough to support himself and his family and to not be a burden on the state are incorrect applications of EU law. While the tribunal decision corrected these mistakes, albeit still finding the work to be marginal and ancillary, it took until the point of appeal for this correction to be made. This will not be an option for many EEA nationals, especially where they lack language skills, legal literacy, do not have the financial means or access to free advice or support to make an appeal. The more socially excluded an EU national is, the further excluded they may be from their rights, particularly if they require a tribunal to enforce them.

6.7.2 Strict interpretation of remuneration

Another potential issue in the DMG is its unclear treatment of remuneration. The guidance states that ‘a worker must receive remuneration’ and this is determined as economic in nature and therefore a decision maker should not consider worker status when looking at an EEA nationals delivering ‘unpaid voluntary work’.¹⁰² This contradicts the decisions of the CJEU that, as discussed in chapter 5, found that remuneration could include material needs even if they received no pay.¹⁰³ This matter is given some clarity in the examples given in the DMG. One example describes an EEA national receiving low pay and free board who was found to be a worker and another who had done unpaid charity work who was found to not meet the requirements for worker status.¹⁰⁴ While this goes some way to clarify the difference, it would be prudent if the guidance could include the specific recognition that remuneration of any value could be considered in the decision of genuine and effective work. The current

¹⁰² DWP (2018) (n 13) [073043].

¹⁰³ Case C-196/87 *Steymann* (n 94) para 11-13, See chapter 5, section 5.4.2 The CJEU and atypical work.

¹⁰⁴ DWP (2018) (n 13) [073052].

guidance risks decision makers treating all work that does not receive a traditional income as marginal and ancillary.

6.7.3 Presumptions and Speculations

The DMG also requires decision makers to make subjective findings on aspects of EEA nationals' motivation for seeking employment and of their physical capacity to fulfil the requirements of an employment. Neither of these considerations are grounded in EU law and both require an element of inappropriate guess work from the decision makers.

Motivation for work

The CJEU have been clear that the motives of an EU national seeking work 'are of no account and must not be taken into consideration' instead the issue is simply whether they perform work that is genuine and effective.¹⁰⁵

However, a number of national courts in Member States, including the UK, have shown a willingness to consider perceived intention of taking employment with fewer hours as a way to access welfare benefits.¹⁰⁶ The UK Court of Appeal has interpreted EU law on motivation of seeking employment as *relevant*, but only when determining whether an EEA national is genuinely pursuing activity as an employed person worker.¹⁰⁷ But once this has been established, motivation for seeking employment 'is of no relevance' to the genuine and effective test.¹⁰⁸ The 2015 FreSso report warns that discrediting the genuineness of work in instances where there is a perceived ulterior motive for work 'does not have a sound basis in EU law.'¹⁰⁹ Adopting motivation as a relevant factor to any part of the test risks worker status being refused due to what is *perceived* to be the EU nationals' motives to work in a Member State, even when they are factually performing work.

¹⁰⁵ Case C-53/81 *Levin* (n 16) para 22; Case C-46/12 *L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte* EU:C:2013:97 para 47; Motive for migration is also considered immaterial see Case C-109/01 *SSHD v Akrich* [2003] ECR I-9607, para 55; Case C-542/09 *Commission v Netherlands* EU:C:2012:346, para. 68; Case C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-2617 para. 21.

¹⁰⁶ O'Brien, Spaventa, and De Coninck (n 27) 9.

¹⁰⁷ *MDB (Italy) v SSHD* [2012] EWCA Civ 1015, [61-65].

¹⁰⁸ *ibid.*

¹⁰⁹ O'Brien, Spaventa, and De Coninck (n 27) 66.

Stephan

In the arguments presented by the DWP in Stephan's appeal, they claimed that during a telephone conversation to the Department, Stephan had asserted that a judge told him that selling the Big Issue he would be entitled to Pension Credit. The DWP's representative argued that:

"Such an assertion would confirm that [Stephan] took up his self-employment solely for the purpose of accessing social assistance benefits in the UK and therefore, his work is not genuine".

Stephan received advice and support from the AIRE Centre for this appeal which argued that this was factually inaccurate. Pointing to the MR decision letter where it was described how Stephan was advised by a Judge (from an appeal in a previous benefits application) to keep records of his self-employment to evidence his right to access benefits in the future, not to take up self-employment. This issue was not discussed in the tribunal judgment.

Stephan's case illustrates some of the risks of permitting an assessment that relies on speculation, assumptions and perceived intention. This could be especially problematic where signals from national government indicate that action needs to be taken to stop 'rogue EU benefit claims'.¹¹⁰

There is an additional risk that the DMG's approach to the motivation for seeking work fails to clearly make the distinction of when motivation is irrelevant. The DMG instructs decision makers that:

'the motives which have prompted the worker to work in another Member State are irrelevant, provided the work is genuine and effective'.¹¹¹

This approach to motive could confuse decision makers trying to assess worker status. Firstly, stating that motivation is only irrelevant 'provided the work is genuine and

¹¹⁰ DWP (April 2014) (n 36).

¹¹¹ DWP (2018) (n 13) [073043].

effective’ could be construed as meaning it is relevant to the genuine and effective test. Secondly, the guidance, just one page later, instructs decision makers to ‘look at all the circumstances including the person’s primary motivation in taking up employment’ when considering ‘whether the claimant is genuinely exercising their EU rights as a “worker”’.¹¹² While the guidance correctly applies the interpretation of the UK Court of Appeal,¹¹³ this wording has the potential to cause confusion for decision makers who are instructed to consider motives when deciding if an EEA national is *genuinely* exercising their rights as a worker but not consider them in relation to their determination on whether the work is *genuine* and effective.

Physical Capacity

The consideration of physical capacity is also offered as a relevant factor when deciding whether an EEA national has been a worker. An example provided in the DMG, in which a worker’s contract is terminated after two weeks because health problems prevented her from being able to continue in the post, states that:

‘a claimant’s physical incapacity to do the work she had undertaken and the fact that she had been dismissed from it after a short period were relevant to the issue of whether the work was genuine and effective.’¹¹⁴

This assertion is based on just ‘one judgment of a Social Security commissioner in 2007’, not a CJEU judgment and ‘invites speculative retrospective guesswork about physical capacity and job performance’ while not requiring the review of expert evidence or occupational health and reasonable adjustment duties.¹¹⁵ This runs counter to the goals pursued by the Charter of Fundamental Rights which recognises the rights of persons with disabilities to be supported in integrating with social, occupational and community life.¹¹⁶ O’Brien also describes this as a ‘too disabled’ criterion¹¹⁷ which can

¹¹² DWP (2018) (n 13) [073047] and DWP ‘JSA(IB) –Right to Reside – establishing whether an EEA National is/was a “worker” or a “self-employed person”’ (2014, Memo DMG 1/14) [11-12].

¹¹³ *MDB (Italy)* (n 107) [61-65].

¹¹⁴ DWP (2018) (n 13) [073043].

¹¹⁵ O’Brien (2015) (n 37) 120.

¹¹⁶ Charter of Fundamental Rights of the European Union (2012/C 326/02) art 26.

¹¹⁷ O’Brien (2015) (n 37) 119.

be expected to have an adverse impact on EEA workers with disabilities where their work may be considered marginal and ancillary due to a presumed physical incapacity.

These incorrect interpretations and confusing approaches are often incompatible with CJEU case law and can result in adverse decisions where a more restrictive approach is taken and worker status is withheld. The second tier should constitute a catch-all for those unable to meet the threshold, providing their work is genuine and effective.

However, characteristics of atypical work are also likely to be caught up in the elements of this second tier that are incompatible with CJEU case. For example, atypical workers are more likely to earn less than the minimum subsistence levels, have a lower level of earnings that may attract accusations of a presumed motive for employment and workers with limits to their physical capacity are overrepresented in the atypical labour market.¹¹⁸

6.8 Summary

This chapter has concluded that the adjustment to defining an EU worker, through the introduction of the MET, could and has shifted decision makers to take a more restrictive approach than is compatible with EU law.

The first issue addressed has been the tendency for local authority decision makers to apply the MET as entirely determinative of worker status. This is the clearest example of incompatibility with EU law and means that workers who earn under the threshold, sometimes marginally so, are at risk of being automatically denied access to benefits, without any consideration of the genuine and effective criteria.

Without the thorough and accurate application of the second tier, the UK's approach to worker status could also be deemed incompatible with EU law. The guidance provided to decision makers on assessing whether work is genuine and effective under the second tier is misleading and sometimes deliberately contrary to EU law. This chapter has found that the overemphasis of earnings in the DMG steer many decision makers into starting from a position of marginality when assessing work below the threshold. And misleading and incorrect guidance can encourage decision makers to weigh up irrelevant and inappropriate considerations, sometimes encouraging speculation, to detriment of low-earning atypical workers. These issues effectively puts an extra burden on atypical workers who must prove that their work is genuine and effective *despite* their low

¹¹⁸ See chapter 4, section 4.5 A brief equality impact assessment.

earnings. They may also have to directly contest any consideration given to irrelevant criteria. The guidance and decisions analysed in this chapter suggest that atypical work may have to meet a particularly high standard to be treated as ‘genuine and effective’.

For many workers the second tier of the test only exists in theory, as the true test ends at the point they fail to meet the MET. In which case, the worker test in the UK is one that is based on a flawed and restrictive earnings threshold that excludes and discriminates against workers who are not high earners or able to take on a full-time and permanent position. As examples from this chapter have shown, the UK’s approach to worker status could exclude a considerable variety of workers.

The concerns raised also reflect a larger issue with the EU definition of work and the free movement rights of all EU citizens. Without further guidance and clarity around the outer edges of the definition, many EU citizens who are working will struggle to access their rights. As previous chapters have shown, without worker status, many EU nationals will be relying on the inadequate protection of rights for EU citizens. The exclusion of large groups of low paid workers therefore creates a substantial barrier to them being able to enjoy their free movement rights instead, treating the higher earning workers as more ‘deserving’ of these freedoms.

A worker definition which, in practice, excludes many atypical workers will likely have a discriminatory impact on a growing section of the labour market that is particularly occupied by lone parents, carers, disabled workers and young workers. Chapter 7 will therefore look to additional case studies to examine whether atypical aspects of work and personal circumstances are accommodated in the UK’s worker status test

Chapter 7: Inequality squared: How the MET compounds discrimination

7.1 Introduction

The European labour market is becoming more diverse, in terms of both work and workers.¹ Whether the definition of ‘genuine and effective’ work includes a variety of working situations is more relevant to a growing number of EU citizens. To ensure that free movement rights and protections are not withheld from the atypical workforce, the definition of work must reflect these diversities.

The UK’s introduction of the minimum earnings threshold (MET) into the decision making process can limit the discretion of decision makers and risks arbitrary outcomes that do not properly reflect the complexities and intricacies of work and individual circumstances.² This approach becomes particularly problematic as the CJEU has ruled that worker status must not be ‘interpreted restrictively’³ by Member States or modified to the point of ‘eliminat[ing] at will the protection afforded by the Treaty to certain categories of person’.⁴ Where a restrictive approach is adopted, those on the ‘fringes’ of the definition of work, atypical workers and those facing barriers to standard employment, are most likely to face exclusion from free movement and equal treatment rights.

This chapter contributes to commentary on the adequacy of the EU concept of worker and its national implementation, focussing on the specific issues of the UK’s approach in light of the changing labour market. While chapter 6 focussed on the incompatibility of the worker test in the UK as it is written, this chapter looks at some of the more hidden discriminatory impacts either due to omissions or inadequate detail in the EU concept of work or the UK guidance. This chapter therefore contributes to some of the existing analysis and concerns about the worker test in the EU and the UK.⁵ The

¹ See Chapter 4: ‘What a way to take a living’: The Rise and Risks of the Atypical Labour Market.

² Anders Molander, *Discretion in the Welfare State: Social Rights and Professional Judgment* (Routledge, 2016) 12.

³ Case C-3/90 *Bernini v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1071, para 1.

⁴ Case C-75/63 *Hoekstra* [1964] ECR I-0177.

⁵ Charlotte O’Brien, *Unity and Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Bloomsbury, 2017); Niamh Nic Shuibhne, ‘Reconnecting free movement of workers and equal treatment in an unequal Europe’ (2018) 43(4) *European Law Review* 477; Herwig Verschueren, ‘Being Economically

empirical data presented offers a fresh perspective on the specific elements of the UK's worker test and how it is applied by decision makers to irregular and precarious employment. The rigidity with which the test has been applied to a range of already disadvantaged demographics is also highlighted. The analysis in this chapter continues to address research question 6, which asks: What does the UK's MET show about the availability of free movement and equal treatment rights in the changing labour market? The way this test is applied in the UK, while highlighting problems with the EU definition itself, also provides a concerning example of how the broad and imprecise definition of work can be filtered down through the interpretation of Member States and the tendencies of street-level decision makers in a way that detaches a growing number of atypical workers from free movement rights.

The first part of this chapter focuses primarily on the ways the worker test fail to reflect the diversity of work arrangements. Section 7.2 will look at the level and calculation of the MET and section 7.3 will show how the second tier may can be interpreted restrictively for atypical workers. The second part of the chapter looks at the diversity of workers in the labour market and how the construction of the worker test leaves insufficient room for consideration of the personal circumstances of workers and may lead to their exclusion. Section 7.4 will consider the impact of pushing the same expectation of 'genuine and effective' work on all workers, ignoring their personal circumstances. Section 7.5 will then focus on the particularly difficult and contradictory situation of the provision of unpaid care not being treated as economic activity, even when receiving Carer's Allowance.

7.2 Earnings thresholds in a diverse labour market

As the MET plays a key role in determining worker status in the UK, and is sometimes the only aspect that decision makers consider,⁶ the level at which it is set and the way it is calculated must be closely inspected to determine potentially exclusionary impacts. This section will therefore look closely at the level of the earnings threshold and how it is specifically calculated to highlight how this results in the exclusion of many atypical

Active: How it Still Matters' in Herwig Verschueren (ed.) *Residence, Employment and Social Rights of Mobile Persons: On how EU Law defines where they belong* (Intersentia, 2016) 187; Charlotte O'Brien, 'Social blind spots and monocular policy making: The ECJ's migrant worker model' (2009) 46(4) *Common Market Law Review* 1107; Stefano Giubboni 'Being a worker in EU law' (2018) 9(3) *European Labour Law Journal* 223.

⁶ See chapter 6, section 6.5 What second tier? The determinative threshold.

workers. It will then address examples captured in the empirical evidence which demonstrate how decision makers can choose to approach the second tier of the test in a way that disadvantages atypical workers.

7.2.1 Setting a steep and restrictive threshold

As discussed in chapter 6, the compatibility of the MET with EU law hinges on its conception as a streamlining tool to improve efficiency in decision making and not, as the UK's own press releases allude to, an exclusionary and definitive device.⁷ Where a threshold is adopted with efficiency in mind, the level of earnings required should closely reflect the flexible and broad approach of the EU. More generally, the Commission has highlighted its concerns of the use of 'income and time thresholds...' in national welfare systems, as they may result in '...an unduly high obstacle to access social protection for some groups of non-standard workers and for the self-employed.'⁸ Setting any kind of earnings threshold will disproportionately impact atypical workers who are more likely to have lower earnings than those in more typical employment.⁹

By adopting a threshold that is too high, the UK pushes many atypical workers into the second tier where they face higher levels of scrutiny and an increased burden to offset a presumption of marginality.¹⁰

The current threshold requires those earning minimum wage to work for at least 21 hours a week consistently for over 3 months. This sets the benchmark of hours for low earners above the average for part-time workers in the UK (16.1 hours).¹¹ It is also far beyond the suggested hours that may be 'genuine and effective' in the eyes of the CJEU;

⁷ DWP 'Minimum Earnings Threshold for EEA migrants introduced' (February 2014) <<https://www.gov.uk/government/news/minimum-earnings-threshold-for-eea-migrants-introduced>> last accessed 9 May 2018.

⁸ Commission, 'Proposal for a Council Recommendation on access to social protection for workers and the self-employed' COM (2018) 0132 final.

⁹ See chapter 4, section 4.4.2 Pay penalties; Stephen Clarke and Nye Cominetti, 'Setting the record straight: How record employment has changed the UK' (Resolution Foundation, January 2019) 52.

¹⁰ See chapter 6, section 6.6.1 Genuine and 'exceptional' part-time work

¹¹ Debra Leaker, 'Average actual weekly hours of work for part-time workers (seasonally adjusted).' (Office for National Statistics, 17 March 2020) <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/time-series/ybvb>> last accessed 28 March 2020.

where part-time work of around 10 hours per week,¹² and even 5.5 hours,¹³ were not prevented from constituting ‘genuine and effective’ employment. Requiring those earning the minimum wage to work over double the amount suggested in CJEU case law is an indication that the threshold is set at an unreasonable level. The 21-hour calculation above can also be considered a ‘best-case scenario’ as gig and self-employed workers’ earnings do not correlate to hours worked.

Marie

Marie has lived in the UK since 2008. After ill health meant she had to leave her job in 2014, she tried to find new flexible employment to ease back into work. She began working as a leaflet distributor and was paid £40 for every 1000 leaflets distributed. She reported working around 5 hours a day for 6 days a week and has evidence of earnings for the past 3 months that fall below the MET.

In June 2015, Marie was once again signed off from work due to ill health. She applied for ESA and this was refused as she was deemed to not meet the MET. In turn this triggered the cancelling of the Housing Benefits and working tax credits she had been receiving.

Someone working as many hours as Marie, who is earning NMW, would meet the MET automatically. Whereas workers who require more flexible arrangements and take on work where pay is not calculated at an hourly rate, will find meeting the earnings threshold particularly difficult. Already disadvantaged demographics are overrepresented among those in work that is not paid per hour,¹⁴ including migrant workers.¹⁵ Setting an earnings threshold can result in the indirect discrimination of these

¹² See chapter 5, section 5.4 The inclusion of non-traditional work, Case C-53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR I-1035.

¹³ Should other aspects of the employment suggest it is genuine and effective (Case C-14/09 *Genc v Land Berlin* [2010] ECR I-0931).

¹⁴ See section 7.4.2 Universal Credit and the contradictory conditionality of the worker test

¹⁵ Foreign-born workers make up over 50% of workers who rely on platform work as their main economic activity in Joint Research Centre ‘The Changing Nature of Work: and skills in the digital age’ (Publications Office of the European Union, 2019) 62.

groups who may have to work far more than the 21 hours calculated above to each the threshold.

The same is true for undeclared or cash-in-hand work. The Upper Tribunal (UT) case of *JA* ruled that worker status under EU law is an economic status, not a legal one.¹⁶ The fact that the worker in question was receiving payment in cash and did not pay taxes or National Insurance contributions as a result did not preclude them from obtaining worker status.¹⁷ While worker status should not be withheld from those who are in undeclared work, they may not be earning the national minimum hourly rate and therefore may have to work considerably more hours to meet the threshold. They may also struggle to meet some of the evidentiary requirements to calculate their average earnings over three months. Workers in this situation may include victims of exploitation and trafficking and so the measurement of ‘genuine and effective’ work by a level of earnings could result in access to welfare benefits or permanent residence being withheld on the grounds that they have been exploited.¹⁸

The UK’s national minimum wage also enables employers to pay younger workers less. As can be seen in Table 7.1, this can result in the requirement for younger EEA nationals to work more hours than the already problematic 21-hour requirement of the threshold.

Table 7.1: Number of hours required by different age groups on minimum wage to meet the MET

Age	National minimum wage (2020/21)	Hours required to meet MET £183 (2020/21)
25 and over	£8.72	21
21-24	£8.20	22.3
18-20	£6.45	28.4

¹⁶ The UT emphasized that the factual situation of the economic relationship, and not the legality, controls whether someone is a worker under EU law in *JA v. SSWP* [2012] UKUT 122 (AAC).

¹⁷ *ibid.*

¹⁸ See section 7.4.3 for more difficulties faced by victims of trafficking.

Under 18	£4.55	40
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Younger workers are overrepresented in several forms of atypical work.¹⁹ Additionally, around 40% of EEA nationals recorded as living in the UK in 2015 were below 30.²⁰ Any EEA migrant workers below 25 and earning national minimum wage will therefore be required to work more hours to be able to meet the threshold set by the UK. The combination of a high earnings threshold and the UK's tiered approach to minimum wage places further hurdles in front of young EEA workers to access their rights. As a result, younger EEA workers may not have the same access to equal treatment rights as workers over 25.

7.2.2 Calculating consistency in inconsistent work

The MET is also calculated based on average earnings extracted from the immediate previous three months.²¹ This can disproportionately affect workers in casual or zero-hour contracts, gig work or temporary contracts whose earnings may fluctuate over time. The MET is applied strictly, meaning that atypical workers cannot rely on averages over a long period of time to meet the threshold, nor can earnings over the threshold in one month be carried over to make up for quieter months. Even if one month shows earnings well beyond the threshold, subsequent monthly earnings which fall below will result in a failure to meet the threshold.

There are two potential issues here, firstly that earnings can differ from week-to-week for many casual workers and secondly, the requirement to show income for three months.

¹⁹ See chapter 4 Section 4.5.3 Young workers; For Europe see Andrea Broughton, Martha Green, Catherine Rickard and Sam Swift 'Precarious employment in Europe part 1: patterns, trends and policy strategy' (European Parliament Committee on Employment and Social Affairs, July 2016) 35; For the UK see Ann Berrington, Peter Tammes, Steven Roberts, Teresa McGowan and Genna West, 'Measuring Economic Precarity among UK Youth during the Recession' (University of Southampton, ESRC Centre for Population Change Briefing Paper, 2014).

²⁰ About 40% of all EEA citizens living in the UK in 2015... were children (17%) or young adults below the age of 30 (24%) in Migration Observatory 'Young People and Migration in the UK: An Overview' (December 2016) 9.

²¹ DWP, 'DMG Vol 2 Chapter 7 Part 3 Habitual Residence and Right to Reside – IS/JSA/SPC/ESA' (Vol 2 Amendment 39, February 2018) [073038].

Fluctuating Income

The UK Courts have recognised that self-employment often results in periods of ‘feast and famine’.²² Taking this into account, an income test relying on a stable income seems unsuitable for self-employment. Just as self-employed workers face ebbs and flows in business, so do the workers employed in zero hours or temporary and seasonal contracts. As features of atypical employment and self-employment become more closely aligned, recognition of periods of ‘feast and famine’ should perhaps be drawn over to types of employment. However, the calculation of the MET requires consistency and does not cater for fluctuating income. A closer inspection of Tomas’ case, discussed in chapter 6, exemplifies how the requirement of consistency can impact flexible work.

Tomas

This case concerned a refusal for Housing Benefit on the basis that ‘Tomas’ work failed to meet the MET. The second tier was not applied. Tomas worked in a flexible contract for a food production company. He provided wage slips for the most recent 3 months which showed an average wage of £135 (the MET for the relevant financial year was £153).

The wage slips show that Tomas earned over the MET for 7 of the 13 weeks. Two weeks of these earnings stand out as significantly lower (£56 and £70). They cover the period over Christmas and New Year where Tomas was not able to work his usual hours due to scheduled closures. There is no information on whether Tomas was entitled to any holiday pay. These two weeks represent anomalies and are the only payslips when Tomas’ weekly earnings fell below £100.

A worker test that places significance on average earnings fails to account for any short periods of sickness, lulls in business or other circumstances that could reduce the ability of the worker to take on paid hours. A worker with a full-time contract would likely have access to holiday and sick pay and other cover. Whereas a worker in a casual contract is more likely to face a fluctuation of income and to require access to benefits to fill gaps in work, especially when access to holiday and sick pay are not guaranteed

²² *SSWP v JS* [2010] UKUT 240 AAC [5].

and may have to be accrued based on average hours. Yet it is precisely when a worker may need this access that they may find that their work is not classed as ‘genuine and effective’. Or workers who have lived in a host Member State for over five years might only discover that their work is considered marginal and ancillary at the point of making an application for permanent residence.

Three-month requirement

The second issue relates to the requirement to provide average earnings over the three months immediately prior to an application for benefits if relying on current worker status.²³ Unless establishing permanent residence or retaining worker status, an EEA worker cannot select their own period of three months where work has been consistent and instead must rely on the immediate three months prior to application. Any short-term work of less than three months or where there are gaps in the availability of hours in the previous three months can result in failure to meet the requirements of MET.

This seems to diverge from CJEU case law, where an EU national working just 16 days was not precluded from being a ‘worker’.²⁴ Additionally, some social risks (such as illness, disability) can result in earning capacity beginning to diminish in the preceding weeks and months before the point of claiming a welfare benefit, meaning that earnings are likely to be lower during the 3 month period assessed by the MET. The problem is further exacerbated by the tendency of decision makers to assess whether each short period of work (or separate but concurrent work contracts) is individually genuine and effective rather than cumulatively, as discussed further below.²⁵

As work becomes more fragmented, it becomes increasingly difficult to justify a test for genuine and effective work that relies on consistency and excludes based on the characteristics commonly present in atypical work. Despite the CJEU ruling that being employed under an on-call or zero-hours contract cannot preclude an individual from being a worker,²⁶ the MET is calculated in a way which weaponizes a worker’s irregular earnings or short-term contracts as a reason to exclude them from the threshold. This approach to calculating ‘genuine and effective’ work ignores a growing area of the

²³ DWP (2018) (n 21) [073038].

²⁴ Case C-357/89 *Raulin* [1992] ECR I-1027, para 14.

²⁵ See section 7.3.2 Separate consideration .

²⁶ Case C-357/89 *Raulin* (n 24) para 14.

labour market and pushes many atypical workers to the second tier of the test, which may be ignored²⁷ and which can steer decision makers towards findings of marginality through either problematic consideration in the guidance²⁸ or through exclusionary tendencies examined in the next section.

The use of an earnings threshold seems to be entirely inappropriate to the assessment of ‘genuine and effective’ work. Yet, if a MET is to remain as a form of administrative guidance, it would be useful to ensure that its level more accurately reflects the CJEU case law and the fragmentation of the labour market. Setting the income to NMW earnings of around 10-12 hours a week at minimum wage would be more inclusive and provide a wider scope for worker status in the UK. An alternative option which would not unfairly disadvantage low-income workers would be a threshold which focuses on hours worked rather than income. Alternatively, there is room to ensure the MET is calculated in a way that more accurately reflects the labour market and does not rely on consistency. For example, EEA workers could be asked to provide evidence of some months of work in the last 6 months that have met the threshold, particularly as worker status can be retained for 6 months in the case of involuntarily unemployment. Moulding a test for worker status that accounts for these factors would be a more precise reflection of the state of the labour market and would reduce the risk of automatic exclusion of atypical work.

As it currently works, the UK’s use of the MET puts atypical workers at a disadvantage and fails to reflect the reality of work as it is experienced. By setting this threshold, the UK has privileged work that fits an outdated and potentially discriminatory standard. The MET excludes many atypical workers and leaves their ability to access welfare support or establish permanent residence as entirely contingent on the second tier of the test. This places a considerable burden on EEA workers who must evidence that their work is genuine and effective *despite* the fact that they have not earned enough to meet the MET.

²⁷ See chapter 6 section 6.5 What second tier? The determinative threshold.

²⁸ See chapter 6, section 6.6 The pervasiveness of earnings in the second tier and 6.7 Incorrect considerations and misleading guidance.

7.3 Exclusionary tendencies of the second tier

The second tier of the UK's worker test must be applied broadly to act as a 'catch-all' for the many workers who will not meet the strict requirements of the threshold but are in 'genuine and effective' work. As covered in chapter 6, the second tier of the test is often either ignored altogether or interpreted and applied restrictively, requiring workers to refute a presumption of marginality or correcting decision maker errors.²⁹ Rather than issues in the text of the DMG itself, this section highlights where decision makers have tended towards restrictive interpretations where the guidance on a matter is either insufficient or absent. Together with the analysis in chapter 6 it contributes to the evidence of how adopting an earnings threshold especially when it is particularly high, while problematic itself, cannot necessarily be redeemed by a secondary restrictively interpreted and poorly executed 'genuine and effective' test.

7.3.1 Selective consideration of the second tier criteria

The second tier requires decision makers to consider 'each case as a whole, taking account of all circumstances'.³⁰ On paper, this approach would allow significant discretion and could be beneficial for atypical workers. However, some of the listed considerations that decision makers must take into account could lead to the exclusion of atypical work. The five considerations are:

6. whether the work was regular or intermittent,
7. the period of employment,
8. whether the work was intended to be short-term or long-term at the outset,
9. the number of hours worked and
10. the level of earnings.³¹

While they tend to represent some of the directions given in CJEU judgments,³² this is by no means an exhaustive list of relevant considerations. Although the guidance covers some further relevant factors from CJEU judgments stating that 'the following

²⁹ See chapter 6, section 6.6 The pervasiveness of earnings in the second tier and 6.7 Incorrect considerations and misleading guidance.

³⁰ DWP (2018) (n 21) [073040].

³¹ *ibid* [073050].

³² See chapter 5, section 5.4 The inclusion of non-traditional work.

principles can be derived from EU case law’,³³ they are not part of this core ‘genuine and effective work’ list after the MET has been applied. Additionally, the guidance is not clear on how each consideration should be weighed up, stating that:

‘In some cases the DM will have to weigh, for example, low hours against long duration of work as part of their overall assessment of whether work is genuine and effective. However, case law does not identify one consistent approach to applying these and other factors: each case must be decided on its own merits.’³⁴

This leaves plenty of room for discretion and, while this can be useful to reflect the breadth of the EU definition, can result in overly restrictive approaches. Decision makers could be tempted to focus on the aspects of work that fail to meet the criteria and conclude that employment is marginal and ancillary.

Krzysztof

Krzysztof had arrived in the UK in 2015 and was a victim of trafficking. He managed to escape this situation and from late November 2017, Krzysztof worked a full-time job for 4 months (ending February 2018). He left this job due to difficult personal circumstances and tried to find new work. From March 2018, he started a full-time but temporary contract with an agency, where the job ended when he was no longer required. He received a full-time salary from this position for 3 weeks.

Krzysztof made an application for jobseeker’s allowance, relying on his retained worker status on the basis that he was involuntarily unemployed.³⁵ The decision maker found that Krzysztof’s first job between November 2017 to February 2018 was genuine and effective:

‘by taking the following factors into account – the length of employment, number of hours, if the work was regular or erratic and the level of earnings’

However, when considering his second job, the decision maker found that:

³³ DWP (2018) (n 21) [073043].

³⁴ *ibid* [073050].

³⁵ The Immigration (European Economic Area) Regulations 2016, SI 2016/1052 (EEA regulations) reg 6(2)(b).

‘Due to the short-term nature of your last job, it has been determined that this employment was not genuine and effective to give you “worker” status

The “worker” status you had previously gained from [employment 1] would be lost as you have not continued in genuine and effective employment...’

The decision maker concluded that Krzysztof had not retained his worker status at the date of the claim for JSA. The AIRE Centre provided advice and helped argue that the consecutive months of income should contribute to a single period of worker status, not be considered separately. While this argument was not accepted in the MR, the First tier Tribunal overturned the decision and found that Krzysztof did have a right to reside to access jobseekers’ allowance.

The most concerning issue in this case is the treatment of Krzysztof’s prior work as irrelevant, which will be considered below. This case also illustrates a decision maker selectively applying aspects of the second tier to the detriment of atypical workers.

While Krzysztof’s first job lasted 4 months on a full-time basis and would have subsequently yielded an income over the MET, the decision maker still addressed the criteria in the second tier to show precisely how it was genuine and effective. This was not necessary and instead sets the decision maker up to compare the second period of employment against the first. Despite working full-time, Krzysztof’s second employment had not yet lasted three months so could not meet the MET, instead the second tier was used to distinguish how the former employment was genuine and effective and not the latter. This is not the correct test and adopts a restrictive interpretation, where the decision maker is happy to model the remits of the second tier around work that already meets the steep requirements of the MET. Additionally, in dismissing the second period of work as marginal and ancillary, the decision relies solely on ‘the short term nature’ of the work without considering the other criteria, which would have likely assisted Krzysztof’s case, such as the hours worked and income received. Selectively applying criteria will likely result in arbitrary decisions which may become overly exclusive, or in some cases inclusive,³⁶ to worker status.

³⁶ It is worth noting that accidental generosity at the point of a benefit application might come back to haunt EEA nationals when making an application that relies on the same period of time, for example a permanent residence application, where the time period is re-assessed.

The selective approach also places more importance on the length of employment than is intended by the DMG. The CJEU, in *Ninni-Orasche*, stated that a short-duration of employment cannot, in itself, exclude that employment from the scope of worker status.³⁷ In the UK, the Court of Appeal, in *Barry*, found that employment which was, and always known to be, of two weeks' duration could be sufficient for worker status.³⁸ Additionally the UT in *NE*, found that where work ends prematurely, rather than a fixed-term contract that was always intended to be temporary, it may be more likely to be considered genuine and effective.³⁹ By basing a decision of marginality on the short duration of Krzysztof's second employment, the decision maker appears to take the exact approach that both the CJEU and UK Courts have prohibited.

Atypical workers who must first contend with an unreasonably high threshold, are unlikely to find solace in the second tier. A selective approach to applying relevant criteria is likely to lead to the exclusion of many atypical workers.

7.3.2 Separate consideration for each source of income

Secondly, data collected for this research saw decision makers assess both a change in employment contracts and concurrent employment and self-employment as separate periods of worker status. The DMG requires an assessment of the 'average gross earnings from employment or self-employment'; it does not restrict this to one single occupation⁴⁰ and instructs decision makers to take account 'of all the occupational activities the person has undertaken in the host Member State'.⁴¹ Nevertheless, this research encountered negative worker status decisions emerging from the individual examination of different sources of income. These decisions illustrate the potential confusion of some decision makers over whether they should assess each employment as genuine and effective, or a period of economic activity together. Failing to offer this clarity is likely to disadvantage and exclude atypical workers, as they may layer work to build up income.

³⁷ Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, para 25.

³⁸ *Barry v London Borough of Southwark* [2008] EWCA 1440 [44].

³⁹ *NE v SSWP* [2009] UKUT 38 [9].

⁴⁰ DWP (2018) (n 21) [073038].

⁴¹ *ibid* [073043].

Krzysztof's case, discussed above, is an example of where a decision maker examined employment in two jobs as two separate periods of worker status, rather than a continuous period of work. This is not in line with UK case law, where the UT found that short gaps in between different agency contracted work does not prevent an EEA national from having worker status throughout that time.⁴² This suggests that consecutive contracts of employment should be assessed cumulatively. The two employment contracts in Krzysztof's case were full-time positions and yielded income in consecutive months without a gap. It can therefore be assumed that if they were jointly assessed, Krzysztof would have secured worker status for this time period. The decision maker's treatment of each employment separately meant that, despite an accumulation of nearly 5 months of full-time work, Krzysztof's earlier work counted for nothing simply because he had a change of contract. While this decision was overturned at the First tier Tribunal, were different employments to be counted separately, vast numbers of atypical workers or those who rely on short term work would significantly struggle to establish worker status.

Overlapping employment and self-employment

This problem also extends to where EEA migrant workers overlap concurrent employment and self-employment to build-up their income. The 'right to reside' test, like Article 7 Directive 2004/38 separates the categories of 'workers' and 'self-employed person[s]'.⁴³ The DMG deals with each category separately but both direct decision makers to the same two-tier process in assessing whether work is 'genuine and effective' including the MET.⁴⁴ Importantly, the DMG is silent on how to assess applicants combining work and self-employment. This can lead to decision makers insisting that at least one of these activities stands up to 'genuine and effective' test based entirely on its own merits, regarding any aspects of the other activity irrelevant. This approach becomes particularly problematic where decision makers may also apply the MET definitively.

<p>Naomie</p>

⁴² *NE v SSWP* (n 42) [9-10].

⁴³ Universal Credit Regulations 2013 (UC Regulations), SI 2013/376, Reg 9(4)(a).

⁴⁴ DWP (2018) (n 21) worker at [072816]; Self-employment at [072843].

In an application for Housing Assistance, Naomie's self-employment as a housekeeper was deemed to not yield enough income to pass the MET. The second tier was not applied:

*"The income you claim to get from your self-employment is below the stipulated [MET] of £155 a week for self-employed persons. **I am therefore** of the view that your employment is not genuine and effective..."*

The decision maker also considered employment that was completed alongside Naomie's self-employment. Due to her caring responsibilities, Naomie had limited time to fit extra work in. She found and took on informal work as a leaflet distributor. The hours were flexible, and she was paid per box of leaflets. She had no official record of this income. The decision maker relied on data from HMRC records that recorded Naomie's income from this work as ranging from around £400 to £4,500 per annum. In assessing whether this was genuine and effective the decision maker wrote:

"The income you earn falls below the MET of £153 for National Insurance Contribution"

Here, income generated from employment and self-employment is assessed separately to determine if either meets the MET. As a result, both fail, yet if considered together they may have met the threshold. Of course, this example is already problematic given the decision maker's treatment of the earnings threshold as conclusive of genuine and effective work, yet the separate examination of concurrent employment and self-employment, even where the second tier of the test is applied correctly, is still likely to disadvantage atypical workers. While not impossible, atypical workers in this situation face the prospect of trying to meet a required standard with one economic activity, while any time spent for other economic activity is not only treated as irrelevant but may also have a negative impact on their ability to commit to activities that make their self-employment genuine and effective.

It is not clear if this method of assessing concurrent employment and self-employment is endorsed by EU law. On the one hand, free movement rights are mutually exclusive.⁴⁵ By taking this approach, a consideration of ‘genuine and effective’ work is applied, not to an EEA national’s overall activity, but to the relevant activity, i.e. their employment *or* self-employment. An EEA national might not meet the requirements of the scope of one freedom by nearly fulfilling the requirements of two freedoms.

Yet, with the fragmenting of the labour market and likely increase in those mixing employment and self-employment to build their right of residence, it would hardly seem in the spirit of the free movement regime and Directive 2004/38 to expose those who combine work and self-employment to the risks associated with being deemed ‘economically inactive’. If key objectives of the directive are to facilitate free movement and secondly to ensure EU citizens do not become an ‘unreasonable burden’ on the host Member State,⁴⁶ it seems counterintuitive to treat workers differently depending on whether their work is employment, self-employment or a combination of the two.

The principles guiding the free movement of workers and self-employed persons are often closely aligned.⁴⁷ In particular, the rules concerning access to welfare benefits for the self-employed often emulate or are encompassed in the rules applicable to workers.⁴⁸ Further to this, the CJEU has shown reluctance to differentiate between the entitlements of workers in different employment situations in *Tarola*⁴⁹ and between those in employment and those in self-employment in *Gusa* and *Dakneviute*.⁵⁰ While *Tarola* concerned the ability to retain worker status under Article 7(3)(c) Directive 2004/38 when in fixed-term employment, AG Szpunar found ‘no objective

⁴⁵ Case C-275/92 *Her Majesty's Customs and Excise v Schindler* [1994] ECR I-1039.

⁴⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (Directive 2004/38), Preamble.

⁴⁷ ‘...they are based on the same principles both in so far as they concern the entry into and residence in the territory of Member States of persons covered by community law and the prohibition of all discrimination between them on grounds of nationality.’ Case 48/75 *Royer* [1976] ECR 0497, para 12 and Case C-116/75 *Watson and Belmann* [1976] ECR 1185, para 9.

⁴⁸ Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross Border Access to Public Benefits* (Hart Publishing, 2003) 41-42.

⁴⁹ Case C-483/17 *Tarola v Minister for Social Protection* EU:C:2019:309.

⁵⁰ Case C-442/16 *Gusa v Minister for Social Protection* EU:C:2017:1004; Case C-544/18 *HMRC v Dakneviute* EU:C:2019:76.

justification' for a difference in treatment between those who pursue an occupational activity as a worker or self-employed person as both would have 'contributed to the social and tax systems' of the host Member State.⁵¹ *Gusa* and *Daknevičiute* both concerned the extension of rights, which had been provided to those in employment, to those in self-employment (respectively the ability to retain worker status after involuntary unemployment⁵² and the rights to retain worker status when temporarily out of work due to the late stages of pregnancy as found in *Saint Prix*).⁵³ The CJEU identified that 'employees and the self-employed are in a comparable vulnerable position if obliged to stop working, and therefore cannot be treated differently as regards retention of their right of residence in the host Member State'.⁵⁴ It is worth noting that these judgments concern the substance of rights in Directive 2004/38, rather than scope of who is included in the right to reside categories in Article 7(1). Nevertheless, the difference in treatment or inclusion in Article 7(1) for those who combine work and self-employment compared to their solely employed or self-employed counterparts would have the same effect: a loss of a right of residence, even though these workers pursue occupational activity and contribute to the social and tax systems of the host Member State.

As it stands, the separate consideration of status as a worker *or* as a self-employed person fails to reflect the reality of a labour market which has seen a proliferation in overlapping and temporary contracts and occupations which sit in a grey area between the definitions. Such fixed distinctions creates a significant barrier for atypical workers, who, like Naomie and Krzysztof, could be penalised because the nature of their work is atypical.

Overall, the second tier of the UK's test falls short of replicating the broad approach of the EU and is far from the catch-all necessary to include all the workers who are marginalised by the steep demands of the MET. Those relying on a fair application of

⁵¹ Case C-483/17 *Tarola v Minister for Social Protection* EU:C:2018:919, Opinion of AG Szpunar, para 50.

⁵² Directive 2004/38, art 7(3)(b).

⁵³ Case C-507/12 *Saint Prix v SSWP* EU:C:2014:2007.

⁵⁴ Case C-544/18 *Daknevičiute* (n 50) para 33; referring to Case C-442/16 *Gusa* (n 50) paras 42-43.

the second tier of the test may find that the very nature of their work as atypical will lead to its exclusion, rather than a full consideration of the merits of their work.

As the EU concept of worker is filtered down to decision makers, the broad outer edges of the test more closely resemble a rigid boundary where the scope for discretion can be limited by thresholds, steers in the guidance or a lack of clear instruction on the array of employment situations present in the labour market. The projection of these issues in the case studies of atypical workers illustrates the exclusionary impact of this approach on a significant and growing number of EEA workers in the labour market. The impact of this narrowing of worker status is felt most by workers who are alienated from more ‘standard’ employment and have no choice but to take on part-time or atypical employment due to their personal circumstances.

7.4 Worker status and the diverse workforce

Human lives are not simple and homogenous. Recognising inequality and barriers faced by some individuals due to impairments and health conditions or the limited capacity of those with care responsibilities requires a level of flexibility and discretion in the assessment of worker status. Any assessment of whether an individual is a worker, which relies on evaluating if they are working *enough*, should be applied relative to the individual and their circumstances rather than rigidly applying the same expectations to everyone.

As chapter 5 covered, the CJEU’s imprecise broad approach to worker status may be anticipated to include those facing barriers to ‘standard’ work but an explicitly required consideration of personal circumstances is lacking. While the CJEU has addressed some forms of work outside of the ‘normal’ labour market where it may assist workers with disabilities to integrate into the labour market,⁵⁵ work conducted in the ‘normal’ labour market remains the EU’s primary concern.⁵⁶ Explicit inclusion of personal circumstances as a relevant factor could see a nuanced approach to the concept of ‘genuine and effective’ work which could include the application of proportionality to allow for such an assessment.

⁵⁵ See chapter 5, section 5.4.2 The CJEU and atypical work; Case C-316/13 *Fenoll v Centre d’aide par le travail ‘La Jovenue’* EU:C:2015:200.

⁵⁶ O’Brien (2017) (n 5) 97-100.

The UK's definition of work in its current form includes relatively little space for the consideration of personal situations. With regard to the first tier of the test, those who face barriers to more secure work are expected to meet the same requirements as those with no such barriers. The second tier, which applies the 'genuine and effective' criteria, could theoretically involve the holistic assessment of these circumstances but does not require decision makers to specifically or thoroughly acknowledge these aspects.

Without a consideration of these circumstances, there is no recognition of the difficulties faced by disabled workers, those with caring responsibilities or lone-parents when trying to find suitable work. Nor are there concessions to recognise the hardship faced by those who have been victims of exploitation, trafficking or situations of domestic abuse.

The personal circumstances of workers have, to a limited extent, been recognised in the UK Courts when considering self-employment. In the UT, when assessing whether the claimant should have a right to reside from her self-employment, Judge Ward suggested that evidence on 'circumstances at the time' could provide 'important background that might be relevant to whether she was in a position to continue self-employment'.⁵⁷

However, there is still no formal recognition of the consideration of individual circumstances in an assessment of whether work or self-employment is 'genuine and effective'.

This section will look at how the UK's approach to worker status fails to accommodate the personal circumstances of workers. It will first consider the flaws in approaching equality formally and treating all the workers the same. Then, the section will address the contradiction between how individual circumstances are treated in the UK welfare benefits system more generally compared to the expectations placed on EEA workers. Finally, the section will address the impact of this approach on workers who face barriers to more 'standard' employment and, using examples from the case studies, highlight how the worker test may exclude potentially vulnerable EEA workers from the protection of free movement rights.

⁵⁷ *SSWP v JS* (n 22) [8].

7.4.1 The inequality of the ‘same’ treatment

While the DMG asks decision makers to approach ‘each case as a whole, taking account of all circumstances’,⁵⁸ a more explicit appreciation of barriers through the use of exceptions or concessions is absent from the guidance. Failure to do so risks the ‘genuine and effective’ test being applied homogenously. This approach ignores the structural barriers limiting some workers’ access the labour market and full-time employment and is likely to disadvantage these groups further by excluding them from the benefits that come with worker status. This is particularly noticeable given that these barriers are recognised for national workers in the UK in the form of a sliding scale of conditionality.⁵⁹ Without such recognition in a free movement context, the rigid definition of work can be a significant barrier for many individuals who are left without equal treatment in access to welfare benefits.

The failure to build in mechanisms to account for personal circumstances and the barriers they face represents a larger shift towards neoliberal approaches to welfare. Humpage attributes this approach as treating inequality and social risk as ‘emerging from individual inadequacies’.⁶⁰ Consequently, individuals are held ‘personally responsible for, and expected to overcome, their vulnerable circumstances.’⁶¹ As policies tend towards a focus on individual responsibility, there is a concern that ‘social, economic and political causes of unemployment, poverty and disability will cease to be recognised’,⁶² rather than understanding that, for those with particular personal characteristics, atypical work and subsequent precarity is not a choice. Taking Sen’s focus on the ‘capability approach’, Deakin argues that the lack of choice can stem from institutional and societal levels which fail to take the necessary ‘state action to remove

⁵⁸ DWP (2018) (n 21) [073040].

⁵⁹ See section 7.4.2 Universal Credit and the contradictory conditionality of the worker test.

⁶⁰ Louise Humpage, *Policy change, public attitudes and social citizenship: Does neoliberalism matter?* (Policy Press, 2014) 29.

⁶¹ Helen Stinson, ‘Supporting people? Universal Credit, conditionality and the recalibration of vulnerability’ in Peter Dwyer, *Dealing with welfare conditionality* (Policy Press, 2019) 15; Humpage (n 60) 29.

⁶² Peter Dwyer, ‘Rewriting the contract? Conditionality, welfare reform and the rights and responsibilities of disabled people’ in Dan Horsfall and John Hudson (eds), *Social Policy in an Era of Competition: from global to Local Perspectives* (Bristol, the Policy Press 2017) 145.

the conditions which inhibit effective market participation'.⁶³ Instead a formal equality approach is taken, focusing on treating everyone the same, without consideration of these wider societal factors and barriers. This is only likely to further entrench inequalities. Holding disadvantaged groups to the same productivity standards treats them 'the same' but actually 'results in discrimination in favour of those in positions of established privilege'.⁶⁴ The problems with this expectation is brought into sharp focus when considered alongside the measures limiting the conditionality of some recipients receiving welfare benefits in the UK.

7.4.2 Universal Credit and the contradictory conditionality of the worker test

The UK has seen a recent reform to its welfare system, focused on activation and benefit claimant responsibility to improve their living standards through work. While this has taken place over many years and several administrations,⁶⁵ its current form is seen through Universal Credit. This welfare benefit introduced heightened mandatory job search requirements paired with sanctions regimes if the claimant fails to reach targets, which have since been shown to be ineffective and damaging.⁶⁶ This conditionality also extends beyond the unemployed, to part-time and low-paid workers⁶⁷ and to those who may have previously held relatively unconditional access to benefits, such as disabled people⁶⁸ or lone-parents of pre-school aged children.⁶⁹

Some elements of this conditionality can be tailored to the personal circumstances of the individual. Universal Credit requires claimants to sign up to a 'claimant commitment' to work a certain amount of hours or spend a certain amount of hours seeking work. Work coaches have the ability, although often applied inconsistently,⁷⁰ to

⁶³ Simon Deakin, 'The 'Capability' Concept and the Evolution of European Social Policy' in Eleanor Spaventa and Michael Dougan (ed), *Social Welfare and EU law* (Hart Publishing, 2005) 4-5.

⁶⁴ O'Brien (2017) (n 5) 100.

⁶⁵ Dwyer (2017) (n 62) 136.

⁶⁶ Peter Dwyer, 'Final findings report: Welfare Conditionality Project 2013-2018' (June 2018) 23.

⁶⁷ Beth Watts and Suzanne Fitzpatrick, *Welfare Conditionality* (Routledge, 2018) 6.

⁶⁸ Dwyer (2017) (n 62) 136.

⁶⁹ Laura Dewar and Dalia Ben-Galim, 'An impossible bind: Requirements to work under Universal Credit' (Gingerbread, November 2017) 7.

⁷⁰ Dwyer (2018) (n 66) 24.

modify the expectations of job-seeking where the claimant has a disability, is a lone parent or has caring responsibilities.⁷¹ The claimant commitments can also be adapted to more temporary circumstances such as sickness, where a claimant has experienced domestic abuse or other extenuating circumstances that make them ‘unfit for work’.⁷²

While this recognition of limited capacity for work was originally withheld from EEA nationals, the relevant provision in the Universal Credit Regulations has been repealed⁷³ and they are now, in theory, available. However, for EEA migrants to even get to the point where they benefit from the relevant limitations, they must first be granted access to Universal Credit through the process of the Habitual Residence Test and right to reside requirements. Therefore, EEA workers must first meet the requirements of the restrictive two-tier test before they have any recognition of personal circumstances that could limit their capacity for full-time work. As UK nationals automatically pass the right to reside portion of this test, they do not have to meet the same expectations. This creates a situation where a UK national lone parent of a 4 year old child is only expected to work or seek work for 16 hours a week,⁷⁴ but an EEA national with the same caring responsibilities could have to work 21 hours continuously for at least 3 months to even be eligible for Universal Credit. The effect of this is an important illustration of the contradiction in the UK welfare system for EEA nationals where, at the point of application, their personal circumstances are irrelevant, but once Universal Credit is awarded, these circumstances can have a significant impact on the level of conditionality faced. Should the EEA national reduce their hours in line with the requires for Universal Credit, they risk losing entitlement to the welfare benefit on the grounds of not meeting the earnings threshold.

Hanna

Hanna is an Italian national who has recently separated from partner. She is a full-time carer for her son who has autism.

⁷¹ UC Regulations, reg 88.

⁷² DWP, ‘Chapter J3: Work-related requirements’ (March 2013) [J3180 - J3233].

⁷³ UC Regulations, reg 92 (repealed).

⁷⁴ ‘Universal Credit: further information for families’ (Gov.uk, 30 November 2017) <<https://www.gov.uk/government/publications/universal-credit-and-your-family-quick-guide/universal-credit-further-information-for-families>> last accessed 11 May 2018.

Hanna has taken on work as a fitness instructor, earning just £80 a week. She says she would like to work more but is unable to take on more hours alongside her caring commitments for her son.

Due to her low income, Hanna is currently relying on loans from her mother but not sure how long she can do this. She made an application for Universal Credit which was refused on the basis of Hanna's employment not being genuine and effective. She is still in receipt of child benefit but is worried that this will also be stopped.

Without any support from Universal Credit Hanna is looking into whether she will have to move back to Italy but is reluctant to take her son out of the UK since he has only ever lived here, does not speak Italian and she fears he will struggle with the adjustment.

This case highlights the lack of logical coherence between the UK's worker status test for EU nationals and how individuals in the same circumstances are treated when accessing welfare benefits. When accounting for Hanna's personal circumstances as a lone parent and full-time carer, it cannot be fair to expect her to take on more work.⁷⁵ In this example, if Hanna had been granted access to Universal Credit, her claimant commitment would have been tailored to reflect these responsibilities and it is likely that she would have been placed in the 'no work requirements' category and received Universal Credit with relatively little conditionality.⁷⁶ Yet it is the same circumstances that would ease conditionality in the Universal Credit system that are ignored to exclude her from welfare benefits in the first place.

7.4.3 The unequal impact of worker status

The homogenous approach to worker status impacts workers who face barriers to the 'standard' labour market and are therefore more likely to be in atypical work. EEA nationals in these situations have no or very little control over these situations and the barriers that impact their ability to work. Yet their personal circumstances can force

⁷⁵ See section 7.5 Discrediting the value of informal care.

⁷⁶ Work and Pensions Committee, *Valuing and Supporting Carers* (HC 2007-08, 485-I) para 187; UC Regulations, Reg 89(1)(b).

them to take on atypical work and subsequently struggle to meet the requirements of the worker status test, as applied in the UK.

As discussed in chapter 4, Nearly all types of atypical work are over-represented by workers who are alienated from more permanent and high paid roles. This includes disabled workers, carers,⁷⁷ migrant workers, lone-parents (who are predominantly women) and women more generally.⁷⁸ The over-representation of workers with limited capacity in atypical forms of work will also push the impact of a restrictive worker definition disproportionately on these groups. As migrant workers are over-represented among atypical worker,⁷⁹ EEA nationals and their family members could, even generally, be more likely than nationals to be in the type of work that sits at the outer edges of the worker definition.

The statistics suggest that there is likely to be a significant cross-section of atypical workers who face the outdated and restrictive interpretation of work and workers who, due to individual circumstances, should not be expected to work more. As worker status acts as a gateway to many important free movement rights, this combination can indirectly discriminate by essentially excludes these groups from free movement rights.

Disabled workers and ill health

Disabled workers face considerable obstructive barriers to the labour market. They are often expected to reconcile their health conditions and impairments with a world of work that previously ‘designed out “nonstandard” people’.⁸⁰ This expectation does not challenge the ableist ‘hegemonic constructions of productive value’⁸¹ and therefore disabled workers are often expected to compromise by working in low-paid, low-progression, insecure work. Despite the belief that more flexible working conditions

⁷⁷ ‘Just over 2.1 million people have reduced their working hours in order to care’ in Carers UK, ‘Juggling work and unpaid care A growing issue’ (February 2019) 9.

⁷⁸ See chapter 4, section 4.5.1 Women in the flexible labour market.

⁷⁹ See chapter 4, section 4.5.4 Migrant workers.

⁸⁰ Alan Roulstone, ‘Disability, work and welfare’ in Chris Grover and Linda Pignott, *Disabled people, work and welfare: Is employment really the answer?* (Policy Press, 2015) 257, 260.

⁸¹ *ibid.*

support disabled workers, Sayce points out that this trade-off instead leaves many in employment that is rarely suitable for their disability.⁸²

For EEA disabled workers this compromise can also inhibit their ability to access rights through worker status. Marie's case above shows an example where, leaving standard employment and joining the flexible labour market due to a health conditions led to her losing her status as a worker and therefore access to welfare benefits.⁸³ In her case, no account was taken of her health conditions and how they could impact the barriers to her engagement in more 'standard' and secure work. Informal carers are also affected by the restrictive approach to worker status. Their particular situation and the relationship between unpaid care and worker status is covered in more detail in section 7.5 below.

Disabled EEA nationals are arguably not even shown the courtesy of formal equality, as can be seen by the inclusion of physical capacity as a factor to consider.⁸⁴

Lone-parents

Lone-parents are also more likely to be excluded from free movement rights due to the restrictive application of the worker test. The vast majority of lone-parents are women.⁸⁵ Like disabled workers, women with families often 'pay the price' of the reconciliation that is expected of them by downgrading their employment, often with the unmet expectation of further flexibility.⁸⁶ The number of lone mothers in part time work was at 32.4% in 2014, more than those in full time work.⁸⁷ Lone-parents who are subjected to work conditionality more generally find that it impacts their progress in work and does not take account of 'individual preferences about whether to work or look after

⁸² Liz Sayce, 'Switching Focus: Whose responsibility to improve disabled people's employment and pay' (London School of Economics, November 2018) 31.

⁸³ See section 7.2.1 Setting a steep and restrictive threshold.

⁸⁴ See chapter 6, section 6.7.3 Presumptions and Speculations.

⁸⁵ 'Of the 2.9 million lone parent families in the UK in 2016, the majority (86%) were headed by a female lone parent' in Emily Knipe 'Families and Households: 2016' (Office for National Statistics, 4 November 2016) <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2016>> last accessed 11 May 2018.

⁸⁶ Mary Gregory and Sara Connolly, 'The Price of Reconciliation: Part-Time Work, Families and Women's Satisfaction' (2008) 118(526) *The Economic Journal* F1, F7.

⁸⁷ Matthew Tinsley, 'Parenting Alone: Work and welfare in single parent households' (Policy Exchange 2014).

children, the impact on child wellbeing, the availability of work, the potential for flexible working and the quality of childcare.⁸⁸ Case studies examined in this research have also demonstrated the difficulties in meeting the standard for worker status for lone-parents, particularly when combined with other circumstances such as disability, care (see Naomie and Laura) and domestic violence (Juliana and Sophie).

Victims of domestic abuse

Two of the cases examined in this research concerned lone-parents who had fled situations of domestic abuse. Such circumstances can lead to trauma and create a lot of upheaval in an individual's life. The level of and effect of this upheaval is recognised by the requirement for work coaches to ease the requirements of the claimant commitment for claimants of Universal Credit.⁸⁹

One such problem, for EEA nationals facing domestic abuse, can stem from evidencing their EEA national partners' work once they have left, or when the abuser is a British national as EEA nationals cannot rely on their partners' work to establish a right to reside.⁹⁰ O'Brien found some recognition of these 'exceptional circumstances' of domestic abuse victims in the First tier Tribunal.⁹¹ However, as this does not set a precedent, the 'exceptional' circumstances are not formally recognised and leave a significant domestic abuse gap.⁹²

Where EEA nationals cannot derive a right to reside from their partner, they must establish it themselves. Many in this position find that their ability to work is negatively affected⁹³ and may have to leave their employment in the upheaval and disruption present in fleeing domestic abuse. The restrictive worker test in the UK can mean that they are refused access to welfare benefits at this particularly vulnerable time. Juliana

⁸⁸ Dewar and Ben-Galim (n 69) 7.

⁸⁹ DWP (2013) (n 72) [3180].

⁹⁰ O'Brien (2017) (n 5) 167-168.

⁹¹ On the grounds that the decision in *Saint Prix* found the reasons for retaining worker status in Directive 2004/38 art 7(3) were not exhaustive; C- 507/12 *Saint Prix* (n 53).

⁹² O'Brien (2017) (n 5) 167-170.

⁹³ Women's Aid found that 56.1% of their sample 'who had left a relationship with an abuser felt that the abuse had impacted their ability to work' see 'The nature and impact of domestic abuse' (Women's Aid) <<https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/the-nature-and-impact-of-domestic-abuse/>> last accessed 10 May 2020.

and Sophie were held to the same expectation as any worker, despite their responsibilities to care for their children as lone-parents and the circumstances they faced through fleeing domestic abuse.

Juliana

Juliana is a Spanish national who arrived in the UK in August 2015. She is currently living in a refuge with her 5 year-old child after fleeing domestic abuse.

Her ex-partner is currently serving time in prison and while believed to be an EEA national, there is no evidence of his nationality or status in the UK, including evidence of work.

From 2015-June 2016, Juliana was working part-time for 10 hours a week, she was earning minimum wage (£6.70 per hour) and had income of around £67.50 a week. Juliana applied for Housing Benefit in February 2016, but her application was denied. The caseworker who contacted the AIRE Centre said that the justification given was that ‘she is not eligible as she is not earning the minimum required for her to have workers status.’

Sophie

In 2015, Sophie fled an abusive relationship. She had a young child and tried to get a place in a refuge which was refused after she could not access Housing Benefit.

Sophie moved to the UK to study in 2013. Sophie was in the middle of studying for a bachelors degree, but took leave from this due to her circumstances. She started working part-time at a fast-food restaurant and earned approximately £135 per week, working approximately 20 hours a week. When she applied for Housing Benefit as a worker, it was refused due to her not being able to meet the MET (£155 in 2015).

Victims of trafficking and exploitation

While worker status is inclusive of undeclared work, having no space to consider the wider difficulties associated with trafficking or its aftermath means that EEA nationals face the full force of the ‘genuine and effective’ expectations.

The DMG makes reference to the UT’s ruling,⁹⁴ stating that work can still be genuine and effective ‘if the person is employed under a contract that is performed illegally’.⁹⁵ Nevertheless the use of the MET and the homogenous approach to genuine and effective work means that victims of trafficking or modern day slavery may struggle to assert their rights as an EEA worker. This combined with the inadequacies of Home Office support for victims of trafficking can leave EEA nationals in particularly vulnerable positions.

Krzysztof

Before Krzysztof’s run of employment discussed above, he had been a victim of trafficking. He had received a positive decision identifying him as a victim of trafficking (known as a ‘conclusive grounds’ decision) from the Nationals Referral Mechanism (NRM), the system in the UK to identify and provide support to victims of modern slavery. However, he was not granted discretionary leave which meant that after the 45 day ‘recovery and reflection period’ provided to those in the NRM, Krzysztof had to support himself or rely on his EU rights to access support.⁹⁶

During this time, Krzysztof began working again, but left a full-time job due to difficult personal circumstances stemming from the trauma he had faced as a victim of trafficking. He then took on full-time temporary work that lasted just 3 weeks. His

⁹⁴ *JA v SSP* (n 16).

⁹⁵ DWP (2018) (n 21) [073043].

⁹⁶ Those with discretionary leave are exempt from the habitual residence test for at least 30 months; ‘the most recent Home Office statistics show just 12% of confirmed [victims of trafficking] are granted this type of leave’ in ATLEU ‘Legal aid and immigration advice for victims of modern slavery’ (April 2018) <<https://atleu.org.uk/news/legalaidimmigrationadvice>> accessed 9 May 2020.

application for jobseeker's allowance was refused as he was deemed not to have had worker status for this second period of employment.⁹⁷

Krzysztof had gone through the process of being considered as a victim of trafficking, receiving the support that comes with this and went on to find full-time employment. The support offered by the Home Office (which includes accommodation in a safe-house and in-house support) and the limited 45 day period of 'reflection and recovery' is criticised by charities as inadequate, abandoning victims of trafficking and modern day slavery almost as soon as they are recognised as vulnerable.⁹⁸ The shortfalls in support are significant and can create temporary or ongoing barriers to rebuilding their lives and, specifically re-joining the labour market due to loss of or unstable accommodation, impact on physical and mental health and risks of re-traumatisation.⁹⁹ Krzysztof's application for jobseeker's allowance was refused with no consideration of his personal circumstances as a victim of trafficking, or how this impacted on his ability to stay in the initial full-time employment he had found.

Such decisions and refusals of support for EEA workers in these situations could risk further vulnerability, re-traumatisation or forcing individuals back into situations of exploitation and abuse.

Ongoing impact

The inability to consider personal circumstances comes into even sharper focus when looking at the added value that should be gained from having worker status. The initial finding of worker status opens up the ability to retain worker status or establish other residence rights through permanent residence or derivative rights.¹⁰⁰ By binding these rights to an inadequate assessment of worker status as a point of access, they are also exposed to the incompatible or otherwise restrictive interpretations of Member States. Periods of time where an EEA national does not have worker status could deactivate

⁹⁷ As discussed in section 7.3.2 Separate consideration .

⁹⁸ Samantha Ferrell-Schweppenstedde, 'Day 46: Is there life after the Safe House for Survivors of Modern Slavery?' (Human Trafficking Foundation, October 2016).

⁹⁹ British Red Cross, 'Hope for the future: Support for survivors of trafficking after the National Referral Mechanism' (July 2019); Ferrell-Schweppenstedde (n 98) 5.

¹⁰⁰ See chapter 5 section 5.2 The value of worker status.

routes to these rights of residence. For example, Marta's case shows some of the knock-on-effect of a negative worker decision.

Marta

Marta lived in the UK with her 16-year-old daughter Francisca since 2011. After a period of work from June 2014 to March 2017, Marta was advised to stop working due to ill health. She applied for ESA, which was refused after finding that she did not have a right to reside (no details were recorded about this claim). Subsequently, Marta struggled to make ends meet and had got into rent arrears. By the time she requested advice from the AIRE Centre in June 2018, Marta had received a court order to vacate their property. She went to an interview for housing assistance at her local council, where they assessed her right to reside and found that her work was not genuine and effective because she earned less than the MET:

“You previously worked from [June 2014] – [March 2017] as a cleaner. You had a contract to work 16 hours per week and your income was £99.20 per week. This is below the [MET] which is currently £162 per week.”

The council then considered if she had a potential derivative right to reside as a primary carer of a worker's child in education.¹⁰¹ These regulations emulate the rights found in the *Baumbast*, *Ibrahim* and *Teixeira* case law.¹⁰²

‘it is acknowledged that you have a dependent child who is in full time education. I have therefore considered whether you could be said to have a derivative right of residence as per the principles set out in the reg 15A(3) Immigration Regulations as amended. However, this right does not apply in your case because you are not currently working and your previous employment cannot be regarded as genuine and effective.’

¹⁰¹ EEA Regulations reg 15A(3).

¹⁰² Case C-413/99 *Baumbast and R v SSHD* [2002] ECR I-07091, Case C-310/08 *London Borough of Harrow v Ibrahim* [2010] ECR I-01065, Case C-480/08 *Teixeira v London Borough of Lambeth and SSHD* [2010] ECR I-01107.

The finding that Marta's work was not 'genuine and effective' meant that she could neither retain the status nor acquire a derivative right to reside. While the initial finding on worker status can be challenged, as the MET was treated as determinative, a recognition of Marta's individual circumstances as a lone parent and as someone with health conditions could have eased the expectations on her. This decision can have devastating impacts, such as in Marta's case where access to means-tested welfare benefits is lost and when she was facing eviction and potential homelessness. This impact also extends on to the rights of her daughter who, if worker status had been found, would have her right to free movement protected including her right to access and continue education.¹⁰³

Flexible working arrangements and atypical work can play an important role in opening access to the labour market for those who are excluded from or not able to take on full-time work. Yet, if those relying on atypical work are excluded from the benefits associated with worker status, this structural discrimination is only exacerbated. Without recognising where Member States' interpretations of worker status limit its applicability to a diverse range of workers, the EU risks worker status being reserved only for those who do not face structural discrimination or exceptional circumstances.

The one-size-fits-all approach to worker status could be adapted to address these differences. Firstly, it is worth noting that replicating the broad and flexible approach of the CJEU would be helpful to many whose personal circumstances affect their ability to work. Part of the problem for claimants here is that the test in the UK is too steep and rigid. However, it may also be necessary to introduce a tiered approach to the earning threshold or to expectations of work that fall below the MET. This would allow decision makers to assess the 'genuineness and effectiveness' of work based on an expectation that is tailored to fit individual circumstances, similar to the easements seen in *Universal Credit*. Additionally, space in the guidance that allows for discretion to be exercised in these circumstances is essential when dealing with the diversity inherent in individuals' lives.

¹⁰³ Case C-413/99 *Baumbast* (n 102) para 71.

7.5 Discrediting the value of informal care

Informal care, particularly when accompanied with Carer's Allowance, teeters on the edge of the definition of work. While the 'unpaid' care provided by family and friends has been described by the former Minister of State for Disabled People as 'an invaluable service',¹⁰⁴ a DWP briefing paper states clearly that Carer's Allowance 'is not a payment for care provided or a "carer's wage"'.¹⁰⁵ The intention of the benefit has been recognised as the provision of 'a measure of income maintenance' for those who 'had forgone the opportunity of full-time employment in order to care for a severely disabled relative'.¹⁰⁶

Carers in the UK are generally provided with limited expectations to take on work. A 2007 Work and Pensions Committee report recognised that receiving a 'income replacement benefit' did not mean that carers should be treated as 'unemployed' and recommended placing no conditionality or compulsion on these carers to seek employment.¹⁰⁷ To reflect this, those with caring responsibilities for 35 hours a week, regardless of whether they receive Carer's Allowance, are exempt from the requirement to look for work when claiming Universal Credit.¹⁰⁸ Like other 'income replacement benefits' and earnings from employment, the receipt of Carer's Allowance triggers credits of Class 1 National Insurance contributions and is taxable and counted as income in relation to eligibility for means-tested benefits.¹⁰⁹ It is likely that those who receive Carer's Allowance and anyone with caring responsibilities will find it more difficult to meet the requirements of a rigid and restrictive worker definition.

The tendency to overlook unpaid care as work is evident at the EU level, not just in the case of the UK. Excluding informal care from worker status can deprive EU nationals

¹⁰⁴ 'Making it easier for carers to get government help' (Gov.uk, 1 December 2014) <<https://www.gov.uk/government/news/making-it-easier-for-carers-to-get-government-help>> last accessed 11 May 2018.

¹⁰⁵ Steven Kennedy and Manjit Gheera, 'Carer's Allowance' (House of Commons Briefing Paper, Number 00846, 9 January 2020) 17.

¹⁰⁶ Kennedy and Gheera (n 105) 4, DWP, 'Attendance Allowance, Disability Living Allowance and Carer's Allowance: Retrospective equality impact Assessment' (September 2019) [2.8].

¹⁰⁷ Work and Pensions Committee (n 76) para 187.

¹⁰⁸ UC Regulations, Reg 89(1)(b).

¹⁰⁹ Kennedy and Gheera (n 105) 4.

who are providing a service with an economic value of important free movement rights. Hervey points to the treatment of unpaid domestic or caring work as an example of non-traditional work being considered ‘outside “true” market activity’ and therefore not valuable to the single market and subsequently, not included within the scope of EU rights.¹¹⁰ Family and caring roles are still gendered,¹¹¹ meaning that the brunt of precarity involved in this activity is discretionary shifted on to women.¹¹² In the UK specifically, women were also recorded as constituting 73% of recipients of Carer’s Allowance.¹¹³ The failure to accommodate the circumstances of those with unpaid caring responsibilities ignores the extent of restrictions on their ability to work and the value of this care to society alongside having a discriminatory impact on women.

This section will firstly examine the case for unpaid care to be considered work, looking to the reasonings of the CJEU and UK case law on this issue. It will then go on to critique the paradox created by the earnings threshold of the MET and the earnings restrictions on those who receive Carer’s Allowance. Finally, this section will address examples from the case studies to examine how the worker status interacts with time spent caring for relatives and friends.

7.5.1 Care as work

At the EU level, time spent providing informal care to family members has not been included in the definition of work. CJEU case law appears to differentiate between a family member providing care, which is not considered work,¹¹⁴ and non-familial care

¹¹⁰ Tamara K Hervey, ‘Migrant workers and their families in the European Union: the pervasive market ideology of Community Law’ in Jo Shaw and Gillian More, *New Legal Dynamics of European Union* (Oxford University Press, 1995) 91, 104.

¹¹¹ ‘women spend two to ten times more time on unpaid care work than men’ in Gaëlle Ferrant, Luca Maria Pesando and Keiko Nowacka, ‘Unpaid Care Work: The missing link in the analysis of gender gaps in labour outcomes’ (OECD Development Centre, December 2014) 2, In the UK 20% of women said they had unpaid caring responsibilities, and 13% of men in Carers UK (n 77) 10.

¹¹² ‘...over 20 million Europeans (two-thirds of whom are women) care for adult dependent persons, which prevents them from having a full-time job...’ and ‘austerity measures... [have] forced many people, mainly women, to cut their working hours or return to the home to take care of dependants, elderly people, ill people or children’ European Parliament, ‘Motion for a Parliament Resolution on Women Domestic Workers and Carers in the EU’ 2015/2094(INI) OJ C-66/30; Kirsten Scheiwe, ‘EC Law’s Unequal Treatment of the Family: The Case Law of the European Court of Justice on Rulings Prohibiting Discrimination on Grounds of Sex and Nationality’ (1994) 3(2) Social and Legal Studies 243, 249.

¹¹³ Kennedy and Gheera (n 105) 4.

¹¹⁴ Case C-77/95 *Züchner v. Handelskrankenkasse (Ersatzkasse) Bremen* [1996] ECR I-5689.

work that is remunerated by a care benefit, which AG Tizzano described as ‘undoubtedly “effective and genuine activities”’.¹¹⁵ In the latter case, the CJEU avoided the opportunity to ‘take a position’ on whether this kind of care is work, instead opting to locate equal treatment rights with national carers through the status of EU citizenship.¹¹⁶ In *Züchner* (which did not relate to migrant work but whether the individual could utilise the protection from sex discrimination in Directive 79/7/EEC requiring her to be in the ‘working population’),¹¹⁷ a family member providing care on an informal basis was identified as requiring ‘a degree of competence’ which would have to be ‘provided by an outsider in return for remuneration’ should the family member be unable to take on the responsibility.¹¹⁸ However the CJEU determined that it did not fall into the scope of ‘work’, citing a concern of the potential ‘infinite extension’ of the Directive or, as O’Brien puts it, an exercise of ‘damage limitation’.¹¹⁹

The UK’s approach has also added to the problems faced by carers. The UK courts have taken the approach that receipt of Carer’s Allowance is not a reflection of economic activity. A High Court judgment, considering the inclusion of Carer’s Allowance in the calculation of the benefit cap, found that describing ‘a household where care was being provided for at least 35 hours a week as workless was somewhat offensive’ and that ‘reasonable people would recognise that to care for a seriously disabled person is difficult and burdensome and could properly be regarded as work.’¹²⁰ However, the UT has found that the definition of work does not include the time an EEA national spends providing care, even when in receipt of Carer’s Allowance.¹²¹ In an unreported case the UT recognised that the importance of the care provided should not be underestimated,¹²² but ultimately decided that the receipt of Carer’s Allowance

¹¹⁵ Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri and Barth* [2004] ECR I-6483, Opinion of AG Tizzano, para 130.

¹¹⁶ Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri and Barth* [2004] ECR I-6483, para 130.

¹¹⁷ Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L6/24.

¹¹⁸ Case C-77/95 *Züchner* (n 114) para 14-15.

¹¹⁹ O’Brien (2009) (n 5) 1119.

¹²⁰ *Hurley & Ors v. SSWP* [2015] EWHC 3382 [28].

¹²¹ *JS v SSWP (IS)* [2019] UKUT 135 (AAC) [5]; *M & S v SSHD* [2018] UKAITUR EA045132017 [15].

¹²² *M & S v SSHD* (n 121) [13].

did not reflect the requirements of an employment relationship found in *Lawrie-Blum*. To come to this conclusion, the UT echoed the distinctions drawn by the CJEU in *Züchner* between an employee receiving remuneration and an informal carer receiving a benefit from the state.¹²³ The UT judgment also regarded carers to not be working under the direction or supervision of the State providing the benefit.¹²⁴ However some element of direction exists in the conditions attached to the receipt of Carer's Allowance. The requirements to provide care 'regularly and substantially' for a person in receipt of a qualifying disability benefit,¹²⁵ for specified minimum hours and to restrict their level of earnings from elsewhere, reflects a certain level of control and direction. Additionally, the 'remuneration' received is conditional on meeting these requirements.¹²⁶ However, the limitation of the benefit being paid to the carer, rather than to the recipient of services to 'remunerate' the care is a significant hurdle to the legal recognition of informal care as akin to employment.

The conclusion that care is not of 'genuine economic value', as O'Brien highlights, contrary to the fact that 'national economies are subsidised to a very significant degree by the unpaid labour of parents and carers.'¹²⁷ For example, the economic value and contribution of carers in the UK was calculated at around £132bn a year in 2015.¹²⁸ Care work is crucial as it provides an essential service that would otherwise require a paid worker or 'state-funded social care staff at a considerably higher cost to society'.¹²⁹ The informal care of family and friends can also support others to be able to work. By treating unpaid care work as a non-economic activity, many EU nationals providing this

¹²³ *ibid* [14].

¹²⁴ *ibid*.

¹²⁵ Kennedy and Gheera (n 105) 4.

¹²⁶ The Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409 (Carer's Allowance Regulations), Reg 4(1).

¹²⁷ O'Brien (2017) (n 5) 94.

¹²⁸ Lisa Buckner and Sue Yeandle, 'Valuing Carers 2015: The Rising Value of Carers' Support' (Carers UK, November 2015) 4 <<https://www.carersuk.org/for-professionals/policy/policy-library/valuing-carers-2015>> accessed 19 March 2020.

¹²⁹ 'Carers deserve a liveable income' (Guardian letters, 31 March 2015) in Kennedy and Gheera (n 105) 28.

essential service will not be able to access welfare benefits and, as a result, may not be able to risk exercising free movement.

Silvia

Silvia is a French national who has lived in the UK for over 12 years. Recently, her long-term British national partner passed away. They were not married.

Silvia has not worked during her time in the UK. For the last 12 years, Silvia has been a full-time carer for her 12-year-old disabled son and has been receiving Carer's Allowance and other welfare benefits. Shortly after her partner's death, Silvia applied for Universal Credit and this was refused on the basis of her not having a right to reside.

Silvia's case reflects some of the long-lasting impact of not having full-time caring responsibilities recognised as work. Silvia has spent the last 12 years providing full-time care for her son and receiving Carer's Allowance for this. This decision meant that Silvia cannot claim benefits on the basis of having a right to reside as a worker. Silvia's long period of residence is also treated as lost time. Despite living in the UK for over 12 years, Silvia was not be able to rely on her time as a carer to be entitled to permanent residence as it would not be counted towards worker status. In this respect, Silvia's British partner does not offer a route to establish rights and access to welfare.¹³⁰ For many EEA full-time carers, it is only after many years of residence or when they face upheaval in their life and require further welfare support, that they discover that they may struggle to access their EU rights.

7.5.2 The paradox of the MET and Carer's Allowance

As time spent providing unpaid care is not considered work, in order to access free movement rights carers will often rely on establishing a right to reside from other work.

The UK's approach to the definition of work, in particular the MET, creates a paradox for those receiving Carer's Allowance in the UK where they cannot meet the requirements for both. Firstly, EEA national carers do not need to establish a right to reside to access Carer's Allowance, they must be habitually resident in fact. However, an

¹³⁰ Directive 2004/38, art 3(1).

EEA national in receipt of Carer's Allowance will still need to establish a right to reside to access other means tested benefits. As discussed above, in order to receive Carer's Allowance, the claimant must be caring for over 35 hours a week¹³¹ and must not earn more than £128 a week.¹³² This limit has been reported by several charities as making it 'almost impossible for carers to combine paid work with their caring responsibilities.'¹³³ Many must face giving up work or reducing hours to provide care.¹³⁴ Nevertheless, for EEA nationals needing to combine work and care to establish a right to reside as a worker, these rules creates make it significantly more difficult for their work to be recognised under the MET.

EEA carers looking to establish a right to reside as a worker face an impossible task of meeting the earnings threshold of £183, higher than the earnings limit permitted to continue receiving payment under the Carer's Allowance rules. EEA workers with care responsibilities may face a dilemma over whether to increase their time working to more easily meet the MET at the sacrifice of their state support for their caring responsibilities. This will also likely involve a reduction in the amount of care provided. This also creates a potential no-man's-land where a carer could earn over £128 but below £183 and risk being ineligible for either Carer's Allowance or other benefits that require a right to reside.

Additionally, if an EEA national's time caring must be for at least 35 hours, it is unreasonable to expect them to fit in 21 hours of additional work, if earning national minimum wage. The unreasonableness of this expectation is reflected in the rules, discussed above, which exempt UK carers from work requirements in their Universal Credit claim.¹³⁵ The combination of these rules with the MET leaves EEA workers with caring responsibilities in a situation where they would have to work for a minimum total of 56 hours (if earning minimum wage) to meet the MET and guarantee a right to reside as a worker. However, this number of hours could be considerably worse as many

¹³¹ Carer's Allowance Regulations Reg 4(1).

¹³² Carer's Allowance Regulations Reg 8(1); DWP, 'Chapter 60 – Carer's Allowance Vol 10 Amendment 40 June 2015' [60025].

¹³³ Work and Pensions Committee (n 76) para 164.

¹³⁴ 5% of UK adults have given up work to provide care for an ill, disabled or older relative or friend. A further 4% had reduced their hours. This equates to 2.6 million people in Carers UK (n 77) 9.

¹³⁵ Work and Pensions Committee (n 76) para 187; UC Regulations, Reg 89(1)(b).

unpaid workers report caring for over 35 hours.¹³⁶ This is more than the maximum working time of 48 hours a week.¹³⁷ While it is not unusual for carers to have this kind of demand on their time, demanding it of EEA carers to establish a right to reside in order to access means-tested benefits is discriminatory and far from the promise of equal treatment.

7.5.3 Care and the second tier of the test

Many EEA carers will struggle to meet the demands of the first tier of the worker definition. Instead, they will be relying on the second tier of the test. As the DMG leaves little room for the consideration of the personal circumstances of workers and any barriers that may prevent them working to the same capacity as others, any EEA worker with care responsibilities will be held to the same standards as all EEA workers.

Laura

Laura lives in the UK with her 13 year-old daughter, Emma. They have both lived in the UK since 2016 and Laura has worked on and off in both employment and self-employment.

Due to ill health, Emma is no longer in full-time education and Laura took on work as a self-employed carer on a casual basis to allow for more flexibility to care for her daughter.

Laura made an application for Housing Benefit and Council Tax Reduction, which was refused finding that she had no right to reside after a strict application of the MET. A Mandatory Reconsideration was requested by Laura and the decision upheld. The MR letter from Slough Council considered Laura's work, finding that:

'As an employed/self employed EEA national, you are required to be earning above the [MET]. You have informed us that you returned to work on 27/10/17, however your average earnings are below the [MET] and there were periods where you did no work at all.'

¹³⁶ A third of carers in the UK were recorded as providing care for 50 or more hours in Buckner and Yeandle (n 128) 6.

¹³⁷ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9, art 6(b).

By ignoring Laura's personal circumstances, the elements of her work history which accommodate care for her daughter are removed of all their context. Instead, Laura's break and re-start of work, casual hours and the reduction of income are all referenced as indications of marginal and ancillary work.

However, the exclusion of carers can go further. Where the DMG lacks clarity and decision makers turn to their own understanding of the definitions of 'genuine and effective' and 'marginal and ancillary', carers could be excluded from having a right to reside as a worker because of the strenuous nature of their caring responsibilities or where work is seen as a secondary activity.

Naomie

Naomie's case was detailed further above in section 7.3.2.

Naomie was working as a self-employed housekeeper and employed casually to distribute leaflets. Naomie is also a full-time carer for her mother and is a lone-parent of a 4 year-old son. She has been receiving Carer's Allowance since 2014.

She applied for housing assistance from her local council in October 2016. This was refused as she did not meet the MET. Alongside the issues in decision making discussed previously, the decision maker discussed the amount of time spent caring for her mother and the earnings limits that would be necessary for Naomie to be receiving Carer's Allowance, concluding that:

"The Carer's Allowance you receive is a welfare benefit and not remuneration for work carried out. To be able to qualify for Carer's Allowance you must not earn more than £110 per week. You must also spend at least 35 hours a week caring for the person and I am satisfied that you care for your mother who is blind for a minimum of 35 hours in her home at [redacted] and receive a Carer's Allowance of £62.10. I am therefore of the view that the housekeeping services you render could only be marginal and ancillary to the support you give to your mother as a carer..."

Here, the decision maker has misunderstood the EU definition of ‘genuine and effective’ work, instead taking a more literal meaning of ‘ancillary’ to assume that work must be an EEA national’s main activity. The decision maker uses the very fact that care work requires high levels of commitment and that Carer’s Allowance places restrictions to a person’s time and earnings to illustrate that any work alongside this *must* be ancillary to caring. There is no requirement or precedent for ‘genuine and effective’ work to be interpreted as the primary activity in an individual’s life or the activity that takes the most time. This is a problematic approach which would make it impossible for an EEA national in receipt of Carer’s Allowance to fulfil the requirements of the worker definition, essentially barring EEA carers from accessing other benefits.

Carers must balance work with care and be mindful of how this may conflict with the earnings limit which, if surpassed, could strip them of Carer’s Allowance. Yet, the combination of the earnings cap for recipients of Carer’s Allowance and the steep level of earnings required to meet the MET automatically disqualifies many EEA carers from entitlement to welfare benefits. When relying on the second tier of the test, the atypical nature of their work or even the recognition of the pressures of care are used as the very reason to discount them from worker status. Instead, considering that Carer’s Allowance is calculated as income to offset the amount of means-tested benefit received, the UK should count the amount received from Carer’s Allowance as income in relation to the MET. This would allow EEA carers to meet the threshold without falling foul of the eligibility requirements for Carer’s Allowance and act as an indication to decision makers that time spent caring is not irrelevant or a counter-argument for the genuine and effective test in the second tier.

Leaving carers out of the protections offered in the free movement framework is particularly illogical when considered alongside the context of an ageing population¹³⁸ and looming care crisis across Europe.¹³⁹ Going forward, the value of unpaid care

¹³⁸ ‘the over 80 age group is projected to increase its share by 2.5 times between 2008 and 2050’ in Rie Fujisawa and Francesca Colombo, ‘The long-term care workforce: Overview and strategies to adapt supply to a growing demand’ (OECD Health Working Papers no 44, 2009); The number of those over the age of 79 is expected to triple across EU by 2060 in Alina Verashchagina and Francesca Bettio, ‘Long term care for the elderly: Provisions and providers in 33 countries’ (European Commission, 2012) 62.

¹³⁹ There is ‘a threat to the supply of long term carers from the decline in the number of people of working age and from social changes making it less likely for families to provide in the future the same level of informal care as they do today’ in Social Protection Committee and European Commission, ‘Adequate social protection for long-term care needs in an ageing society’ (Luxembourg: Publications Office of the European Union, 2014) 33.33; Rachel Horton, ‘Caring for adults in the EU: Work–life balance and challenges for EU law’ (2015) 37(3) *Journal of Social Welfare and Family law* 356; In

should not be neglected and formal inclusion in the EU free movement regime would be welcome. The failure to adopt a definition that recognises and adapts to the diversity of workers and their caring responsibilities means that the expectation of work required from EEA migrant carers is unreasonable. By failing to establish caring responsibilities as economic activity or to make more nuanced concessions for care, the UK and the EU more broadly discredit the contribution of carers and leaves them out of the free movement framework.

7.6 Summary

The extent to which the UK has restricted the definition of work means that it barely resembles the potential of inclusivity provided by the broad approach taken by the CJEU. The efforts to ‘reduce welfare and cut immigration’ through the use of the MET,¹⁴⁰ have manifested themselves in the exclusion of many atypical workers from equal treatment rights. Without access to the rights provided to those with worker status, such as the ability to access welfare benefits and secure their immigration status, atypical workers face formidable barriers to their free movement.

This chapter has sought to examine the UK’s interpretation and application of the EU concept of ‘worker’ in light of the changes seen in the European labour market, including the increasing diversity in the types of work available and the individual circumstances of workers occupying this space. This analysis has demonstrated how the discretionary outer edges of the worker definition are reduced to rigid boundaries, leaving any ‘non-standard’ work to fall through the gaps. The earnings threshold, adopted by the UK, has been set at an unreasonably high level and rewards consistency and permanence to the exclusion of many EEA nationals engaged in atypical and part-time work. Where the MET is applied as entirely determinative of genuine and effective work, low-paid atypical work can be automatically excluded. Alongside this, the lack of guidance from the EU level and the DMG on issues arising in new forms of work, such as overlapping contracts, the combination of temporary work and inconsistency of earnings means that the second tier of the worker test does not provide the necessary ‘catch-all’ to prevent atypical workers from being excluded. Rather than a ‘catch-all’, the

England ‘By 2032, there is projected to be a shortfall of 160,000 care-givers’ in Linda Pickard, ‘A growing care gap? The supply of unpaid care for older people by their adult children in England to 2032’ (2015) 35 *Ageing and Society* 96.

¹⁴⁰ DWP (2014) (n 7).

restrictive approach to the ‘genuine and effective’ test, as seen in the case studies, can result in EEA national’s work being excluded on the grounds that it is atypical.

These exclusions can be arbitrary, but they can also result in discrimination by ignoring the structural barriers which force the ‘choice’ to engage in atypical work. The one-size-fits-all approach to work ignores the diversity of workers who contribute to a large proportion of the atypical workforce alongside the barriers and structural discrimination they face when accessing work. A homogenous approach to expectations is brought into particularly sharp focus when compared to the changes in expectations and easements that would be offered to UK national workers in the same circumstances when receiving Universal Credit. Case studies from this research also illustrate examples of how specific circumstances of EEA workers present particular barriers to meeting the requirements of worker status such as disability, illness, the responsibilities of lone-parents and carers and the consequences of domestic violence and trafficking. These cases illustrate the hurdles presented where those facing barriers must also contend with a high standard to prove work is ‘genuine and effective’. Lastly, the example of unpaid carers shows how failing to recognise personal circumstances can make it almost impossible for workers to meet the requirements of the UK’s worker test. If care is not capable of constituting economic activity, there should be specific concessions available to carers, for example the inclusion of income from care benefits or hours spent caring towards the calculation of genuine and effective activity.

This chapter has also sought to suggest some ways the worker test in the UK could be adapted to be more inclusive of the changing labour market. However, these proposals are UK-specific, whereas the restrictive interpretation of worker status is apparent in a number of Member States.¹⁴¹ Addressing them will require either EU intervention in Member States’ attempts to narrow the definition of work or an updating and re-framing of the EU concept of work to offer more precise guidance to Member States and adopt a more formally inclusive definition to recognise new and emerging forms of work in the labour market. However, free movement and access to welfare is a politically sensitive topic, attracting reactionary restrictions at the EU level¹⁴² and worker status is often perceived as a tool by which Member States are permitted to exercise

¹⁴¹ Charlotte O’Brien, Eleanor Spaventa, and Joyce De Coninck ‘Comparative Report 2015: The concept of worker under Article 45 TFEU and certain non-standard forms of employment’ (FreSsco, 2016) 24-25.

¹⁴² See chapter 3, section 3.4 The political fragility of free movement.

control over access to their social security systems,¹⁴³ attempts to widen its scope should be dealt with sensitively and could expect to be met with resistance.

Overall, the lack of explicit inclusion in the EU concept of work alongside the restrictive interpretation of the worker test at the UK level limits the ability of some economically active EU nationals to access equal treatment rights. The full rights of free movement are already limited, through the rationale of market citizenship, to only those who can demonstrate economic activity.¹⁴⁴ Adopting an anachronistic conception of work, which can result in the exclusion of atypical workers and entrench inequality, cannot be justified on purely economic grounds and instead exposes the entrenched political value judgments taken in the inadequate construction of 'genuine and effective' work.

¹⁴³ van der Mei (n 48) 130.

¹⁴⁴ Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47(6) Common Market Law Review 1597; Eleanor Spaventa 'Earned Citizenship – Understanding Union Citizenship through Its Scope' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017).

Chapter 8: Conclusion

This thesis has investigated the free movement rights of atypical workers as a way of analysing the credibility of EU citizenship's claim to 'fundamental status' in light of the changing labour market. I have argued that the EU concept of work and its national implementation can lead to the exclusion of atypical workers from equal treatment rights and the ability to exercise free movement. The position of atypical workers in free movement law has been examined with regard to the roles of EU citizen, mobile EU worker and EU migrant accessing rights in the UK to scrutinise the potential for free movement and equal treatment rights at each level.

8.1 Atypical workers as citizens

Chapters 2 and 3 addressed the first stage of this enquiry by examining the potential of EU citizenship as a source of free movement and equal treatment rights for atypical workers.

Chapter 2 questioned the fundamental status of EU citizenship through its theoretical and political contexts. The status of EU citizenship was assessed against theoretical expectations of social citizenship, leading to a finding that it has been unable to move past a market citizenship.¹ This analysis identified two main challenges to EU citizenship which could limit its effectiveness for atypical workers. Firstly, the market roots of the status have left many of the rights it offers, including those which facilitate free movement, conditional on a citizen's market credentials. Secondly, EU citizenship lacks the necessary affective components of solidarity to grow past its market confines. Seeking a shared identity is problematic, ineffective and unlikely in the EU context, while constitutional patriotism, though offering the most useful route to solidarity, is too abstract and has not been fully embraced. Where solidarity exists, it is concentrated on reserving rights for those who can show their contribution to a host Member State, typically through economic activity. The full array of rights available under EU citizenship are therefore conditional on market activity, limiting its ability to protect citizens who cannot demonstrate *enough* market activity.²

¹ Eleanor Spaventa, 'Earned Citizenship – understanding Union citizenship through its scope' in Dimitry Kochenov, *EU Citizenship and Federalism: the Role of Rights* (Cambridge University Press, 2017); Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47(6) Common Market Law Review 1597.

² Addressing RQ 1.

Chapter 3 then analysed the legal rights of EU citizenship in relation to free movement and equal treatment. Despite free movement and the protection from discrimination being theoretically available to all EU citizens on the basis of primary law, through arts 21 and 18 TFEU,³ these are subject to limitations provided in secondary law. The CJEU's recent restrictive interpretation of citizenship rights has elevated the residency requirements in Directive 2004/38 to supra-primary law status, effectively limiting primary law rights to the economically active or self-sufficient.⁴ This shift has seen the focus of the Court divert from EU citizenship as a status to facilitate free movement to a concern for the 'burden' on Member States and their social security systems.⁵ Thus the legal instruments that remove barriers to free movement must be activated by economic activity; the status of EU citizenship provides little benefit if this cannot be established.⁶

The significance of this transition is drawn alongside the recently amplified, but unsubstantiated, concerns of benefit tourism from Member States. The political sensitivity of access to welfare echoes the concerns, identified in chapter 2, of the limits of solidarity in a supranational setting. Alongside the EU-sanctioned restrictions on the equal treatment of workers in the UK and EU's now defunct 2016 settlement, this chapter highlights the desire of Member States to reap the economic benefits of free movement, while curtailing the responsibility to support resident EU nationals – even when they are working. This places atypical workers, who are often both economically active and potentially dependent on welfare, in positions of considerable precarity.

Together these chapters illustrate the limits of the potential for atypical workers to derive equal treatment rights from EU citizenship. It is a status that remains entangled with the market, and so economically inactive EU citizens cannot exercise freedom of movement without enduring great risk, if at all. For EU atypical migrant workers, being

³ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art 18 and 21.

⁴ Case C-333/13 *Dano v Jobcenter Leipzig* EU:C:2014:2358, [2014] ECR I-2358; Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* EU:C:2015:597; Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v García-Nieto* EU:C:2016:114; Case C-308/14, *Commission v. United Kingdom* EU:C:2016:436.

⁵ Daniel Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 (1) Common Market Law Review 17; Spaventa (n 1); Charlotte O'Brien, 'Civis Capitalist Sum: Class as the new guiding principle of EU Free Movement Rights' (2016) 53(4) Common Market Law Review 937.

⁶ Addressing RQ 2.

deemed economically active still matters.⁷ From this, EU citizenship emerges as an aspirational misnomer and is, at best, no more than a form of market membership. Under this kind of model, citizens are treated as potential members, who must pay their subscription by demonstrating *enough* market activity to attain the equal treatment rights attached to being a mobile citizen of the European Union. As a status that supposedly rewards market engagement with access to rights, the automatic assumption is that citizens engaging with and participating in the market should be granted access.⁸ However, for atypical workers, the question must be whether they meet the requirements for membership. This line of enquiry forms part of this research's original contribution; critiquing the 'fundamental' status of EU citizenship through analysing its ability to protect the free movement rights of its economically active citizens, including atypical workers. The next step in this enquiry was an examination of the scope of economic activity, and whether it reflects the reality of work as experienced.

8.2 Work as experienced v work as defined

To examine the adequacy of the legal tests used to define economic activity, it is important to get a sense of how work in the EU and UK may be experienced. The labour market in Europe is fragmenting and work that is not full-time or permanent is increasing. New forms of work which sit in grey zones between employment and self-employment have emerged, particularly in the gig economy. Chapter 4's examination of secondary data offers some insight into the increasing variety of employment circumstances present in the European labour market, and that analysis forms the premise for assessing the adequacy of the EU definition of work in later chapters. Taking on atypical work is also not always a free choice. Data on demographic representation in the atypical labour market has indicated the overrepresentation of workers who face barriers to the standard labour market, such as disabled workers, lone parents, young workers and migrant workers. The EU's ability to provide free movement rights to atypical workers is relevant for a significant number of workers and

⁷ Herwig Verschueren, 'Being Economically Active: How it Still Matters' in Herwig Verschueren (ed.) *Residence, Employment and Social Rights of Mobile Persons: On how EU Law defines where they belong* (Intersentia, 2016) 187.

⁸ Floris De Witte, 'Transnational Solidarity and Conflicts of Justice' (2012) 18(5) *European Law Journal*, 705.

will have an impact on the ability of marginalised workers who do not have the same opportunities as their comparators to engage in more standard employment.

Mobile EU citizens in the atypical labour market also face significant precarity in the form of underemployment, pay penalties, a lack of employment rights and risks to health. Access to welfare systems to off-set or alleviate some of this precarity is therefore essential for those in atypical work to avoid the risks to personal wellbeing and falling into in-work poverty. Exclusion from equal access to social security systems *because* of a lack of economic activity is therefore no longer an accurate depiction of lived experience.⁹ Those engaged in economic activity need access to welfare rights in a host Member State. This thesis has demonstrated that the rise and precarity of atypical work presents barriers to free movement; the contested scope of worker status and the risk of losing access to welfare benefits can create significant barriers for atypical workers and make the prospect of moving to another Member State to take up an employment opportunity unfeasible.¹⁰

Chapter 5 asked to what extent EU free movement law ensures the protection of equal treatment rights for atypical migrant workers and identified gaps in this protection. The decision to keep the EU definition of work broad and vague may have the appearance of inclusivity but (possibly deliberately)¹¹ devolves the responsibility to set the outer edges of worker status to Member States. The pivotal point in the definition that work must be ‘genuine and effective’ and not ‘on such a small scale as to be regarded as purely marginal and ancillary’¹² has been used by the CJEU to include a large variety of working situations including where work is conducted over relatively few hours per week, broad interpretations of remuneration and considerations of formal employment features. Despite this broad approach, the CJEU has not explicitly included other common characteristics of atypical work; some of these have instead been labelled as potential indicators of marginal and ancillary work.¹³ Gaps in the vague definition mean

⁹ Gareth Davies, ‘Migrant Union Citizens and Social Assistance: Trying to Be Reasonable About Self-Sufficiency’ (2016) College of Europe Research Papers in Law No. 2/2016 5.

¹⁰ Addressing RQ 3.

¹¹ Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross Border Access to Public Benefits* (Hart Publishing, 2003) 130.

¹² Case C-53/81 *Levin v Staatssecretaris van Justitie* ECLI:EU:C:1982:105, para 17.

¹³ Case C-357/89 *Ranlin v Minister van Onderwijs en Wetenschappen* EU:C:1992:87, para 14.

that Member States can refine and distil it, such that atypical workers may face exclusion from free movement rights. A possibly inclusive approach taken in a few CJEU cases cannot without clear, consistent domestic implementation give confidence to atypical workers that their free movement rights will be protected.¹⁴

Chapters 4 and 5 combined offer an original contribution by identifying the disjuncture between how work is experienced in the atypical labour market and the fragility of protection offered in EU free movement law. This research makes the case for the explicit inclusion of atypical work in free movement rights at the EU level, and for the adoption of a more nuanced approach where personal circumstances may create barriers to ‘typical’ work. Without these changes, EU citizens in atypical work, including those in already disadvantaged demographic groups, are separated from the equal treatment rights which can be essential to mitigate precarity and vulnerability and make movement to another Member State for work more feasible.

8.3 The experience of atypical workers in the UK

The final two chapters zoned in on the experience of atypical workers in the UK. Together these chapters contribute to the scrutiny of the UK definition of worker by evidencing how the test operates against common aspects of atypical working including low-income, inconsistent work, and overlapping or consecutive contracts. I have argued that this test infringes EU law, making the case for the EU to act on this incompatibility, and for the UK government to rethink the suitability of the MET in light of the variety of work in the atypical labour market.

Chapter 6 combined a doctrinal analysis of the MET and decision maker guidance with empirical data collected from EEA atypical worker interactions with the UK definition to argue that it is incompatible with EU law. The empirical data gathered for this research has suggested three key sources of incompatibility.¹⁵ Firstly the evidence suggests that the earnings threshold has been applied as determinative, so withholding worker status on the basis of limited earnings whereas the CJEU has taken the position that limited remuneration does not have ‘any consequence’ for the determination of

¹⁴ Addressing RQ 4.

¹⁵ Addressing RQ 5.

worker status.¹⁶ The earnings threshold is set considerably higher than CJEU case law suggests is necessary for work to be considered ‘genuine and effective’. Secondly, where work falling below the earnings threshold was assessed under the second tier, decision makers face steers in the guidance to re-assert the importance of income and hours worked, establishing what O’Brien calls a ‘presumption of marginality’ for work failing the earnings test.¹⁷ Thirdly, evidence from cases demonstrates how incorrect considerations or misleading language in the guidance can prompt decision makers to approach worker status in ways that have been explicitly rejected by the CJEU; examples include assertions that earnings must meet a level of subsistence, and the requirements to consider a worker’s motivation and physical capabilities.

Chapter 7 analysed the empirical data to find that the MET not only infringes EU law, but also results in workers in the atypical labour market facing indirectly discriminatory barriers to worker status. These exclusions are often compounded by a combination of the EU definition, UK interpretation and decision maker tendencies.

The level of earnings required and the calculation of the first tier of the MET inherently demands more from low-income workers, both when earnings are calculated hourly and where they are paid per gig – sometimes below minimum wage. The requirement for income consistency disadvantages those with irregular earnings. As the guidance offers little by way of addressing atypical work characteristics, such as overlapping contracts, decision makers can easily get lost when navigating these issues. This study found cases in which decision makers demonstrated restrictive approaches, categorising work as marginal and ancillary on the grounds that it is atypical. Applying the test uniformly, without expressly accommodating the personal circumstances of workers has a disproportionate impact, limiting free movement rights for those who face barriers to more standard employment, arising from disability, from care responsibilities (disproportionately borne by women), and from domestic abuse. This thesis makes an explicit case for protecting equal treatment rights for EEA nationals who provide informal care, drawing upon evidence of the problematic prevailing assumptions about

¹⁶ See chapter 5, section 5.4 The inclusion of non-traditional work.

¹⁷ Charlotte O’Brien, *Unity in Adversity: EU citizenship, Social Justice and the Cautionary Tale of the UK* (Bloomsbury, 2017) 156.

care and work and the requirement to balance both responsibilities to still meet the standard of ‘typical’ worker status.

These discriminatory effects could be reduced with a more nuanced approach to these personal circumstances – either through explicitly recognising such variables as relevant factors for the consideration of worker status, or through adopting a sliding threshold which appreciates barriers to work and constraints on time.

This case study, analysing the impact of UK’s MET on free movement and equal treatment rights in the changing labour market, lends support to two key arguments developed throughout the thesis.

Firstly, it demonstrates how some of the EU’s vague and imprecise definition can be manipulated in practice, and how it can become exclusionary.¹⁸ This reinforces the case for explicit inclusion of atypical forms of work and the recognition of personal circumstances at the EU level.

Secondly, in illustrating the exclusive nature of the test for economic activity it has contributed further evidence of EU citizenship’s manifestation as a form of membership. This goes further than critiques of EU citizenship as market citizenship, to suggest that engagement in the labour market is not decisive. Alternatively, taking the model of EU citizenship as a membership, equal treatment rights and citizenship rights, such as permanent residence are reserved for those workers who are economically active *enough* and whose economic activity is conducted in the ‘right’ consistent and regular way – subscriptions must be paid and club etiquette rules observed. An EU citizen’s membership of the ‘equal treatment’ club is also constantly scrutinised. Unless and until they successfully prove 5 years of economically diligent membership, sufficient to attain the platinum membership card of permanent residence, even temporarily defaulting on the terms of membership can result in a complete loss of access to the equal treatment club. The limited conception of economic activity means that atypical workers may never be eligible for the perks of membership.

8.4 Beyond the UK and future challenges

For the UK, given the potential for the MET to exclude many atypical and vulnerable workers, the transition out of the EU must be scrutinised carefully to ensure that the

¹⁸ Addressing RQ 6.

rights of EU citizens are respected. As it stands, the MET will still play a role for EU nationals in the UK who cannot evidence 5 years' residence with the EU Settlement Scheme. This cohort will need to pass the right to reside test to access welfare benefits. Therefore, the inadequacies of the MET could continue to limit the rights of atypical workers in the UK for years to come.

Going forward, it would be useful to expand this enquiry to the investigation of other EU rights associated with mobility, including experiences of cross-border claims, when residence and work are in different Member States, or where multiple work contracts are conducted across different Member States. While these factors did not appear in the cases examined for this study, a key theme throughout has been the recognition that lives, work and personal circumstances are rarely simple. Further research into these experiences of intra-EU mobility would be beneficial to flesh out the understanding of atypical workers experience with free movement.

It would also be beneficial to examine the free movement experience of EU migrant atypical workers in other Member States to see if their iterations of the definition of work present similar issues of exclusion. As mentioned to in chapter 6, restrictive applications of the worker status definition are not limited to the UK. Many Member States adopt thresholds using a mixture of earnings, hours or the two combined to assess worker status.¹⁹ While this does not mean that countries operating a threshold interpret the overall assessment as restrictively as the UK, it does highlight some of the impact a threshold can have and offers caution to the use of earnings thresholds as a device for this task. Further research into the impact of thresholds in these Member States would be necessary to determine if atypical workers are separated from their free movement rights more systemically across the EU.

An anachronistic model of work that excludes – or enables Member States to exclude – atypical workers from equal treatment rights disproportionately impacts disabled workers, women and workers with caring responsibilities. In failing to keep pace with the changing labour market, the EU risks entrenching inequalities – deepening the disadvantage and exclusion faced by these groups. The model of market citizenship to justify the exclusion of economically active citizens is not logically sound. What EU

¹⁹ Charlotte O'Brien, Eleanor Spaventa, and Joyce De Coninck 'Comparative Report 2015: The concept of worker under Article 45 TFEU and certain non-standard forms of employment' (FreSsco, 2016) 24-25.

citizenship, the UK case study, and the problematic positioning of carers show us is that sterile arguments about the economic or political origins or ambitions of the Union miss the point. The economic is political – how economic activity is defined is not a matter of ‘fact’; it is a political choice. It is time to consider making a new one.

Appendix

Case data

Overall, 15 cases were recorded in detail. Below is a breakdown of the demographics of cases, the type of work concerned, and the evidence collected.

Demographics:

Gender		
Male	6	
Female	9	
Nationalities		
Slovak	1	
Polish	4	
Swiss	1	
Italian	3	
Portuguese	2	
German	1	
Dutch	1	
Bulgarian	1	
Spanish	1	
Age		
Under 25	2	
25- 59	12	
Over 60	1	
Disability and illness	Disability	Illness
Claimant		3
Family member of claimant	4	
Caring responsibilities		
4		
Domestic violence survivor	Trafficking	
2	1	
Pre-school age children	School-age children	
2	6	
Homelessness	Risk of homelessness	
2	3	

Work and evidence gathered:

Employment Type	
Part-time	5
Temporary full-time	2
Temporary part-time	2
On-call/casual	3
Pay-per-gig	2
Self-employment	3
Type of evidence included:	
Decision letters	7
Mandatory Reconsideration letter	3
First Tier Tribunal decisions	2
Quoted decision letter	1
Anecdotal evidence from adviser	3
Anecdotal evidence from individual	1
Type of Applications	
Benefits/support (Local Authority)	6
Benefits/support (DWP)	9
Permanent Residence (Home Office)	1
Long term residence	
0-1 year	0
1-5 year	5
5+ years	6
10+ years	1
20+ years	1
unknown	2

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