FREEDOM OF MOVEMENT AND THE NORMATIVE VALUE OF THE RIGHT TO WORK IN THE UNITED KINGDOM POST-BREXIT

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ABSTRACT

A new legal order has arisen in the United Kingdom (UK) following that country's withdrawal from the European Union (EU). Nowhere are these changes more evident than in the complex rules that have emerged in the fields of freedom of movement and the right to work. In evaluating the new legal landscape, this article has two overarching aims. The first is to assess the level of protection granted to the right to work and associated free movement rights within EU and UK law, including the terms of the EU-UK Withdrawal Agreement. The second aim is to examine the extent to which those right to work rules are reflective of the status of the right to work as a fundamental social right. Three separate categories of rights-holder are relevant for this discussion, namely: (1) those with EU or UK citizenship status ('national workers'); (2) 'former' national workers i.e. those EU and UK citizens whose right to work is protected by the Withdrawal Agreement and who thereby enjoy a hybrid status; and (3) Third Country National (TCNs) who have moved specifically for the purpose of obtaining lawful employment ('migrant workers'). The purpose is to examine the manner in which freedom of movement and the right to work of (former) national, and migrant workers are conceptualised under EU (withdrawal) law and UK law. It is argued that UK right to work rules are derived from a patchwork of immigration law, with the complexity and differing coverage of this framework serving to undermine the right to work as a fundamental right. This can be contrasted with the level of protection granted to the right to work within EU law, including its clear connection to fundamental rights concepts. Brexit unmoors the right to work from EU free movement rules, thereby undermining the normative value of that right, while exacerbating flaws in domestic rules governing access to employment. Our understanding of the right to work as a fundamental right also draws on Marshall's rights-based conception of 'social

citizenship', which can transcend legal distinctions derived from political or identity-based notions of citizenship, and which can bridge—albeit without completely overcoming—the distinction between national and migrant workers. It is contended that a clearer articulation of the right to move and work within the UK, coupled with a social (citizenship) conception of those rights, would go some way to ensuring recognition of the normative value of the right to work as a fundamental right post-Brexit.

INTRODUCTION

A new legal order has arisen in the United Kingdom (UK) following that country's withdrawal from the European Union (EU). Nowhere are these changes more evident than in the complex rules that have emerged in the fields of freedom of movement and the right to work. In evaluating the new legal landscape, this article has two overarching aims. The first is to assess the level of protection granted to the right to work and associated free movement rights within EU and UK law, including the terms of the EU-UK Withdrawal Agreement (WA). The second aim is to examine the extent to which those right to work rules are reflective of the status of the right to work as a fundamental social right. Three separate categories of rights-holder are relevant for this discussion, namely: (1) those with EU or UK citizenship status insofar as they reside in a territory of which they enjoy citizenship rights, whether a current EU Member State, or the UK ('national workers'); (2) 'former' national workers i.e. those EU and UK citizens who used to enjoy citizenship rights in the relevant territory, but who have lost those rights due to Brexit, and whose right to work is now protected by the Withdrawal Agreement, and who thereby enjoy a hybrid status; and (3) Third Country National (TCNs) who have moved specifically for the purpose of obtaining lawful employment ('migrant workers').[1] Our purpose is to examine the manner in which freedom of movement and the right to work of (former) national, and migrant workers are conceptualised under EU (withdrawal) and UK law. The rights of migrant workers are perhaps more amenable to a direct 'comparison' between EU and UK law, given that both regimes govern the level of protection granted to workers entering from 'outside'. Freedom of movement for national workers is perhaps less readily comparable given that the UK is a sovereign unitary state, while the EU is a transnational union of states,

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[1] V Mantouvalou, 'The Right to Non-Exploitative Work' in V Mantouvalou (ed), *The Right to Work* (Hart, 2017), p 39 addresses undocumented workers.

each with their own, although increasingly coordinated, immigration and right to work regimes for migrant workers. Nevertheless, it is suggested here that lessons can be drawn from EU free movement law in reconceptualising freedom of movement and the right to work within domestic law.

It is argued that UK right to work rules are derived from a patchwork of immigration law, with the complexity and differing coverage of this framework serving to undermine the right to work as a fundamental right. This can be contrasted with the level of protection granted to the right to work within EU law, including its clear connection to fundamental rights concepts. Most obviously, we rely on work to fulfil our basic human needs such as food, housing, and health, but more widely, the freedom to pursue a freely chosen trade or profession has clear links to the concepts of self-determination, self-realisation, and human dignity.[2] Our understanding of the right to work as a fundamental right also draws on Marshall's rights-based conception of 'social citizenship', which can transcend legal distinctions derived from political or identity-based notions of citizenship, and which can bridge—albeit without completely overcoming—the distinction between national and migrant workers.[3] It is contended that a clearer articulation of the right to move and work within the UK, coupled with a social (citizenship) conception of those rights, would go some way to ensuring recognition of the normative value of the right to work as a fundamental right post-Brexit.

There is no doubt that ending freedom of movement played a significant role in the UK's decision to leave the EU.[4] There is a clear connection between the concepts of freedom of movement and the right to work—whether within EU law, or more generally—given that in order to benefit from a right to work, one must first be able to move to (and within) the host state. For those seeking employment, the right to reside is of little value unless accompanied by a right to work. Freedom of movement itself can be—and within EU law is—considered a fundamental right, given the importance of that freedom for access to employment.[5] As this article demonstrates, the connection between freedom of movement and the right to work within EU law is explicit, whereas in UK law, the connection is weaker. It is further shown that EU law and UK law take different approaches to the protection of the right to work. The right

[2] H Collins, 'Is there a Human Right to Work?' in Mantouvalou note 1 above, p 17.
[3] T H Marshall, *Citizenship and Social Class: And Other Essays* (CUP, 1950), p 16.
[4] David Cameron achieved important concessions regarding migration during his renegotiation of the UK's EU membership: European Council, A New Settlement for the United Kingdom Within the European Union 2016 C 69/1/1; C Barnard and E Leinarte, 'Brexit & Free Movement of People' (2020) 24 *Lavoro e Diritto* 441.
[5] J Gordon, 'Transnational Labour Citizenship' (2007) 80 *SoCalLRev* 503.

to work within UK law is reliant on a 'permission-based' immigration regime, including exemptions for national workers and other categories of leave-holder from the need to obtain such permission. This approach can be contrasted with the EU's 'rights-based' free movement and immigration rules, which include legally entrenched and enforceable workers' rights, albeit that the ability of migrant workers to move freely across the Union may be restricted, particularly given the shared competence enjoyed by the EU and its Member States in this field.[6]

The existing literature on the fundamental right to work addresses the meaning of such a right, its precise normative content, as well as its enforceability.[7] Our aim is to use the fundamental right to work as the normative lens through which to examine the implications of right to work *law*, i.e. the manner in which UK and EU legal instruments provide for a right of *access* to employment for both national and migrant workers. EU free movement and citizenship law have received extensive—or in the case of the Withdrawal Agreement—emerging, attention in the literature, particularly with regard to residence rights and social welfare.[8] Less attention has been given to the (related) right to work specifically. Existing discussion on EU free movement rules (for national workers) and EU immigration rules (for migrant workers) is not usually framed in terms of a fundamental 'right to work' analysis of the underlying legal provisions, save to the extent that the limited discussion on the right to work within the EU Charter of Fundamental Rights (CFR) necessarily entails reference to freedom of movement.[9]

The right to work within UK law was traditionally conceived as the right to access employment regardless of trade union (non-)membership.[10] More recent attention has turned to the influence of the right to work on substantive UK employment law.[11] The pre-Brexit literature recognises the interaction between immigration legislation and the right to work, but without further interrogation of the compatibility of the underlying rules with the right to work

[6] J Dennison and A Geddes, 'Brexit and the Perils of "Europeanised" Migration' (2018) 25 *JEPP* 1137, p 1140.
[7] G Mundlak, 'The Right to Work: Linking Human Rights and Employment Policy' (2007) 146 *Int'lLabRev* 189.
[8] C O'Brien, 'Between the Devil and the Deep Blue Sea: Vulnerable EU Citizens Cast Adrift in the UK Post-Brexit' (2021) 58 *CMLRev* 431.
[9] V Mantouvalou and E Frantziou, 'Article 15' in S Peers et al (eds), *The EU Charter of Fundamental Rights*, 2nd ed (Hart, 2021), p 449; S Deakin, 'Article 15' in F Dorssement et al (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart, 2019), p 331.
[10] A Bogg, 'Only Fools and Horses: Some Sceptical Reflections on the Right to Work' in Mantouvalou note 1 above, p 149.
[11] H Collins, 'Progress Towards the Right to Work in the United Kingdom' in Mantouvalou note 1 above, p 227.

as a fundamental right.[12] The post-Brexit discussion on freedom of movement has overlooked the distinctive approaches to the right to work adopted under UK and EU law. This may be because of the absence of explicit domestic provisions governing the right to work for national workers, as well as the fact that the right to work of migrant workers is frequently conditioned by immigration status. Nevertheless, we argue that the manner in which access to employment is protected within UK law is deficient in failing to provide a direct right to work, with that right instead being rooted in exceptions to immigration restrictions, which are vulnerable to amendment over time. There are also wider deficiencies within the UK immigration regime from a right to work perspective, particularly in light of the changes introduced as a consequence of Brexit, which has led to additional categories of immigration status in the UK, with varying degrees of protection for the right to work.

It will be demonstrated that domestic UK law—upon which EU citizens without settled status must rely, alongside other foreign nationals—fails to provide for a generally applicable legal *right* to work. By contrast, EU—and now EU *withdrawal*—law offers a much closer connection to the right to work as a fundamental right. Brexit has paradoxically led to the entrenchment within UK law of a new form of EU-derived right to work as a replacement to EU free movement law, but only for those with settled status, and at a time when British citizens resident in the UK have lost their right to work in EU law. Furthermore, Brexit emphasises the lack of provision for freedom of movement and the right to work within UK (internal market) law.

The article is structured as follows. Section I explores the 'direct' protection of the right to work within EU law and the Withdrawal Agreement, and demonstrates the close connection to the right to work as a fundamental right. The right to work in EU (withdrawal) law is then contrasted in Section II with the absence of clear provisions protecting the right to work within UK law, with that right only being 'indirectly' protected within the permission-based sphere of immigration law. The absence of explicit protections, coupled with the complexity and differing coverage of the existing immigration framework, undermine the right to work as a 'fundamental right', which can be said to underpin the overall scheme of social rights.[13] The categorisation of the right to work is clearly more complex than simply progressing from a

[12] B Ryan, 'Employer Checks of Immigration Status and Employment Law' in C Costello and M Freedland (eds), *Migrants at Work* (OUP, 2014), p 239.
[13] C O'Cinneide, 'The Right to Work in International Human Rights Law' in Mantouvalou note 1 above 99, p 112.

weak to a strong conception of that right, as the level of protection granted to that right depends largely on the instrument chosen to implement it. It is therefore necessary to examine the manner in which rules governing the right to work are manifested in both EU and UK law in order to then understand the extent to which the right to work as a fundamental right has been embedded in both legal orders. We suggest that a clearer articulation of the right to move and work within the UK, as also viewed through a fundamental social rights lens, would represent an important step towards ensuring recognition of the normative value of the right to work for all workers, whether national or migrant.

I. THE DIRECT PROTECTION OF THE RIGHT TO WORK IN EUROPEAN UNION (WITHDRAWAL) LAW

A. The (fundamental) right to work in European Union law

1. The rights of national workers under European Union free movement law

While the UK was an EU Member State, the right to work of EU citizens was clearly expressed in the Treaties and relevant legislation which provided the basis for challenging UK laws hindering the right to work.[14] Article 45 of the Treaty on the Functioning of the European Union (TFEU) grants workers the right to move freely within the Union to seek and accept employment in another Member State on the same terms as nationals of that state, with those rights thereby engaged only in cross-border situations.[15] These free movement provisions are clearly defined and explicitly set out in a 'constitutional' Treaty, which enjoys hierarchically superior status to other EU rules and national measures within the scope of EU law.[16] These 'free movement' rights are supplemented by further Treaty provisions, granting the status of EU citizen—and accompanying rights—to nationals of the Union's Member States.[17] Article 45 TFEU has direct effect and can be relied on by litigants vertically against the state and also horizontally against private parties.[18] The Treaty provisions must be read alongside the more detailed protections found in EU legislation, notably the Citizen's Rights Directive 2004/38 (CRD), which further elaborates upon the principle of equal treatment found in Article 18

[14] *Collins*, C-138/02, EU:C:2004:172.
[15] *Lawrie-Blum*, C-66/85, EU:C:1986:284.
[16] *Les Verts*, C-294/83, EU:C:1986:166, paragraph 23.
[17] Articles 20, 21 TFEU.
[18] *Van Duyn*, C-41/74, EU:C:1974:133; *Angonese*, C-281/98, EU:C:2000:296; *Baumbast*, C-413/99, ECLI:EU:C:2002:493, paragraph 94.

TFEU.[19] There is also legislation specifically dealing with the free movement of workers, as well as the recognition of professional qualifications.[20]

These EU rules, specifying the right to work as well as the conditions of access to work, are essentially predicated on an approach based on legal protections against discriminatory treatment on the grounds of nationality, as well as the facilitation of access to the labour market.[21] Not only are workers—and qualifying family members—entitled to move freely to pursue employment in another Member State, but they are also entitled to equal treatment in terms and conditions of employment such as remuneration, dismissal, and reinstatement.[22] The hierarchy of norms within EU law—with Treaty provisions enjoying superior status to both EU legislation and national legislation implementing EU free movement rules—means that the latter must be interpreted consistently with the former and, in the event of incompatibility between the two, relevant provisions of conflicting legislation should be disapplied.[23] There is a complex relationship between primary and secondary EU law, with the latter often influencing the interpretation of the former.[24] Indeed, in the context of EU free movement rules, the practical consequence of the enactment of more specific legislation may even be to exclude the application of the Treaty.[25]

The right to work for national (EU) workers is not absolute, and may be subject to limitations in the general interest.[26] The free movement provisions have not always been applied consistently, and freedom of movement has also been politically contentious both within and beyond the UK context.[27] EU free movement law nonetheless constitutes a series of delimited rights that may be subject to proportionate restrictions, in compliance with fundamental rights.[28] The citizenship provisions are also subject to limitations, with protections varying depending on the economic status of the individual, as well as length of residence.[29]

[19] Directive No 2004/38 [2004] OJ L158/77.
[20] Regulation No 492/2011 [2011] OJ L141/1; Directive No 2014/54 [2014] OJ L128/8; Directive No 2005/36 [2005] OJ L255/22.
[21] N Nic Shuibhne, 'Reconnecting Free Movement of Workers and Equal Treatment in an Unequal Europe' (2018) 43 *ELRev* 477.
[22] Articles 23, 24 CRD.
[23] *Watson and Belmann*, C-118/75, EU:C:1976:106, paragraphs 15–16.
[24] P Syrpis, 'The Relationship Between Primary and Secondary Law in the EU' (2015) 52 *CMLRev* 461.
[25] *Dano*, C-333/13, EU:C:2014:2358.
[26] *Fries*, C-190/16, EU:C:2017:513.
[27] H Mercenier et al (eds), *La Libre Circulation Sous Pression. Régulation et Dérégulation des Mobilités dans l'Union européenne* (Bruylant, 2018).
[28] *Lawrie-Blum*, EU:C:1986:284.
[29] Articles 6, 7, 16 CRD.

The Court of Justice of the European Union (CJEU) has more recently interpreted the requirements of EU citizenship and free movement law strictly, particularly as they relate to access to social assistance, while enforcement of domestic employment law can remain elusive for vulnerable workers.[30] These free movement provisions also run alongside more restrictive rules governing the entry and residence rights of migrant workers, but who nevertheless enjoy broadly equivalent rights of access to—and conditions of—employment granted to national workers.

2. The rights of migrant workers under European Union immigration law

A consequence of the Union and Member States' shared immigration competence under Article 79 TFEU is that the rights of many *short-term* migrant workers are particularly dependent on national regulatory frameworks.[31] Migrant workers do not automatically obtain the freedom to enter or move across the Union, with their rights instead linked to the length of their residence, while remaining subject to conditions deriving from both EU and national law.[32] Migrant workers who have been legally and continuously resident for five years may be eligible for a long-term residents permit, subject to meeting the relevant conditions. This permit grants equal treatment with nationals in relation to access to (non-public service) employment and equal treatment in relation to working conditions.[33] The ability to seek employment in *another* Member State remains subject to limitations found in national law.[34] EU legislation also governs the freedom of movement and right to work of specific categories of TCN under *Union* law, but on a sectoral basis, for example, for highly-skilled workers, and which are also subject to relevant conditions and restrictions.[35]

These measures are complemented by a horizontal directive, which—subject to certain exceptions—provides for a single application procedure for work permits as well as equal treatment protections for those legally in work, but without long-term residence.[36] Legislative

[30] *Dano*, EU:C:2014:2358.
[31] Zane Rasnača and Vladimir Bogoeski (eds), 'Interaction between labour law and immigration regimes' ETUI Report June 2023, p 9.
[32] E Guild, 'The EU's Internal Market and the Fragmentary Nature of EU Labour Migration' in Costello and Freedland note 12 above 98, p 117.
[33] Article 11(1) Directive No 2003/109 [2003] OJ L16/44.
[34] Articles 14, 15, 21 Directive No 2003/109 [2003] OJ L16/44.
[35] Article 24(1) Directive No 2016/801 [2016] OJ L132/21; Article 12 Directive No 2009/50 [2009] OJ L155/17.
[36] Directive No 2011/98 [2011] OJ L343/1.

protections are also granted to seasonal workers, intra-corporate transferees, and Turkish workers.[37] More general provision is made for access to employment of qualifying family members of migrant workers, while specific provisions on the right to work of family members can also be found within the legislation governing the various categories of TCN.[38] The free movement rights of family members usually follow the rules applicable to their principal, unless such free movement rights have been excluded altogether.[39] Derogations from the protections granted to migrant workers are also largely interpreted in the same way as for EU citizens under Article 45(3) TFEU.[40] As Barnard notes, there is an 'increasing parallelism between the rights of [*long-term*] legally resident TCNs and those of nationals of the Member States who are citizens of the Union'.[41] In addition, TCNs who are family members of EU citizens are essentially assimilated to the position of EU nationals and enjoy immediate access to employment, while EEA and Swiss citizens enjoy rights broadly equivalent to EU citizens.[42]

While national law plays an important role in governing the terms of access to the labour market of TCNs, there is also increased (sectoral) coordination of these rules at EU level, for participating Member States.[43] Union competence over immigration policy is conditioned in Article 79(5) TFEU by the Member States' right to determine the volume of entry of TCNs seeking work within their territory. Nevertheless, the overall picture for TCNs is that despite facing additional hurdles when compared to EU citizens, notably in their variable enjoyment of freedom of movement across the Union, their right to *work* is expressly articulated in the relevant legislative provisions, which must be interpreted in light of the protective framework provided by EU fundamental rights, and the integrationist rationale of the underlying legislation.[44] Indeed, the CJEU has also interpreted protective employment legislation in a manner that ensures access to legislative rights for migrant workers. In *Tümer*, the CJEU held that migrant workers came within the concept of the 'worker' for the purposes of Article 153 TFEU. The CJEU thereby divorced the relevant individual's immigration status from the protections granted by employment legislation. The absence of permission to reside under national immigration law, did not preclude access to legislative protections with 'social

[37] Directive No 2014/36 [2014] OJ L94/375; Directive No 2014/66 [2014] OJ L157/1; Decision No 1/80.
[38] Article 14 Directive No 2003/86 [2003] OJ L251/12.
[39] Guild note 32 above, p 117.
[40] C Barnard, *The Substantive Law of the European Union* 7th ed (OUP, 2022), p 396.
[41] Ibid, p 383.
[42] Guild note 32 above, p 99.
[43] Barnard note 40 above, p 378.
[44] *Kamberaj*, C-571/10, EU:C:2012:233.

objectives', with the Union's competence to regulate employment conditions not confined to EU nationals.[45] There is also a broader connection between EU employment legislation and fundamental social rights, with the right to work of both national and migrant workers being underpinned by an autonomous EU law conception of the right to work as a fundamental right.

3. The right to work as a European Union fundamental right

The impetus for the recognition of the right to work—initially in the form of a general principle of EU law—lay with the CJEU given the then absence of a codified Union fundamental rights regime, with the Court since affirming 'the fundamental right of free access to employment which the Treaty confers individually on each worker in the Community'.[46] The right of 'everyone' to 'engage in work' and to 'pursue a freely chosen or accepted occupation' is recognised as a fundamental right in Article 15(1) CFR, while the freedom of movement 'to seek employment' and 'to work' of EU citizens is further specified within Article 15(2). Article 15(3) CFR provides for the right of TCNs to equivalent treatment with respect to conditions of work, but is expressed more narrowly than the rights of EU citizens. The right to work of non-EU citizens is thus recognised, but only insofar as they are *authorised* to work. The precise scope of Article 15 CFR remains unclear, however, and it may well be that non-EU citizens resident in a Member State have a *right* to obtain such authorisation.[47] TCNs from European Social Charter (ESC) state parties are nevertheless covered by provisions governing labour market access and 'not less favourable' treatment.[48]

These Charter provisions demonstrate the close connection between EU right to work law and the right to work as a fundamental right, which enhances 'personal autonomy and self-realisation, with human dignity serving as its foundation'.[49] The relationship between the Charter and the Treaty's free movement provisions is important, with the latter representing a significant right to work 'intervention'.[50] The combination of the Charter and the Treaty creates a powerful—if so far underutilised—tool for the interpretation and review of both EU law as well as national legislation falling within the scope of EU law, with both sources enjoying a

[45] *Tümer*, C-311/13, EU:C:2014:2337, paragraph 42.
[46] *Nold*, EU:C:1974:51; *Bosman*, C-415/93, EU:C:1995:463, paragraph 129.
[47] Deakin note 9 above, p 344.
[48] Articles 18, 19(4) ESC.
[49] Opinion of Advocate General Bobek, *Fries*, C-190/16, EU:C:2017:225, paragraph 66.
[50] M Freedland and N Kountouris, 'The Right to (Decent) Work in a European Comparative Perspective' in Mantouvalou note 1 above, pp 123, 135.

symbiotic relationship in accordance with Article 52(2) CFR.[51] The rights found within Article 15 CFR are further indirectly strengthened by other social provisions of the Charter, while EU labour law grants substantive employment rights when exercising the right to work in another Member State, ensuring a minimum level of protection across the Union. Article 153(1)(g) TFEU also grants the Union the competence to complement and support the activities of the Member States in regulating the conditions of employment of migrant workers.

The Charter's Explanations further confirm the connection between Article 15 CFR and Article 1(2) ESC, thereby facilitating a potential common interpretative approach between the EU Charter and other rights instruments protecting the right to work.[52] This connection bolsters the 'social' rights credentials of the right to work in EU law, which is conceived more narrowly than other international right to work instruments, and which has traditionally been framed as the 'freedom' to pursue a trade or profession, as also reflected in its location within the 'Freedoms' Title of the Charter.[53] Indeed, the justifications for the initial development of an expansive conception of freedom of movement across the Union, although somewhat ambiguous, were largely economic, but with evidence of underlying political and social justice objectives, and with freedom of movement now being described as an 'ideological commitment'.[54] Article 45 CFR further emphasises the fundamental rights status of freedom of movement of both national and migrant workers, albeit that the latter 'may' be granted such rights in accordance with the relevant Treaty provisions.

EU law thus facilitates the freedom of movement of national workers across the Union, alongside a strong principle of equal treatment and a close relationship to other fundamental Charter rights. These sources provide an avenue for challenging national rules that exclude workers from other Member States. They also interact with more restrictive rules governing the freedom of movement of migrant workers, which were never applicable in the UK due to its having opted out from most EU laws governing the immigration of TCNs.[55] In contrast to the domestic regime, addressed below, EU free movement and right to work rules are explicitly articulated, are framed as *rights*, enjoy a superior status within the hierarchy of sources and are accompanied by detailed legislation specifying the conditions of access to, and enforceability

[51] *AB*, C-511/19, EU:C:2021:274; *NH*, C-507/18, EU:C:2020:289*; PI*, C-230/18, EU:C:2019:383.
[52] O'Cinneide note 13 above.
[53] *Nold*, C-4/73, EU:C:1974:51; *Lidl*, C-134/15, EU:C:2016:498.
[54] C Barnard and S Fraser Butlin, 'Ceding Control and Taking it Back: The Origins of Free Movement in EU Law' (2022) 51 *ILJ* 643, p 671.
[55] Collins note 11 above, p 253.

of, these rights. Crucially, the rights to move freely and to work are reinforced by the normative underpinning of fundamental rights concepts, with national workers benefiting from additional rights derived from their common EU citizenship. Within UK law, there are now several categories of immigration status, each varying in the level of protection granted to the right to work and in its connection to underlying fundamental rights concepts. The immediate consequence of Brexit was the creation of a hybrid immigration status between national and migrant workers. The right to work under the Withdrawal Agreement is reminiscent of the pre-existing EU regime, including in its explicit articulation of that right, and its connection to fundamental rights concepts, but its implementation relies on more restrictive rules deriving from domestic immigration law, albeit that workers with settled status enjoy more favourable substantive and procedural rights than those granted to migrant workers under otherwise applicable immigration rules.

B. Recognition of the right to work under the European Union-United Kingdom withdrawal arrangements

The Trade and Cooperation Agreement (TCA), which forms the basis of the new relationship between the EU and the UK, provides only basic provisions on the mobility of persons. In contrast, the Withdrawal Agreement governing the UK's departure from the Union and which is now embedded in domestic law, essentially replicates pre-existing EU free movement rules, subject to certain changes, such as the absence of onward free movement rights for UK citizens, which is a restriction often applicable to migrant workers within EU law, although such rights may eventually be granted to UK citizens as long-term Union residents.[56] The domestic courts have suggested, however, that the provisions of the Withdrawal Agreement are not 'borrowed' from EU law, and instead constitute a new and autonomous legal order which now applies to 'former' national workers, albeit that they receive more extensive protections than other categories of migrant workers, including EU citizens without settled status. As such, 'general concepts such as the right of free movement' are not 'lurking behind' the terms of the Agreement, nor do any 'free-standing principles of EU free movement law' exist in domestic law.[57] The right to work under the Withdrawal Agreement is therefore grounded in UK law rather than EU free movement law. Nevertheless, these provisions ultimately derive from rights developed within the context of EU law, meaning that the right to work for former national

[56] M Dougan, *The UK's Withdrawal From the EU: A Legal Analysis* (OUP, 2020), p 231.
[57] *R (on the Application of the IMA) v Home Secretary* [2022] EWHC 3274 (Admin) [132], at [192].

workers under the Withdrawal Agreement has more in common with EU free movement law than with domestic immigration law governing access for migrant workers. This can be seen in the clear articulation of the extent of right to work protections and their connection to underlying fundamental rights concepts, both of which are lacking from UK immigration law.

Part Two of the Agreement on 'Citizens' Rights' applies to those who were resident in the host state in accordance with EU free movement rules at the end of the transition period, and who continued to reside there.[58] An ongoing right of residence is provided for under Article 13(1), which replicates those EU rules conditioning free movement rights based on economic status and length of residence. Under the EU Settlement Scheme (EUSS), residence is the principal criterion on which applications have been assessed. This contrasts with the stricter requirements found within EU free movement law, and is also more liberal than the restrictive points-based system applicable to migrant workers, which includes additional requirements, for example relating to employer sponsorship.[59]

The Withdrawal Agreement also provides continuing explicit protections for the right to work, which includes the right not to be discriminated against on the grounds of nationality in relation to employment, remuneration and working conditions.[60] Protected persons are also entitled to take up and pursue an activity under the same conditions as national workers.[61] Article 24(1)(d) provides for equal treatment with respect to conditions of employment, including remuneration, dismissal and reinstatement, or re-employment. Finally, the Agreement provides for the recognition of professional qualifications, where such recognition was sought prior to the end of the transition period.[62] Overall, the Agreement ensures that protected citizens continue to benefit from broadly the same rights post-Brexit that they enjoyed while the UK was a member of the EU, with their right to work continuing to be directly expressed, with further supporting references to the EU Treaties, legislation and domestic implementing measures.

In order to benefit from these rights, EU citizens resident in the UK prior to the end of the transition period, were required to register for settled or pre-settled status (for those with fewer than five years of residence) under the EUSS. The registration scheme evidences the

[58] Article 10(1)(a)–(b) WA; Article 9(b) WA.
[59] Articles 6, 7, 14, 16 WA; E Spaventa, 'The Rights of Citizens Under the Withdrawal Agreement: A Critical Analysis' (2020) 45 *ELRev* 193, 204.
[60] Article 24(1)(a) WA.
[61] Article 24(1)(b) WA.
[62] Articles 27–29 WA.

encroachment into the UK's withdrawal arrangements of a more restrictive 'permission-based' domestic law approach to the right to work, albeit to a lesser extent than the applicable immigration rules for TCNs under the new points-based immigration system. The EUSS is the means by which EU citizens were required to convert the legal basis of their right to reside and work in the UK from EU free movement law to UK immigration law. The UK consciously opted for a constitutive rather than declaratory scheme, as permitted by Article 18 WA. Consequently, any EU citizen who either failed to apply for settled status in the UK before the deadline or has their application rejected, will not be covered by the rights contained in the Withdrawal Agreement and will be subject to UK immigration controls.[63] In this way, the right to work under the Agreement, while clearly originating in the (fundamental) rights-based provisions of EU law, is nevertheless framed as a privilege that must be applied for, and so reflects elements of the indirect permission-based regime in UK immigration law, or indeed those EU immigration rules applicable to certain categories of TCN. The default position of EU nationals—including those with settled status—within domestic law is now one of discriminatory rather than equal treatment on the basis of nationality, despite the existence of withdrawal rights.[64] Workers with settled status thereby fall into somewhat of a hybrid category between national workers (with regard to the Withdrawal Agreement) and migrant workers (with regard to domestic law).

All non-Irish EU citizens moving to the UK from 1 January 2021 instead fall into the category of 'migrant' worker and need to meet the requirements of the UK's new points-based system. The same is true of those who lose their settled status due to absence from the UK for five years.[65] Those with settled status can apply for UK citizenship—subject to the relevant conditions—and where successful, their right to work will be based on domestic immigration law. Thus, while the rights under the Withdrawal Agreement derive from an international agreement based on pre-existing EU law concepts, including the direct protection of the right to work as interpreted through the lens of Union fundamental rights, the Agreement also shows evidence of the UK's scepticism towards freedom of movement. Nevertheless, the UK remains subject to obligations deriving from the Agreement, which thereby provides a framework

[63] Articles 18(1)(b), (c), 18(2), 18(3) WA.
[64] C O'Brien and A Welsh, 'Memo: The Cessation of EU Law Relating to Prohibitions on Grounds of Nationality and Free Movement of Persons Regulations 2022', EU Rights and Brexit Hub, 12 July 2023.
[65] Article 15(3) WA.

against which implementation of the right to work within domestic immigration law must be assessed.

The Withdrawal Agreement has been transposed into UK law by the European Union (Withdrawal Agreement) Act (EU(WA)A) 2020, which amends Section 7A of the European Union (Withdrawal) Act (EU(W)A) 2018 and provides the necessary permission to introduce further secondary regulations. The detailed rules governing access to settled status can be found within Appendix EU to the Immigration Rules. In the event of a conflict between the Citizens' Rights provisions of the Agreement and UK domestic law, UK courts must disapply the latter and give full effect to the former in accordance with the principle of primacy.[66] Those provisions of the Agreement that are capable of direct effect can also be enforced before domestic courts.[67] The Citizens' Rights provisions of the Withdrawal Agreement are further supported by the oversight of the CJEU for eight years post-transition, as well as the newly created Independent Monitoring Authority (IMA).[68] Decisions of the CJEU in this regard will have binding effect in the UK legal order.[69]

The (EU(W)A) 2018 also introduced the new domestic law concept of 'retained EU law', which continues—on a more limited basis—to provide for substantive rights at work deriving from EU law, including EU workers' rights implemented within domestic employment legislation. Retained EU law, which does not include the Charter, enjoys a continued qualified—and now temporary—primacy over other domestic law enacted prior to the end of the transition period.[70] Article 4(5) WA requires UK judicial and administrative authorities to have 'due regard' to future case law of the CJEU in the interpretation and application of the Withdrawal Agreement, which may lead to a continued indirect role for the Charter, which may also have ongoing application within domestic law.[71]

In addition, the domestic courts are under certain interpretative obligations in accordance with the terms of the Withdrawal Agreement and which facilitate an ongoing role for the direct protection of the right to work deriving from EU law, and which again can be contrasted with the purely domestic regime applicable to migrant workers, discussed below.

[66] Sections 7A, 7C EU(W)A 2018; Article 4 WA.
[67] Article 4(1)–(2) WA.
[68] Articles 158, 159 WA; Articles 18(1), 19–21 WA.
[69] Article 158(2) WA.
[70] Retained EU Law (Revocation and Reform) Act (REULA) 2023; Section 5(4) EU(W)A 2018.
[71] *AT v SSWP* [2022] UKUT 330 (AAC). S6 EU(W)A 2018 governs the domestic value of retained EU case law. S 5(5) EU(W)A 2018 preserves the interpretative function for general principles, a role that has been removed by the REULA 2023.

Section 7C EU(W)A 2018 requires domestic law implementing or falling within the scope of the Withdrawal Agreement, to be interpreted in accordance with the Agreement as a whole and with Article 4 WA in particular.[72] Article 4 WA stipulates that provisions of the Agreement which refer to EU law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of EU law, as well as CJEU case law handed down prior to the end of the transition period, unless otherwise qualified by more specific provisions.

There is of course the risk that over time and despite the direct effect of the Withdrawal Agreement, that the rights of EU citizens with settled status come to be viewed as simply another facet of UK immigration law to be interpreted in accordance with the provisions and principles of that system.[73] This means being subject to the complex and at times contradictory Immigration Rules, which are updated frequently, and which grant wide powers to immigration authorities within the overall policy context of seeking to control national borders and to reduce immigration.[74] That is not to say, however, that there are no weaknesses in the EU-derived regimes either.[75] The Withdrawal Agreement relies on pre-existing EU rules that themselves can be difficult to apply in practice, particularly for vulnerable citizens, some of whom may even have failed to apply for settled status, been denied that status, or erroneously granted pre-settled status instead, although responsibility for the design and implementation of the settlement regime ultimately lies with the UK.[76] Pre-settled status only grants a limited right of residence under domestic law, leading to potentially inferior rights, particularly regarding access to social welfare.[77] UK rules requiring those with pre-settled status to reapply for settled status have recently been found to be incompatible with the Withdrawal Agreement, which only provides for very limited situations in which residence rights may be lost.[78] Particular emphasis was placed on the fact that a loss of limited leave to remain leads to the individual

[72] Section 7C EU(W)A 2018.
[73] S Smismans, 'EU Citizens' Rights Post Brexit: Why Direct Effect Beyond the EU is not Enough' 14 (2018) *EuConst* 443, p 460.
[74] B Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (OUP, 2013) 50.
[75] S de Mars and C O'Brien, 'Inevitably Diminished: Rights of Frontier Workers in Northern Ireland After Brexit' (2022) 73 *NILQ* 119.
[76] A Yong, 'A Gendered EU Settlement Scheme: Intersectional Oppression of Immigrant Women in a Post-Brexit Britain' (2022) *S&LS* 1; C Barnard, S Fraser Butlin and F Costello, 'The Changing Status of European Union Nationals in the United Kingdom Following Brexit: The Lived Experience of the European Union Settlement Scheme' (2022) 31 *Socio Legal Studies* 365; Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 SI 2020/61.
[77] O'Brien note 8 above, p 458.
[78] *R (on the Application of the IMA) v Home Secretary* [2022] EWHC 3274 (Admin).

becoming subject to the full force of the Immigration Act (IA) 1971, and which stands in contrast to EU free movement rights, which can be regained through future exercise.[79]

In certain respects, the Withdrawal Agreement provides for more limited protections to those found within EU free movement law, for example in the restrictive definition of protected family members.[80] Within the UK context, the fact that access to citizens' rights now requires registration is itself an additional hurdle. As with rights at work more generally—whether in domestic or EU law—the rights found within Part Two WA are capable of misinterpretation, misapplication, or indeed exploitation by employers and depend primarily on individual enforcement.[81] More broadly, the future governance of citizens' rights in the UK must be viewed within the context of domestic constitutional arrangements, with Article 38 EU(WA)A 2020 emphasising that its provisions do not undermine the core constitutional principle of parliamentary sovereignty. These rights are therefore vulnerable to future amendment. Such fragilities are compounded by the indirect manner in which the right to work is conceptualised in domestic immigration law.

II. THE INDIRECT PROTECTION OF THE RIGHT TO WORK IN UNITED KINGDOM LAW

A. Locating the right to work in domestic law

1. Deriving protections for the 'right to work' from domestic law

It was only in the nineteenth century that the 1562 Statute of Artificers impeding workers' freedom of movement was abolished. This statute had confined certain occupations to particular social classes and was accompanied by local regulations restricting employment.[82] More recently, the right to work at common law has largely been conceived through the restraint of trade doctrine, which is based essentially on individual economic freedom, and which prevented access to employment being made conditional upon membership of a trade union. The doctrine of restraint of trade also has continued wider application, for example to contractual provisions preventing departing employees from working for competitors.[83]

[79] Ibid, [140].
[80] Articles 9(a), 10(1) WA.
[81] Smismans note 73 above, p 451.
[82] Marshall note 3 above.
[83] *Tillman v Egon Zehnder Ltd* [2019] UKSC 32.

However, most people living in the UK—whether national or migrant workers—do not enjoy direct protections for their right to work, i.e. a right to work that is explicitly articulated in legislation, with that right instead depending on whether the individual requires permission to work under UK immigration law. Employment in the UK is thus lawful only in the indirect sense that those without permission to work may not seek employment. In other words, for those who do not require leave to enter or remain in the UK, it follows that they are not committing an offence under the Immigration Act 1971 if they work.[84] National (British) workers also do not enjoy a direct right to work, but rather have a right of abode in accordance with the terms of the 1971 Act, and so fall outside the immigration restrictions found within that legislation, which only apply to persons with limited leave to remain, thereby ultimately deriving a right to work from their underlying citizenship.[85] Section 3(1) IA 1971 requires all persons without the right of abode to obtain permission before entering the UK, unless exempt.

Specific provision has recently been made for Irish citizens as a distinct class for the purposes of UK immigration law.[86] Section 3ZA IA 1971 stipulates that '[a]n *Irish citizen* does not require leave to enter or remain in the United Kingdom', unless certain exceptions apply', leading to their treatment as 'national' workers for the purpose of UK immigration law. This provision was necessary to bridge the gap between the rather sparse Common Travel Area (CTA) arrangements and wider UK immigration law, but which thereby continues to ground the rights of Irish workers in the negative and permission-based domestic immigration regime in the absence of a directly effective bilateral agreement governing the right to work. Persons with indefinite leave to remain in the UK are also entitled to work, not because of any explicit articulation of such a right, but because restrictions on employment in Section 3 of the 1971 Act only apply to those with limited leave to remain. In other words, the right to work of distinct categories of limited leave-holder depends on the immigration rules that apply to them.

While the UK was an EU Member State, Section 7 of the Immigration Act 1988 similarly provided that EU citizens were not subject to the provisions of the 1971 Act governing leave to remain. With the ending of freedom of movement, the UK's immigration and right to work regimes now apply to all EU citizens without settled status, who are thereby subject to the UK's new points-based immigration system in the same way as other migrant workers.[87]

[84] Sections 15–25 Immigration Asylum and Nationality Act (IANA) 2006; Section 24B IA 1971.
1971; Schedule 6 IA 2016.
[85] Sections 1(2), 2 IA 1971.
[86] B Ryan, 'Recognition After All: Irish Citizens in Post-Brexit Immigration Law' 34 (2020) *JIANL* 284.
[87] Immigration and Social Security (Coordination) Act 2020.

This system allows work visas to be allocated for various categories of migrant worker, including temporary, skilled and seasonal agricultural workers on the basis of their personal characteristics and qualifications, in addition to market conditions and salary thresholds. Most migrant workers remain dependent on employer sponsorship as a condition of access to work, which itself can hinder freedom of movement within the UK by tying workers to a particular employer or location.[88]

Having a right to work in the UK deriving from the relevant immigration status does not always mean being able effectively to enjoy such a right in practice, with employers continuing to exercise control over access to work. There are right to work implications whenever an employer decides whether to employ a worker, whether to provide work while employed or whether to terminate the employment relationship.[89] The procedures surrounding the right to work in UK immigration legislation are complex and increasingly involve employers in the application of immigration law.[90] Employers thus act as gatekeepers to the right to work in the sense of deciding whether or not to (continue to) employ an individual. Indeed, in contrast to EU law, which grounds the right to work within freedom of movement (for national workers) and immigration rules granting equivalent treatment protections, at least in relation to employment conditions (for migrant workers), the right to work of both national and migrant workers within UK law is usually raised within the context of right to work 'checks' by employers, and which are ultimately located in the context of immigration restrictions. The tension between the two regimes has been recognised by the domestic judiciary, with Lane J finding that '[t]he nature and scope of EU free movement rights were incompatible with the general system of immigration control in the United Kingdom'.[91] Indeed, EU-derived free movement and equal treatment rights are also no longer recognised as forming part of domestic UK law.[92]

Right to work checks are controversial given the possibility of discrimination, and Home Office guidance recommends that 'all potential employees, including British citizens' be checked.[93] Given the consequences of failing to comply with legislative provisions

[88] CJ McKinney et al, 'The UK's New Points-Based Immigration System' House of Commons Research Briefing, 27 September 2022.
[89] B Hepple, 'A Right to Work' 10 (1981) *ILJ* 65.
[90] Ryan note 12 above, p 239.
[91] *R (on the Application of the IMA) v Home Secretary* [2022] EWHC 3274 (Admin), at [3].
[92] Cessation of EU Law Relating to Prohibitions on Grounds of Nationality and Free Movement of Persons Regulations 2022 SI 2022/1240.
[93] Home Office, 'An Employer's Guide to Right to Work Checks', 6 April 2022; Immigration (Restrictions on Employment) Order 2007 SI 2007/3290 (as amended).

circumscribing the right to work, employers may avoid making offers to those who are subject to any form of immigration control.[94] There is also the risk that employers may be mistaken as to whether the individual has (or requires) permission to work in the UK.[95] The UK Supreme Court has held that being a migrant worker is insufficient in itself to found a race discrimination claim where that discrimination arises out of immigration status rather than nationality.[96] Having said that, illegality in the working relationship will not always prevent reliance on anti-discrimination laws—as opposed to contractually-derived rights—with the courts finding that unlawful conduct must be balanced against the aims of protective legislation.[97]

While in contrast to EU free movement and immigration law, and the Withdrawal Agreement, there are no explicit 'right to work' provisions within UK law, there are aspects of UK law that are relevant to ensuring access to—and protections during—employment. All those engaged in work with a sufficiently strong connection with Great Britain fall within the territorial scope of domestic employment law, which may therefore apply to any dispute arising from an employer's decision not to employ, or to dismiss, an employee on the grounds of their nationality, for example if the employer did not believe that they enjoyed a continued right to work in the UK. There is a strong link between the Equality Act (EqA) 2010 and the right to work, even if the right to equality and the right to work remain distinct rights, with different purposes.[98] Section 9 EqA 2010 provides for the protected characteristic of race, which includes nationality, but not immigration status. Depending on the precise circumstances, the dismissal of an employee may also constitute unfair dismissal under the relevant provisions of the Employment Rights Act (ERA) 1996.[99] Although also not framed in terms of the right to work, the rules governing dismissal have clear right to work implications given the consequences for access to the labour market of an unfounded dismissal.[100] Despite this rather weak connection between UK legislation and the right to work, fundamental rights obligations will continue to apply to the UK through—admittedly less readily enforceable—international law instruments protecting the right to work as a fundamental social right.

[94] Section 21 IANA 2006; Section 24B IA 1971.
[95] Ryan note 12 above, p 253; *Okuoimose v City Facilities Management (UK) Ltd* UKEAT/0192/11/DA.
[96] *Onu v Akwiwu and Taiwo v Olaigbe* [2016] UKSC 31.
[97] *Hounga v Allen* [2014] UKSC 47.
[98] Hepple note 89 above, p 73.
[99] Section 98 ERA 1996.
[100] Collins note 11 above, p 242.

2. *Ongoing obligations applicable to the United Kingdom under the international fundamental right to work framework*

We have already noted the connection between the right to work within Article 15 CFR and Article 1 ESC. The latter has been described as assuming that the state and legal system constitute the market 'with a particular instrumental goal in mind: this is the goal of protecting and enhancing the capabilities of market actors'.[101] Therefore, and despite the absence of the Charter, the UK has ongoing obligations to respect the right to work by refraining from direct or indirect interference with that right; to protect it from interference from private actors such as employers; and an ongoing obligation to fulfil the right through legislative and judicial measures aimed at its full realisation.[102] The General Comment on the right to work in the context of Article 6 of the International Covenant on Economic Social and Cultural Rights (ICESCR) further stipulates that retrogressive measures should in principle not be taken in relation to the right to work.[103] The latter includes an obligation to 'recognize the right to work in national legal systems'.[104] Discrimination on the grounds of national origin is also prohibited and specific reference is made to the need to protect migrant workers.[105]

The General Comment, in addressing the question of national implementation, does not specify issues of immigration or citizenship status, but the overarching approach is that states 'should adopt a national strategy, based on human rights principles aimed at progressively ensuring full employment for all'.[106] States are obliged to take account of their legal obligations in relation to the right to work when entering international agreements.[107] Finally, States are *encouraged* to incorporate in their domestic legal orders, international right to work instruments.[108] These guiding principles are important to ensure that rules governing access to employment are compatible with the right to work.

The right to work as a fundamental right is also composed of 'positive' and 'negative' elements. The right to work as a positive fundamental right can be said to include the right to *have* (decent) work, and a corresponding duty on the State to provide work. The right to work

[101] S Deakin, 'Article 1' in N Brunn et al (eds), *The European Social Charter and the Employment Relation* (Hart, 2017) 147, p 149.
[102] General Comment No 18, 24 November 2005.
[103] Ibid, para 21.
[104] Ibid, para 26.
[105] Ibid, paras 23, 33.
[106] Ibid, para 31.
[107] Ibid, para 33.
[108] Ibid, para 49.

as a negative fundamental right means the ability to enter employment without unjustified or discriminatory restrictions. The right to work in this negative sense of freedom to pursue an occupation is a right which applies to 'everyone', simply by virtue of being human.[109] As such, everyone enjoys a right to work, but not necessarily a right to a job, or to work in any particular territory. The right to work thus straddles the traditional dichotomy between economic and social rights on the one hand, and civil and political rights on the other. The right to work as a social right has usually been conceived as the right to a job, with a corresponding duty on the state to secure full employment, while the right of non-discriminatory access to the labour market might be conceived as a civil liberty-right.[110]

It should now be clear that the right to work in various guises can be found in a number of rights instruments at both international and EU level. These instruments differ in the range and specificity of protections offered, but relevant features include the recognition of a freedom to enter and pursue a chosen occupation, the freedom to seek, accept and perform employment, and protection against discrimination in relation to work.[111] Taken together, these elements impose obligations on states to ensure non-discriminatory access to the labour market, but with a recognition that additional restrictions may be imposed on migrant workers. By way of contrast, the right to work in UK law is located largely within the context of right to work verifications by employers, but the concept is also devoid of any direct connection to wider fundamental rights concepts. The UK lacks a written constitution and no expression of the right to work is to be found in any domestic rights instrument. The closest the UK has to such an instrument is the Human Rights Act (HRA) 1998, which gives further effect to the ECHR in domestic law. The latter instrument does not address the right to work explicitly, but does include the right to a private life in Article 8, which has been interpreted as protecting some access to the labour market as well as the prevention of forced labour, but has not been influential in providing for a *right to work* more generally.[112] In contrast, the right to work as a fundamental right is deeply embedded within the Charter, and the continued relevance of EU law concepts within the UK legal order further serves to highlight the absence of a fundamental rights-based right to work regime within domestic law. Indeed, it reminds us that the right to work of national workers also rests on a rather thin legal basis in domestic law.

[109] Ibid, para 22.
[110] Collins note 11 above, p 229.
[111] Article 23(1) UDHR; Article 6 ICESCR; Article 1 ESC; Article 15 CFR.
[112] R O'Connell, 'The Right to Work in the European Convention on Human Rights' (2012) 2 *EHRLR* 176.

With this in mind, we argue that securing the right to access work within domestic immigration law, while resting on negative conceptions of the right to work as a fundamental right, also necessitates legislative intervention, which is normally suggestive of a socio-economic rather than a civil right. As such, our understanding of the right to work within domestic law, although grounded largely in the negative conception of the right to work as a fundamental right, nevertheless requires 'positive' protection and thus also exhibits features of a 'social' conception of the right to work. This understanding is reinforced by the right to work's location in economic and social rights instruments, as well as its crucial role in unlocking access to other social rights. Indeed, the concept of 'work' itself is capable of being infused with social content as indicated by the recognition of the fundamental right to work as a right to *decent* work.[113] While it may be difficult to enforce a positive right to a (particular) job, fundamental rights concepts can nevertheless be useful in framing the approach a state might adopt towards labour market access and employment policy more generally.[114] The right to work as a negative fundamental right can thereby inform the interpretation of domestic legislation, but also provides the normative benchmark against which the right to work in that domestic legislation might be assessed. The recent emergence of UK internal market law overlooked the place of freedom of movement and the right to work within the UK for both migrant and national workers.

3. The missing right to work within the domestic internal market

The common law has long resisted restrictions on freedom of movement and the right to pursue economic activity, while at the same time not compelling employment, with employers permitted to refuse employment at common law for any reason.[115] Active restrictions on freedom of movement for the purposes of work are now less likely to occur, but the freedom continues to lack explicit protection. The Covid-19 pandemic also demonstrated the ease with which (emergency) internal restrictions on movement can be introduced and, in the past, there have been wartime and terrorism-related restrictions on movement between Northern Ireland (indeed the island of Ireland) and Great Britain.[116] The UK may not be unique in failing to provide explicit free movement rights and legislative protections for the right to work of its own nationals—with that right instead being integrated within the range of (implicit)

[113] Deakin note 9 above, p 338.
[114] Ibid, p 349.
[115] *Mayor of Winton v Wilks* 2 Ld Raym 1131.
[116] Ryan note 86 above, p 286.

citizenship rights. Right to work provisions of varying degrees of precision and enforceability can, however, be found within national constitutions, for example Article 4 of the Italian Constitution recognises 'the right of all citizens to work'. Article 45.2 of the Irish Constitution more obliquely provides for the abstract and non-justiciable right to a livelihood, while the right to earn a living also constitutes an 'unenumerated right' under Article 40, which obliges the state to protect 'personal rights' and equality before the law.[117] In *NHV*, the Irish Supreme Court found that the right to work was part of the human personality and therefore guaranteed to national and migrant workers alike.[118] Such an abstract constitutionalised right to work can be criticised for placing too much discretion in the hands of the judiciary, particularly in the UK context, given the absence there of a written constitution as well as the previous use of common law principles to undermine workers' rights.[119] Recent efforts at (re)constructing the UK's internal market post-Brexit represented a missed opportunity to embed the right to work as a concrete legislative—as opposed to solely an 'abstract' constitutional—right.

The UK Internal Market Act (UKIMA) 2020 facilitates the free movement of goods and services within the UK after Brexit, by enshrining the principles of mutual recognition and non-discrimination.[120] The Act does not address the right to work, despite labour mobility usually being conceived as concomitant to other free movement rights in the construction of an internal market.[121] The right to work is also absent from Gordon Brown's proposals for more explicit social rights protection as part of wider UK constitutional reform, and the construction of a 'social union'.[122] The UKIMA 2020 does, however, provide for the mutual recognition of qualifications across the UK, which has clear right to work implications.[123]

More broadly, the UKIMA 2020 neglects to codify a right for those legally resident in the UK to travel freely within the state to take up employment, despite the UK Government recognising the importance of labour mobility, with unhindered movement across the UK being

[117] F Keyes, 'Our Herculean Judiciary? Interpretivism and the Unenumerated Rights Doctrine' (2020) 4 *Irish Judicial Studies Journal* 45.
[118] *NHV v Minister for Justice* [2017] IESC 75.
[119] Bogg note 10 above, p 151.
[120] T Horsley, 'Constitutional Reform by Legal Transplantation: The United Kingdom Internal Market Act 2020' (2022) 42 *OJLS* 1143.
[121] Barnard and Fraser Butlin note 54 above.
[122] The Labour Party, 'A New Britain: Renewing Our Democracy and Rebuilding Our Economy', December 2022 67.
[123] Part 3 UKIMA 2020.

'every citizen's right'.[124] There are, however, no explicit protections for freedom of movement and the right to work for national workers beyond those civil and political liberties that exist at common law or through the HRA 1998, as well as those provisions of the EqA 2010 preventing discrimination on the grounds of nationality, which would for example, protect an English worker seeking employment in Scotland.[125] The potential for Scottish independence or indeed Irish reunification also open up significant questions as to what it means to be British and to have a right freely to move within either one state or between states.[126]

Freedom of movement and the right to work are not concepts alien to the UK legal order given that until recently, the UK was part of the EU's free movement regime—although not the borderless Schengen Zone—and remnants of EU free movement law continue to apply through the Withdrawal Agreement. EU law did not, however, apply to wholly internal situations within a Member State.[127] Perhaps the most obvious model to fall back on then is the CTA, which in conjunction with national legislation, allows workers from its component territories to enter, reside and work without hindrance. However, the overall arrangements rest on a weak legal basis and even when certain rights are reinforced in national legislation, they are vulnerable to unilateral amendment or repeal. Placing the right to reside and to work on a more secure bilateral treaty basis as then further implemented in national law, and with clear enforcement mechanisms, would not only recognise their importance as fundamental social rights, but would also ensure that all those entitled to move within the free movement zone also have an explicit right to work there.

In constructing protections for freedom of movement and the right to work across the entire UK—including internal movement within each of the four nations, examples might be drawn from other (federal) nations. Article IV of the US Constitution, for example, provides that '[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States', thereby providing for freedom of movement between the states as well as a prohibition on discrimination, although without referring to the right to work specifically.[128] The German Constitution is more explicit in providing for a right of free movement, declaring at Article 11(1) that 'All Germans shall have the right to move freely throughout the federal territory', with Article 11(2) outlining permissible restrictions on that

[124] UK Internal Market White Paper (CP 278, 2020) 11.
[125] *National Joint Police Board v Power* [1997] IRLR 610.
[126] Intrastate movement is a right found in Article 12 ICCPR.
[127] *Levin*, C-53/81, EU:C:1982:105.
[128] *Crandall v Nevada* 73 U.S. 35 (1868).

right, for example in the case of an epidemic. This provision is immediately followed in Article 12 by the right to pursue a freely chosen occupation, itself a core element of the right to work.

There are certainly good reasons for placing freedom of movement and the right to work within the UK internal market on a firmer footing. First, the increased devolution of power to the nations making up the UK heightens the risk of barriers to the movement of people. Employment law is currently a reserved UK matter (except in Northern Ireland), but other fields such as education or health, which are devolved, can—although do not necessarily—lead to (indirect) barriers to freedom of movement and thereby the right to work, essentially by rendering such movement less attractive. An obvious example is the introduction of fees for university students from the rest of the UK studying in Scotland, but there are also broader divergences in the protection of social (welfare) rights, which themselves have free movement implications.[129] Indeed, the UK's immigration and visa regime itself creates disparities, with migrant workers tending to be concentrated in particular regions.[130] Second, the right to work associated with certain categories of immigration status, for example those with post-Brexit settled status, *are* explicitly articulated and supported by an underpinning international agreement, thereby opening up further fragmentations in the personal scope and substantive protections granted by employment law within the UK. Finally, the right to work as a fundamental social right militates in favour of strong domestic rules protecting access to employment, for both national and migrant workers. In the absence of the protective framework offered by EU law, it is therefore necessary to consider how the right to work as a fundamental right might (re)infuse domestic law with the normative content of that right.

B. Reinfusing domestic law with the right to work as a fundamental right

We have already considered the extent to which right to work principles are reflected in both EU and domestic law. We have also seen that the right to work may be expressed and applied differently depending on the relevant underlying legal instrument and whether it governs the rights of migrant or national workers. The right to work is embedded in EU law, both in the manner in which that right is expressly articulated in legislative and Treaty instruments, but also in its recognition, indeed embodiment, of the right to work as a fundamental right,

[129] Mark Simpson, *Social Citizenship in an Age of Welfare Regionalism: The State of the Social Union* (Hart, 2022).
[130] McKinney et al note 88 above, p 20.

including for TCNs. The latter may, however, face additional temporal and geographical restrictions on their freedom of movement, but which, as limitations on fundamental rights, must be interpreted strictly, if only when those measures fall within the scope of EU law. Overall, national and migrant workers in EU law have been granted essentially full equal treatment with regard to working conditions, and with some of those substantive employment rights also capable of direct effect.[131] There is no doubt that a more Union-wide approach to the protection of migrant workers would strengthen this rights-basis by reducing competition between Union and Member State immigration regimes.[132] Within domestic law, the right to work for both national and migrant workers merely constitutes permission to work, or exceptions from the need to obtain such permission. This is not to say that UK (employment) law does not contain elements touching upon the right to work, for example equality and unfair dismissal legislation. This legislation does not, however, have the right to work as its principal underpinning, with that right therefore capable only of being raised indirectly in support of the underlying claim. The weak implementation of the right to work within UK law fails to recognise the underlying value of the right to work as a fundamental social right.

The fundamental right to work does not prescribe the form that permissible controls on that right, such as work permits, might take. The right to work can therefore be seen as a universal right, while the right to access a job may be based on legal status, such as citizenship or immigration status rather than on wider grounds such as dignity.[133] Immigration status can thus form a basis on which to ground rights of residence and to work, with potential justifications including the need to protect the national labour market or to protect migrants from exploitation and precarity, although immigration restrictions based on citizenship can of course also generate the latter.[134] Indeed, the former justification has been used temporarily to limit the access to national labour markets of EU citizens from newly acceding Member States.[135]

As already mentioned, our understanding of the right to work as a social right in its application to domestic law, also draws on the concept of 'social citizenship' defined by

[131] Kees Groenendijk, 'Equal Treatment of Workers from Third Countries: the Added Value of the Single Permit Directive' 16 (2015) ERA Forum 547, 560.
[132] Rasnača and Bogoeski note 31 above, p 212.
[133] Mantouvalou note 1 above, pp 39–40.
[134] M Ruhs, 'Immigration and Labour Market Protectionism: Protecting Local Workers' Preferential Access to the National Labour Market' in Costello and Freedland note 12 above, pp 60, 62; E Gorham, 'Social Citizenship and its Fetters' (1995) 28 *Polity* 25, p 34.
[135] Guild note 32 above, p 104.

Marshall as 'a status bestowed on those who are full members of a community', with all who possess that status being 'equal with respect to the rights and duties with which the status is endowed'.[136] This rights-based citizenship, built on equal community membership, is composed of three elements: civil rights such as freedom of speech; political rights such as participation in the exercise of political power and finally social rights, that is the right to live life according to the prevailing social standards.[137] Marshall, writing in the 1950s, classified the right to work as a 'civil' right due to its foundation in the concept of individual economic freedom, and which he defined as 'the right to work where and at what you pleased under a contract of your own making'.[138] We suggest that the right to work, while remaining grounded in individual freedoms, nevertheless encompasses clear social dimensions as recognised both in international human rights law, but also in the subsequent proliferation of both EU and domestic employment legislation, protecting the worker as the weaker party to the employment relationship.

This form of social citizenship should not be conflated with nationality, rather it is a 'normative concept both as regards the rights that are attached to it and the persons that it encompasses. It means that everyone should be the beneficiary of all group rights'.[139] This form of common social citizenship encapsulates the relationship between individual rights, such as the right to work, and belonging to a community, and can be contrasted with other conceptions of citizenship, notably citizenship based on legal status, identity, or political participation.[140] Arbitrarily to exclude access to social rights, such as the right to work, would be to undermine the sense of common citizenship necessary for a cohesive community based on equal status, and which is the hallmark of social conceptions of citizenship. This is not to say that there is no role for legal rules in framing these rights, but any such rules must themselves be exercised in a manner compatible with the right to work as a fundamental right.

The notion of social citizenship also ties in with broader discussions distinguishing between moral and legal sources of social rights.[141] Social rights based on morality include (i) social human rights, i.e. the floor of rights we enjoy as a matter of political morality, and which are not dependent on legal recognition and (ii) social citizenship rights which are based on

[136] Marshall note 3 above, pp 28, 29.
[137] Ibid, p 11.
[138] Ibid, pp 15, 22.
[139] C Gearty and V Mantouvalou, *Debating Social Rights* (Hart, 2010), p 106.
[140] Gordon note 5 above, p 513.
[141] J King, *Judging Social Rights* (CUP, 2012), p 18.

distributive justice concerns but tend to be limited to particular communities e.g. workers. Legal sources of social rights include (iii) international social rights, which more or less mirror social human rights, (iv) legislative social rights, which are embedded in statute and are judicially enforceable, and (v) constitutional social rights, i.e. rights granted a privileged place among sources of legal norms, but which may not be justiciable.

The right to reside—but not a right to work—under UK immigration legislation is located in (iv). The absence of a written constitution in the UK renders an explicit constitutionalisation of the right to work difficult to achieve in practice (v), but the right to work does enjoy constitutional status within the EU Charter and general principles. Finally, we have seen that the right to work as an international social right (iii), imposes certain obligations on the state to ensure compliance with human rights norms, including provision for non-discriminatory access to employment and encouragement to embed the right to work within domestic law. The difficulty of placing the right to work in UK law within the above categorisations is the fact that it derives from various sources at international and domestic level, including potential exemptions from otherwise applicable immigration rules.

We should, of course, be wary of over-reliance on rights concepts which can be difficult to invoke or enforce in practice.[142] Nevertheless, conceiving of the right to work as a fundamental right helps to locate this right within the broad notion of social citizenship. As Gearty notes, human rights concepts are multi-purpose and make sense on the level of morality (why you ought to help the stranger), politics (arrangements must be made to ensure respect for the right), and law (this is the instrument chosen to protect the right).[143] In this way, rights evoke a 'sense of moral entitlement and this serves the useful purpose of rendering redundant the erection of any distinction between the deserving and the undeserving' or in our view, between citizens and non-citizens.[144] The concept of social citizenship goes some way to filling the gap between the general claim that we should care for others, and concretised human rights, without which 'any societal commitment to rights will rarely rise above the flimsy and uncertain'.[145]

Although the strong protections and enforcement mechanisms for the right to work afforded by EU free movement law have now been removed post-Brexit, the UK has ongoing commitments derived from the right to work as an international social right, to prevent

[142] Hepple note 89 above, p 68.
[143] Gearty and Mantouvalou note 139 above, p 12.
[144] Ibid, p 21.
[145] Ibid, p 20.

discrimination in access to employment both from its own regulations, but also through the intervention of employers. Fundamental rights law adds normative weight to the right to work and emphasises that strong justifications are required for restrictions on that right. Indeed, judgments of domestic immigration tribunals already recognise the potential negative consequences of a change in immigration status for the right to work and the need to reconcile such changes with human rights considerations.[146]

As with EU free movement and immigration arrangements, UK immigration law represents an important right to work intervention and should be accompanied by associated commitments to respect freedom of movement and the right to work as fundamental social rights, including as a minimum, the direct enshrinement of those rights within primary legislation, whether that be within the context of the UK internal market (freedom of movement) or domestic employment legislation (the right to work). In particular, explicit provisions should be introduced governing (1) the right to internal movement within the UK for individuals, based on the principle of 'non-discrimination', similar to the protections granted to service providers within the UKIMA 2020, which is facilitated by the fact that immigration is not a devolved matter in the UK. There is also an evident connection to the negative conception of the right to work, which is framed in terms of non-discriminatory access to employment, with these principles also being reinforced by the prohibition of nationality discrimination contained within Section 9 EqA 2010; and (2) the right to work, including the substantive conditions or restrictions under which that right is to be exercised, for both national and migrant workers. In the absence of a much anticipated post-Brexit Employment Bill, existing domestic employment legislation such as the Employment Rights Act 1996, which already governs employment status and unfair dismissal, could represent a potential location for such rights. Admittedly, defining the precise content of the right to work and related rights is fraught with difficulties and would inevitably be dependent on the interpretative gloss provided by domestic courts. Locating the right to work within the broader domestic employment law—as opposed to immigration law—framework would help to emphasise the social character of that right, particularly given the structural and normative differences between employment law, which is largely conceived as *protective*, and immigration law, which is largely *restrictive* in purpose, with the former field also enjoying a closer connection to fundamental social rights concepts.[147] Indeed, migration policy, with its objectives grounded

[146] *Jahe Kupa* Upper Tribunal (Immigration and Asylum Chamber) Appeal Number: DC/00074/2019.
[147] Ryan note 12 above, p 239.

largely in reinforcing borders and ensuring legal residence, adds a restrictive layer to the rights-based field of protective employment policy, and which can thereby lead to increased vulnerability for migrant workers, including by restricting their freedom of movement or by imposing temporal restrictions on their ability to seek employment.[148]

The rights-based Union framework for the protection of the right to work also comes into contact with restrictive national implementing provisions given the shared competence enjoyed by the EU and Member States in this field. A recent report has highlighted the negative consequences that (short-term) TCN workers face in various EU Member States when their labour market status is grounded within domestic immigration law, including variability in the substantive employment rights to which they have access, as well as their limited ability to remain in the host state to find alternative or additional work.[149] A fundamental rights-based *employment* law, rather than a permission-based *immigration* law, approach to the regulation of migrant employment further supports the detachment of a particular employment relationship from immigration status, with access to an effective right to work ultimately dependent on the ability to search for and acquire work, without the imposition of restrictive measures hindering that ability.

An employment rights-based approach would favour changes to national immigration arrangements, for example by basing residence permits on 'employment' or labour market activity rather than being linked to a particular employer, or by allowing workers to seek employment for the duration of the residence permit, independently of the specific job for which they were granted permission to enter the host state in the first place.[150] Recently proposed changes to EU immigration law demonstrate a move towards more flexible rules governing intra-Union mobility and labour market access, including by allowing migrant workers to change employers, within the overarching context of ensuring greater equality between migrant and national workers.[151] The case law of the CJEU and UKSC also demonstrates the practical consequences of grounding protective measures within 'employment' legislation, rather than immigration rules, with both courts preventing the exclusion of migrant workers from accessing certain legislative rights granted to national workers on the sole basis of their immigration status i.e. the absence of permission to work.

[148] Rasnača and Bogoeski note 31 above, pp 13, 197.
[149] Ibid.
[150] Ibid, p 209.
[151] Recast Directive 2003/109 COM (2022) 650; Recast Directive No 2011/98 COM (2022) 655.

Within domestic employment law this approach has so far been confined to the discrimination context, while the CJEU's approach applies to all EU legislation governing employment conditions.[152] More broadly, the UKSC has recently shown evidence of a 'purposive' approach to the interpretation of protective legislation, with the Court thereby ensuring access to those protections for vulnerable or dependent workers, regardless of the underlying contractual arrangements, and which thereby demonstrates the added value of locating social rights within the context of legislation with an explicitly 'protective' purpose.[153]

Many of the provisions governing access to employment within the UK are currently found within the Immigration Rules, which are complex and have the status of secondary legislation, meaning that they are easily amended, in contrast to primary legislative protections which offer increased transparency and robustness of rights.[154] A clearer articulation of the right to work within domestic legislation would also serve as an entry point for legal reasoning and policy making which recognises the normative weight of that right as a fundamental social right for both national and migrant workers, with the right to work as a fundamental right capable of providing 'criteria for evaluating the processes and mechanisms [used] to implement labour market policies and to regulate work relations', including those national (immigration) rules governing the right to (access) work.[155]

In other words, the right to work as a fundamental right can inform the interpretation of domestic legislation, but also provides the normative benchmark against which the right to work in that domestic legislation might be assessed. A concrete example of the practical consequences of rights-based reasoning in the context of the right to work can be seen in the decision of the Israeli Supreme Court in *Kav LaOved*.[156] In that case, the Court declared the unconstitutionality of tying migrant workers to a particular employer, a practice that continues to be prevalent within the UK's new points-based immigration system. The decision was justified on the basis of the right to work as well as the right to resign, which is itself a corollary of the right to work i.e. the right *not* to be compelled to work for a particular employer. This case demonstrates the practical consequences of infusing domestic law with the right to work, with the more abstract international right leading to concrete outcomes through its domestication within national law. Explicit right to work protections for all workers resident

[152] *Hounga v Allen* [2014] UKSC 47; *Patel v Mirza* [2016] UKSC 42; *Tümer*, EU:C:2014:2337.
[153] *Uber BV v Aslam* [2021] UKSC 5.
[154] McKinney et al note 88 above, p 13.
[155] Deakin note 9 above, p 333.
[156] *Kav LaOved v The Government of Israel* HCJ 4542/02.

within the UK could thereby infuse the approach of courts to the interpretation and application of employment legislation with right to work implications, including equality and unfair dismissal law, but which are themselves replete with barriers to access, including complex common law and legislative rules governing employment status. The right to work would further serve as a high justificatory barrier for any post-Brexit deregulatory agenda undermining the accessibility or acceptability of employment.

As we have seen, the right to free choice of occupation prohibits governments and private employers from unjustifiably restricting access to work. The most obvious example of government regulation that can interfere with the right to work is immigration control. That access to employment within a particular jurisdiction might be conditional upon citizenship or immigration status is not necessarily problematic and there 'is no general internationally recognised right to migrate from one country to another, unless someone is an asylum seeker'.[157] It is here that we can most usefully draw on the concept of social citizenship to reinforce the right to work. In other words, citizenship should be understood not in the narrow sense of nationality, but rather in the wider sense of belonging to a community to which the full range of available rights should apply i.e. once it has been granted, the right to reside should be accompanied by an unhindered right to work, upon which access to other rights attached to social citizenship also derive. The exemption from obtaining permission to work under the Immigration Act 1971 fails to recognise the importance of underlying rights such as the right to work, and as has been pointed out elsewhere, TCNs may be denied the right to enter into paid employment despite being legally resident in the host state.[158]

This is not to suggest that migrant workers should automatically be entitled to the enjoyment of all rights associated with citizenship of the host state. Indeed, the literature already recognises the existence of 'partial citizenship' for migrant workers, defined as the 'selective' extension of rights.[159] The argument that all workers within the UK should enjoy basic social rights deriving from fundamental rights law is also not to overlook the fact that there are additional vulnerabilities associated with migrant worker status, not least of all the barriers faced in accessing the UK to work in the first place, in addition to the fact that the immigration status, and thereby the right to work of migrant workers, is vulnerable to change.

[157] Mantouvalou note 1 above, pp 43–44.
[158] Deakin note 9 above, p 344.
[159] L Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* (OUP, 2010).

Within EU law, there is also recognition that EU citizens and TCNs are not in exactly comparable situations, with the precise rights of the latter often depending on EU and national immigration law rather than free movement law, leading to a 'disaggregation' of the (internal) labour market.[160] Indeed, 'migrant workers' themselves do not form a homogenous group, with the rights of TCNs depending on their qualifications and length of stay or indeed, whether they are entering the EU for the first time (admission), or whether they are moving within the Union (mobility).[161] There is also increased recognition of the growing 'sectoral differentiation' of migrant workers, who may thereby be segregated into particular sectors of the economy, and which may lead to the institutionalisation of social and economic precariousness that employment legislation, which tends to be unitary rather than sectoral in nature, struggles to overcome.[162] The sectorally differentiated market is itself capable of restricting freedom of movement by restricting workers to a particular industry.[163] Immigration rules also have implications not only for freedom of movement and the right to work, but also for access to substantive employment rights, notably due to the additional hurdles migrants may face in negotiating contractual terms.[164]

The unifying nature of 'social citizenship' based on equality of status does not imply that this is a 'unitary' concept. Rather, social citizenship can be conceived as providing a basic floor of social rights for all, regardless of citizenship status and despite the fact that there may be some variability in the source, personal scope and material content of those rights, for example depending on the individual's status as a national or migrant worker.[165] Employment legislation can also be justified by reference to universalist concepts such as fundamental rights, and which can thereby erode the distinction between citizens and non-citizens.[166] This does not preclude recognition of particular vulnerabilities that pertain to TCNs or even within categories of migrant workers, or the need for regulatory intervention to overcome those vulnerabilities.

[160] Guild note 32 above, p 98; S Currie, 'Scapegoats and Guinea Pigs: Free Movement as a Pathway to Confined Labour Market Citizenship for European Union Accession Migrants in the UK' (2022) 51 *ILJ* 277.
[161] Guild note 32 above, p 108.
[162] E Albin, 'The Sectoral Regime: When Work Migration Controls and the Sectorally Differentiated Labour Market Meet' in Costello and Freedland note 12 above, p 134.
[163] Ibid, p 135.
[164] Ibid, p 139 and further references.
[165] T Faist, 'Social Citizenship in the European Union: Nested Membership' 39 (2001) *Journal of Common Market Studies* 37, p 44.
[166] Albin note 162 above, p 157.

This (expansive) conception of social citizenship can also be reinforced by reference to fundamental social rights concepts, such as the right to work, with fundamental rights also playing an important role in defining the content of citizenship rights.[167] Indeed, despite the relative lack of development in EU social law, the EU and the CJEU, in particular, have been active in closing the gap in social rights protection between citizens and 'denizens', i.e. those holding permanent residence status.[168] This post-national approach goes somewhat beyond Marshall's conception of social citizenship, which largely overlooked the place of migrants.[169] Nevertheless, social citizenship, as with citizenship is general, is a malleable normative concept that can be adapted to time and place, and with its inclusionary logic capable of expanding our understanding of 'community' and 'membership'.[170] Even among national workers in the UK, there are increased divergences in the protection of social rights and access to social welfare, and which affect how social citizenship is defined and experienced.[171] There are already (admittedly tentative) moves towards addressing the distinction between citizen and non-citizen within UK Immigration Rules governing access to work, as evidenced by the abolition of the resident labour market test, which had required the advertising of positions within the UK before being opened up to migrant workers.[172]

Freedom of movement and the right to work of everyone resident in the UK should be placed on a more secure footing. The chance to do so was overlooked by recent UK internal market legislation, while an explicit and directly effective right to work has to some extent been secured for particular classes of migrant, for example those with settled status. There are also weaknesses in that system from a right to work perspective, notably the exclusion of particularly vulnerable citizens who may not have registered on time. While EU law also does not provide for comprehensive protections for *all*, with the rights of migrant workers being conditioned by national measures, there are at least clear rules delineating those entitled to worker status and the attendant rights deriving from that status. In addition, EU free movement law has a strong connection to the right to work as a fundamental right and stands in stark contrast to the inadequate protection of the right to work encapsulated in domestic law.

[167] Simpson note 129 above, p 18.
[168] Faist note 165 above, p 46.
[169] Marshall note 3 above; Simpson note 129 above.
[170] Gorham note 134 above, p 40.
[171] Simpson note 129 above, p 3; M Lister, '"Marshall-ing" Social and Political Citizenship: Towards a Unified Conception of Citizenship' (2005) 40 *Government and Opposition* 471, p 474.
[172] McKinney et al note 88 above, p 39.

CONCLUSION

There are clear differences in how the right to work is manifested and protected for both national and migrant workers within UK law and EU (withdrawal) law. These differences stem from the manner in which the right to work is conceptualised and articulated. There is no direct protection for the right to work within UK immigration law, including for British citizens, with the 'right to work' within the UK legal order being treated as essentially synonymous with right to work checks, or being associated with the common law restraint of trade doctrine. Brexit highlights the deficiencies of this approach to the protection of the right to work, particularly in comparison to EU law, with the Union's free movement and citizenship rules providing a coherent and multi-layered framework for the protection of the right to work for national workers, but with the fundamental right to work also capable of framing the more restrictive rights of migrant workers found within EU immigration law.

Thus, while the freedom of movement and citizenship provisions within EU law are not without limitations, including an increased reliance by the CJEU on a more traditional 'market' conception of Union citizenship, particularly when it comes to the rights of the economically inactive, the rights of *workers*, including for migrant workers, are more clearly rights-based when compared to equivalent permission-based provisions in UK law. Within the context of the right to work of TCNs in EU law, there is also recognition that once authorisation to work has been obtained, their right to work is just that, a right, rather than a privilege. Moreover, this right is supported by reference to fundamental rights concepts within the Charter, with the consequence that, within the scope of EU law, any limitations on that right must be interpreted restrictively.

A strong articulation of the right to work of some citizens could of course be found within domestic law while the UK was a member of the EU and continues to be found in those provisions of the Withdrawal Agreement protecting the right to work of those with settled status, which only serves to emphasise further the inadequacy of UK immigration law in this regard. The emerging need for an internal market framework also highlights the importance of espousing a clear declaration of the rights of British citizens to move freely to take up work within the UK. The complexity of the UK's immigration arrangements also undermines the right to work as a fundamental right, a situation that has been exacerbated by Brexit, with the possibility of the same EU citizen eventually having been subject to multiple immigration and right to work regimes within a relatively short period, namely EU free movement law, settled

(or pre-settled) status under EU withdrawal law, and domestic law, where UK citizenship has been obtained or settled status lost.

The right to work also continues to have the status of a fundamental social right within international agreements to which the UK is party, and also governs access to more substantive employment rights. This normative vision of the right to work—coupled with the notion of social citizenship—can inform the interpretation of those provisions of UK law governing the right to access employment, thereby further separating the right to work from the restrictions or permission-based immigration regime, and instead relating it to the rights-based sphere of social or employment law, the latter of which is increasingly justified in terms of 'universalist' values such as dignity, solidarity and fundamental rights.[173] Beyond operational changes to the immigration rules, including ending the practice of tying migrant workers to a particular employer, the enactment of clear statutory provisions setting out the right to work in the UK would also go some way towards ensuring compliance with international rights obligations, which encourage domestic implementation of that right, particularly given that 'access' to employment—as opposed to a right to a (particular) job—is the least controversial, and most readily enforceable, aspect of the fundamental right to work. Moreover, the right to work is undermined unless accompanied by corollary rights to freedom of movement to take up employment within the relevant territory. There can be no doubt that the manner in which the right to work is enforced is emblematic of the value placed on work, as well as rights at work, within the legal system as a whole, with the right to work as a fundamental right capable of infusing that system with respect for social values.

[173] Guy Davidov, *A Purposive Approach to Labour Law* (OUP, 2016).