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## EU Migration and Asylum Law: A Labour Law Perspective

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### Abstract

The purpose of this chapter is survey EU migration and asylum law from a labour law perspective. A labour law perspective is concerned with the work relationship, and focuses not only on the worker, but also the employing organisation and any intermediary involved in labour supply. Examining EU migration and asylum law using this multifaceted prism of labour law reveals that EU migration and asylum law has a profound impact on labour law. That impact may be understood as having three different dimensions. (1) It affects the supply and demand for migrant workers. In this sense, migration law can be a form of labour market regulation. (2) migration and asylum law create different migration statuses that in turn determine, at least in part, labour rights. The move to re-introduce status over contract as a determinant of workers' rights divides the subjects of labour law. (3) Migration status and the fact of migration may be risk factors for labour exploitation. In order to examine these three facets, the particular role of the EU in this field must be explained. Part 1 provides a sketch of the role of states and markets in the regulation of migration. It sets the scene to understand the profound but limited role of the EU in this context. Part 2 examines the status of EU Citizenship, and the forms of liberalised free movement in the EU's internal market, that principally benefit those who hold the nationality of an EU Member State. I also consider two important derivative statuses for so-called third country nationals (TCNs), who gain EU rights as family members of EU Citizens and so-called 'posted workers'. Part 3 concerns those TCNs who require permission to live and work in the EU, and provides an overview of some of the different statuses created by EU law, and their labour rights content. Part 4 explores the notion of 'irregular status', and the EU Employer Sanctions Directive<sup>1</sup> and the ruling of the Court of Justice of the European Union (CJEU) in *Tümer* contrasted. In the final part, Part 6, I briefly highlight some features of migration status that are risk factors for labour exploitation. A recent EU Fundamental Rights Agency Report details the links between migration and extreme labour exploitation. Current responses focus unhelpfully on trafficking, or on forced labour, and look in particular to criminal law for solutions. This chapter recalls some responses from within labour law. It is suggested that further research is required into the question of which regulatory approaches and combinations thereof work best to protect migrant workers from exploitation.

### Introduction

The purpose of this chapter is survey EU migration and asylum law from a labour law perspective. A labour law perspective is concerned with the work relationship, and focuses not only on the worker, but also the employing organisation and any intermediary involved in labour supply. It acknowledges that labour law is a form of labour market regulation, with impacts on the supply and demand for work and workers. And naturally it is concerned with

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\* The author thanks Anne Davies, Alan Bogg, Mark Freedland, Bernard Ryan and Elaine Dewhurst for most helpful comments. All errors remain of course my own.

<sup>1</sup> Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L 168/24 ('Employer Sanctions Directive'). See also European Commission, Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third - country nationals, COM (2014) 286 final.

the right to work and labour rights, and the potential for their violation in any work relation. Examining EU migration and asylum law using this multifaceted prism of labour law reveals that EU migration and asylum law has a profound impact on labour law. It should thus command greater attention from EU labour lawyers.

That impact may be understood as having three different dimensions. Firstly, migration law affects the supply and demand for migrant workers. In this sense, migration law can be a form of labour market regulation.<sup>2</sup> Secondly, migration and asylum law create different migration statuses that in turn determine, at least in part, labour rights. The move to re-introduce status over contract as a determinant of workers' rights divides the subjects of labour law, as Mark Freedland and I have observed elsewhere.<sup>3</sup> Thirdly, migration status and the fact of migration may be risk factors for labour exploitation.

In order to examine these three facets, the particular role of the EU in this field must be explained. Part 1 provides a sketch of the role of states and markets in the regulation of migration. It sets the scene to understand the profound but limited role of the EU in this context. Part 2 examines the status of EU Citizenship, and the forms of liberalised free movement in the EU's internal market, that principally benefit those who hold the nationality of an EU Member State. I also consider two important derivative statuses for so-called third country nationals (TCNs), who gain EU rights as family members of EU Citizens and so-called 'posted workers'. Part 3 concerns those TCNs who require permission to live and work in the EU, and provides an overview of some of the different statuses created by EU law, and their labour rights content. The EU has also set minimum standards for some TCNs' entry into and residence in the EU. There is no general measure on labour migration, with the exception of the Single Permit Directive (SPD).<sup>4</sup> Instead, we find specific instruments to deal with different types of migrants, in particular that of Students,<sup>5</sup> Researchers,<sup>6</sup> Highly-Skilled Workers (Blue Card Directive),<sup>7</sup> Seasonal Workers,<sup>8</sup> and Intra-Corporate Transferees.<sup>9</sup> Some

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<sup>2</sup> This is the central insight of H Bauder, *Labor Movement: how migration regulates labour markets* (OUP 2006).

<sup>3</sup> M Freedland and C Costello 'Migrants at Work and the Division of Labour Law' in C Costello and M Freedland, *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014).

<sup>4</sup> Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L 343/1 ('Single Permit Directive' or 'SPD').

<sup>5</sup> Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (Students Directive) [2004] OJ L375/12. Note that a recast version of this Directive is currently under negotiations between Council and Parliament, Commission, 'Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing (recast)' COM (2013) 151.

<sup>6</sup> Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research (Researchers Directive) [2005] OJ L289/15. Note that a recast version of this Directive is currently under negotiations between Council and Parliament: Commission, 'Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing [RECAST]' COM (2013) 151 final.

<sup>7</sup> Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L155/17 ('Blue Card Directive' or 'BCD').

<sup>8</sup> Council Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94/375 ('Seasonal Workers Directive' or 'SWD'). See J Fudge and P Herzfeld Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights' (2014) 16 *European Journal of Migration and Law* 439.

workers within the EU also derive rights from association agreements between the EU and their countries of origin, notably Turkish workers. However, for reasons of space, these are not examined in detail.<sup>10</sup> Finally, Part 5 explores the notion of ‘irregular status’, and the EU Employer Sanctions Directive<sup>11</sup> and the ruling of the Court of Justice of the European Union (CJEU) *Tümer*<sup>12</sup> contrasted.

In the final part, Part 6, I briefly highlight some features of migration status that are risk factors for labour exploitation. A recent EU Fundamental Rights Agency Report details the links between migration and extreme labour exploitation.<sup>13</sup> Current responses focus unhelpfully on trafficking, or on forced labour, and look in particular to criminal law for solutions. This chapter recalls some responses from within labour law.<sup>14</sup> It is suggested that further research is required into the question of which regulatory approaches and combinations thereof work best to protect migrant workers from exploitation.

Of necessity, a survey piece such as this must take a broad-brush approach, and does not claim to be comprehensive. Rather, it selects key cases and instruments to illustrate the phenomena under discussion, and suggests various new avenues for further research.

## **1. Migration Law & Labour Market Regulation: States & Markets**

### **1.1 States and Migration Control**

Migration law is predominantly, but not exclusively, immigration law, reflecting the standard assumption that it is predominantly the receiving state that regulates migration. That assumption rests on the asymmetry built into the international system, with the right to leave a country being enshrined in international law, but no right to enter any particular state. The Universal Declaration of Human Rights (UDHR) reflects this assumption, as do other international legal instruments.<sup>15</sup> The UDHR speaks of a ‘right to nationality’ but not in the country of one’s residence or choosing. It affirms the right ‘to freedom of movement and residence’ but only ‘within the borders of each state’<sup>16</sup> and the ‘right to leave any country, including his own, and to return to his country’,<sup>17</sup> but not to enter another.

Some sending states do regulate the emigration of their citizens, in some instances by entering into bilateral agreements with receiving countries. There has been a resurgence of bilateral

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<sup>9</sup> Council Directive 2014/66/EU of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2104] OJ L157/1 (‘Intra-Corporate Transferees Directive’ or ‘ICTD’).

<sup>10</sup> See generally, D Thym & M Zoetewij-Turhan (eds), *Rights of Third Country Nationals under EU Association Agreements: Degrees of Citizenship and Free Movement* (Brill 2015).

<sup>11</sup> Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L 168/24 (‘Employer Sanctions Directive’). See also European Commission, Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third - country nationals, COM (2014) 286 final.

<sup>12</sup> Case C-311/13 *Tümer* (CJEU, 5 November 2014).

<sup>13</sup> European Union Fundamental Rights Agency (FRA), *Severe labour exploitation: workers moving within or into the European Union* (FRA 2015). This research focuses on the exploitation of workers who have moved either within or into the EU, regardless of whether they are EU or third-country nationals and regardless of their residency status.

<sup>14</sup> Drawing on C Costello, ‘Migrants and Forced Labour: A Labour Law Response’ in A Bogg and others (eds), *The Autonomy of Labour Law* (Hart Publishing 2014).

<sup>15</sup> For instance, International Covenant on Civil and Political Rights, arts 12 and 13.

<sup>16</sup> UDHR, art 13(1).

<sup>17</sup> UDHR, art 13(2).

labour migration agreements in recent years.<sup>18</sup> These are, as yet, understudied by labour lawyers, notwithstanding that they often regulate the labour rights of migrant workers directly.<sup>19</sup> While they may have this protective capacity, they may also set up legally questionable forms of discrimination. For instance, in Spain, one seasonal programme allowed only *mothers* under 40 to enter as seasonal agricultural workers.<sup>20</sup> Some bilateral agreements are less formal, and may be non-binding and apply at the sub-state level. For instance in the UK, there is a Memorandum of Understanding between the Philippine Overseas Employment Administration (POEA) and the National Health Service (NHS). Under this agreement, the NHS pays the cost of initial application, entry visa application costs and the costs of initial airfare to the UK provided workers remain in the post for 12 months. The NHS contributes to the Worker's Welfare Fund and the Employees' Guarantee Trust Fund, both administered by the POEA. In this way, the state *qua* employer mitigates some of the costs of migration imposed by the state *qua* regulator. Yet, the pay-off is a form of tied worker system, which restricts the labour market mobility of the workers in question.

International human rights law applies to all human beings, irrespective of their migration status. In practice, general human rights instruments permit migration controls, and these include many of the restrictive practices that are a feature of labour migration policies.<sup>21</sup> Even refugees do not have a clear right to enter any state, although the principle of *non-refoulement* in effect creates a right not to be rejected at the frontier under certain circumstances. International human rights and refugee law accommodate states' migration control prerogatives, albeit with many tensions and frictions. The dedicated human rights treaty for migrants, the International Convention on Migrant Workers and their Families, remains conspicuously under-ratified by EU Member States and most migrant-receiving countries.<sup>22</sup> The EU's position has been criticised for lack of commitment to this instrument.<sup>23</sup> Nonetheless, it has entered into force, and has a life within the UN human rights system.<sup>24</sup> While some have criticised the MWC for adding nothing new,<sup>25</sup> the more informed view identifies some clear added value that the instrument brings over general international human rights law, including on obligations home states owe to emigrants.<sup>26</sup>

<sup>18</sup> These agreements do often contain provisions that seek to determine the rights of migrant workers, in a manner that should attract the interest of labour lawyers.

<sup>19</sup> For a notable exception, see R Cholewinski, 'Evaluating Bilateral Labour Migration Agreements in the Light of Human and Labour Rights' in M Panizzon, G Zürcher and E Fornalé (eds), *The Palgrave Handbook of International Labour Migration: Law and Policy Perspectives* (Palgrave Macmillan 2015) 231.

<sup>20</sup> S Mannon and others, 'Keeping Them in Their Place: Migrant Women Workers in Spain's Strawberry Industry' (2011) 19 *International Journal of the Sociology of Agriculture and Food* 83.

<sup>21</sup> For instance, under the ECHR, many restrictions on migrants' rights are permitted as the states' basic right to control migration is assumed. See M-B Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015); C Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2015).

<sup>22</sup> The Convention currently has 48 states parties, none which is an EU Member States. See <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-13&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en)> accessed 16 January 2016.

<sup>23</sup> E MacDonald and R Cholewinski, 'The ICRMW and the European Union' in R Cholewinski, P de Guchteneire and A Pécoud (eds), *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (CUP 2009).

<sup>24</sup> A Desmond, 'The Triangle that could Square the Circle? The Un International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review' (2015) 17 *European Journal of Migration and Law* 39.

<sup>25</sup> WR Böhring 'The Protection of Migrant Workers and International Labour Standards' (1988) 26 *International Migration* 133; J Nafziger & B Bartel 'The Migrant Workers Convention: Its Place in Human Rights Law' (1991) 25 *The International Migration Review* 771.

<sup>26</sup> See in particular B Ryan, 'In Defence of the Migrant Workers Convention: Standard-Setting for Contemporary Migration' in S Juss (ed), *The Ashgate Research Companion to Migration Theory and Policy* (Ashgate 2013) 491.

While bilateral migration agreements are relatively common, there is no global multilateral system that regulates labour migration. The World Trade Organisation (WTO) system only touches those aspects of movement of persons that are liberalised as adjuncts to transnational service provision, under the General Agreement on Trade in Services (GATS).<sup>27</sup> The GATS has had relatively little practical impact on the movement of persons, as the commitments made under this aspect of the GATS are fairly limited. Indeed, as will be discussed in the context of the ICT Directive, sometimes there is the tendency to overstate the extent of GATS obligations. In the context of the ICT Directive, for instance, it was wrongly suggested that liberalising intra-company transferees was required by GATS commitments.<sup>28</sup>

International law does not set up a system of multilateral regulation for migration, although international human rights and refugee law constrain how states treat those who seek entry or are present in the territory of particular states. States thus retain broad powers to regulate immigration, and tend to do so in their own interests.

## 1.2 Markets and Migration

That it is left to states to control immigration tells us little about the political economy of the underlying processes. In practice, migration laws are often highly stratified. Different forms of status are accorded to different types of workers, often differentiated ostensibly across 'skill levels'. Migration status is often temporary, reflecting a general shift towards temporary migration, a resurgence of 'guest work' under another name.<sup>29</sup> These temporary statuses may be highly precarious,<sup>30</sup> contributing to the presence of irregular migrants, who may lack a clear right to live or work in the EU. Taking a labour rights perspective to migration law means we should consider the role of employing organisations and intermediaries in the migration process. At the national level, the forms of immigration law vary considerably, some effectively delegating migration control and status to employers, while others are highly centralised, and require fees and compliance with various regulatory standards before migrant workers may be hired.

Policy discourse on 'managed migration' tends to treat labour migration as a way of enhancing competitiveness and meeting employer demand, leading to regulatory systems that are highly employer driven.<sup>31</sup> Yet, if systems leave it up to employers, they may prefer migrant labour, which will inevitably be plentiful and cheaper. Different approaches have emerged to seek to reconcile the regulatory aim of meeting employer demand, whilst testing that the labour shortage is genuine, as Ruhs has identified.<sup>32</sup> One approach is to issue work

<sup>27</sup> J Schmitz, 'The Temporary Movement of Natural Persons in the Context of Trade in Services: EU Trade Policy Under Mode 4 (WTO/GATS)' in Panizzon, Zürcher and Fornalé (n 18).

<sup>28</sup> See discussion around (n 149) below.

<sup>29</sup> S Castles, 'Guestworkers in Europe: A Resurrection?' (2006) 40 *International Migration Review* 741.

<sup>30</sup> On this phenomenon, see B Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24 *Work, Employment and Society* 300; J Fudge, 'The Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2011) *Metropolis British Columbia Working Paper Series No 11/15*, 5 < [www.isv.liu.se/remeso/konferenser-och-workshops/labour-rights-as-human-rights/proceedings/commissionedpapers/1.342814/JudyFudgePrecariousMigrantStatusandPrecariousEmployment.pdf](http://www.isv.liu.se/remeso/konferenser-och-workshops/labour-rights-as-human-rights/proceedings/commissionedpapers/1.342814/JudyFudgePrecariousMigrantStatusandPrecariousEmployment.pdf) > accessed 13 February 2016; LF Vosko, *Managing the Margins* (OUP 2010). S Marsden, 'The New Precariousness: Temporary Migrants and the Law of Canada' (2012) 27 *Canadian Journal of Law and Society* 209, 211.

<sup>31</sup> See further G Menz, *The Political Economy of Managed Migration* (OUP 2009).

<sup>32</sup> M Ruhs, 'Immigration and Labour Market Protectionism' in Costello and Freedland (n 2). See also M Ruhs, 'Openness, Skills and Rights: An empirical analysis of labour immigration programmes in 46 high- and middle- income countries' (2001) *Centre on Migration, Policy and Society*, University of Oxford. Working paper No 88/2011 <[www.compas.ox.ac.uk/2011/wp-2011-](http://www.compas.ox.ac.uk/2011/wp-2011-)

visas to employers simply on the basis of their attestation that there is a shortage of local workers. Another uses attestation in combination with an official labour market test, which assesses the ‘reality’ of the labour shortage. In the UK, the Migration Advisory Committee, an independent, non-statutory body comprising independent economists, advises the government on which sectors have genuine skills shortages. In Germany in contrast, certification of the labour market need is required, which means in practice, that the existence of a real need for migrant workers is subject to a bureaucratic assessment. Some states combine these forms of attestation with limited number of permits for particular sectors. A further approach is the Swedish one, which is cast as exceptional in that employers are virtually free to hire TCNs, but there is strong enforcement of local labour standards and collective terms and conditions. This model, it seems, has proved effective at curbing employer demand for migrant labour somewhat, although as discussed below, comes into collision with the EU approach to posted workers, which undermines the integrity of the domestic labour standards, thereby removing the main Swedish safeguard to limit demand for migrant workers.<sup>33</sup>

The tension is between meeting employer demand, and the normative commitment to ensuring that national workers (and defining that group is not straightforward) have preferential access to the labour market. As Anderson and Ruhs have demonstrated in their earlier work, the notion of ‘shortage’ is often problematic, particularly as restrictive immigration status may create a more dependent workforce, leading to greater demand for migrant workers.<sup>34</sup> As Ruhs puts it ‘some employers may develop a preference for migrants because of the characteristics and restrictions attached to their immigration status.’<sup>35</sup> Anderson, Fudge, and others have refined the claim that immigration ‘regulates’ labour markets, by demonstrating how the precariousness of migration status creates a precarious, ‘ultra-flexible’ workforce.<sup>36</sup> Migration law, in this account, combines with less formalized migratory processes to help produce ‘precarious workers’ that cluster in particular jobs and segments in the labour market.’<sup>37</sup> Accordingly, ‘managed migration’ often created structured demand for migrant labour, with migrant workers less able to demand better terms and conditions.

As will be discussed below, the EU labour migration directives are highly stratified, so in this respect they reflect the prevailing approach at the national level. However, they are largely agnostic about the extent to which labour migration is employer-driven, and leave significant leeway to the Member States as to how to regulate admissions. The Directives discussed below tend to regulate status once admitted, rather than the admissions process itself.

The other actors that should garner attention from a labour law perspective are intermediaries. Migration often involves intermediaries who take on a labour supply role. Depending on their legal form and activities, the law distinguishes sharply in how it regulates these intermediaries. Regulating intermediaries is a key part of attempting to ensure that migrant workers are not supplied in a manner that places them in a vulnerable position. While ‘vulnerability’ is evidently a highly contested notion, in the context of labour relations, it is assumed that the worker is in a weaker bargaining position than the employer. In that sense, workers are vulnerable. Measures that further enhance their dependency on the employer or another third party, or their economic precariousness, exacerbate that vulnerability.

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088\_ruhs\_migrants\_rights\_full/> accessed 13 February 2016. In this overview 18 of the EU Member States are included.

<sup>33</sup> S Engblom, ‘Reconciling Openness and High Labour Standards?’ in Costello and Freedland (n 2).

<sup>34</sup> M Ruhs and B Anderson (eds), *Who Needs Migrant Workers? Labour Shortages, Immigration and Public Policy* (OUP 2010).

<sup>35</sup> Ruhs ‘Immigration and Labour Market Protectionism’ (n 31) 65.

<sup>36</sup> Anderson, ‘Migration’ (n 29); Fudge, ‘The Precarious Migrant Status’ (n 29) 5; Marsden (n 29) 211.

<sup>37</sup> Anderson, ‘Migration’ (n 29) 301.

Regulating intermediaries is thus congruent with the traditional aims of both labour and migration law.<sup>38</sup>

Article 1(3) of the Council of Europe's revised European Social Charter (ESC), the right to work, implies the obligation of States Parties to 'establish or maintain free employment services for all workers'. This provision in turn inspired Article 29 of the EU Charter of Fundamental Rights (EUCFR), which grants to everyone the right of access to a free placement service. As regards private employment agencies, Article 7 (1) of the International Labour Organization (ILO) Private Employment Agencies Convention establishes the clear rule that such 'agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers'.<sup>39</sup> Hence it is normally the employers who should bear the costs of employment services. Yet, in the migration context particularly, this rule is subject to exceptions and seems to be easily circumvented.<sup>40</sup>

However, in spite of Article 29 of the Charter, EU law does not regulate labour supply comprehensively. Article 29 signals that labour supply agencies should not charge workers for finding them jobs, which in turn reflects the clear position in international labour law. However, there is no EU legislation regulating intermediaries in their migrant labour supply role, although the Agency Workers Directive is of course relevant to the general regulation of agency work.<sup>41</sup>

## 2. EU Citizenship & the Internal Market

The EU context profoundly changes that statist assumption of migration control outlined in the preceding section. A constitutional fundamental of the EU is rights to movement and residence afforded by the EU Treaties as an aspect of both the internal market and EU Citizenship. These mobility rights are primarily for EU Citizens that is those who hold the nationality of the EU Member States. However, EU Citizens enjoy clear family rights, which embrace family members irrespective of their nationality. Accordingly, some TCNs derive rights from their EU Citizen family members. Posted workers too enjoy EU mobility rights that they derive from their relationship with an EU enterprise providing services in the EU. They may be EU Citizens or TCNs working in one EU state and transferred to another. Taking a labour rights perspective, the position of EU Citizens, their TCN family members, and posted workers will be considered in turn.

For the most part, attempts by EU Citizens to invoke their Treaty freedoms *against* labour protections have failed. For instance, in *Graf* an attempt to argue that Austrian labour law discouraged workers from leaving was dismissed, as raising no barrier to free movement.<sup>42</sup> Similarly, in *Albany* collective agreements were treated as effectively immune from

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<sup>38</sup> See further J Fudge and K Strauss (eds), *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (Routledge 2013).

<sup>39</sup> Article 7(1) ILO Convention No C181 of 1997, Private Employment Agencies Convention.

<sup>40</sup> See generally the Study for the European Parliament *The Role and Activities of Employment Agencies* (EP 2013) 75,

<[www.europarl.europa.eu/RegData/etudes/etudes/join/2013/507459/IPOL-EMPL\\_ET\(2013\)507459\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/507459/IPOL-EMPL_ET(2013)507459_EN.pdf)> accessed 16 January 2016.

<sup>41</sup> Directive 2008/104/EC of 19 November 2008 on Temporary Agency Work [2008] OJ L327/9. The Directive guarantees the following working and employment conditions: equal treatment; access to information regarding vacancies; prohibition on agency fees; access to the amenities or collective facilities; and the inclusion of agency workers in the threshold for worker representation. See also N Countouris and R Horton, 'The Temporary Agency Work Directive: Another Broken Promise?' (2009) 38 ILJ 329. On agency work generally, see ACL Davies, 'The Implementation of the Directive on Temporary Agency Work in the UK: A Missed Opportunity' (2010) 1 ELLJ 303.

<sup>42</sup> Case C-190/98 *Volker Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-00493.

competition law.<sup>43</sup> In general, the internal market has been premised on the basic territorial scope of domestic labour law, reflecting the principle of *lex loci laboris*, that the law of the state where the work was done applied to that work relationship. Overall, labour rights seem to be supported rather than undermined within the internal market. Admittedly, there are some troubling exceptions. For instance, the Court has apparently elevated freedom of contract in light of Article 16 of the Charter (freedom to conduct a business) in some recent cases.<sup>44</sup> And of course, the main area of site of friction concerns posted workers, who are treated as adjuncts of transnational service provision, as discussed in Part 2.3 below.

Although internal mobility was part of the project of European integration from its outset in 1957, it was assumed that it would not include even those TCNs already present in the (then) EEC. While some rights of TCNs were mentioned in the original EEC Treaty, their entry and residence fell largely outside the competence of the Community. Gradually, aspects of migration and asylum were addressed inter-governmentally by the EU Member States, and with the Treaty of Amsterdam, formal law-making competence on immigration and asylum was created. The resulting legislative measures are discussed in Part 4 below.

## 2.1 EU Citizens qua Workers

EU Citizens have the right to live and work throughout the EU, and their rights to do so are neither dependent on national authorisation, nor an employment relationship. Although economic activity remains decisive for EU Citizenship rights, this activity embraces not just work, but also self-employment and the temporary provision of services. In addition, EU Citizens may claim the labour and social rights (with some temporary exceptions) of nationals, so they meet local workers on fairly level playing field. This basic equality in the workplace in particular was expressly provided for by the original EEC Treaty: It was unthinkable that mobile workers would not be subject to a clear equal treatment guarantee.<sup>45</sup> They have the right to stay to live in their host country, even as job-seekers, for a certain period. Having a right to move as a job-seeker diminishes the demand for the services of intermediaries, as there is no need to have a job offer in advance of migrating. Moreover, for EU Citizens, losing their job does not come with the automatic risk of losing migration status. Their right to equality is likely to be more practically effective than that of TCN workers, who may depend on their employer (either directly or indirectly) for their status. Accordingly, as a matter of institutional design, EU Citizens ought to be well-protected as workers in other Member States.

However, in practice, there is evidence of their exploitation, and the barriers they face in enforcing their labour rights. To illustrate, a recent FRA Report on *Severe labour exploitation*<sup>46</sup> examines the predicament of both EU and TCN migrant workers. Catherine Barnard and Amy Ludlow have examined the particular predicament of EU Citizens from central and eastern European countries in the UK, focusing in particular on their underenforcement of their labour rights.<sup>47</sup> Lizzie Barmes' contextual account of the facts

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<sup>43</sup> Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

<sup>44</sup> For example, Case C-426/11 *Alemo-Herron v Parkwood Leisure Ltd* (CJEU, 18 July 2013). See further J Prassl 'Freedom of contract as a general principle of EU law? Transfers of undertakings and the protection of employer rights in EU labour law' (2013) 42 ILJ 434.

<sup>45</sup> Art 48(1) and (2) EEC Treaty 1957: '1. The free movement of workers shall be ensured within the Community not later than at the date of the expiry of the transitional period. 2. This shall involve the abolition of any discrimination based on nationality between workers of the Member States, as regards employment, remuneration and other working conditions.'

<sup>46</sup> FRA, *Severe labour exploitation: workers moving within or into the European Union* (FRA 2015).

<sup>47</sup> C Barnard 'Enforcement of Employment Rights by Migrant Workers in the UK: The Case of EU-8 Nationals' in Costello and Freedland (n 2); C Barnard and A Ludlow 'Enforcement of Employment Rights by EU-8 Migrant Workers in Employment Tribunals' <<http://ilj.oxfordjournals.org/content/>



behind the UK case of *Kalwak*<sup>48</sup> revealed the vulnerability of Polish workers in the UK to sham self-employment, given that they had signed contracts in spite of the fact that they ‘barely spoke English, had no access to legal advice, had arrived in the UK the day before as economic migrants from a poorer country, had been moved in the night to escape attack and were to take up low-skill, low-paid work’.<sup>49</sup>

## 2.2 Family Members of EU Citizens

Family members of EU Citizens too derive movement, residence, and crucially work rights from the EU Treaty. In *Metock* the CJEU explained that that ‘if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed.’<sup>50</sup> That the EU residence rights include a right to work can have profound implications.

To illustrate, consider the ground-breaking case on EU Citizens’ family members, *Zambrano*,<sup>51</sup> from a labour rights angle: Mr Ruiz Zambrano was a Columbian national, with precarious migration status in Belgium. Like many asylum-seekers, his claim for refugee status was rejected, but he was found non-removable for human rights reasons, and continued to live with his wife and children in Belgium. Their migration status was perhaps best characterised as semi-regular.<sup>52</sup> He made various failed attempt to regularise his migration status. The facts of the case reveal the labour law dimension, as reflected in the fact that the case was, after all, referred by the Employment Tribunal of Brussels. Mr Zambrano’s employment ended abruptly after a labour inspection detected his irregular migration status. His application for unemployment benefit was at the heart of the dispute. His entitlement to that benefit depended on his migration status during the relevant statutory qualifying period. His precarious non-deportable status under Belgian law did not entail a clear legal right to work, so his period of working would not qualify him for later benefits under Belgian law. In contrast, if he was deemed to have an EU residence right, the character of his migration status would alter, bringing a change in his domestic legal entitlements.

The case involved an epochal transformation of the scope of EU Citizenship, for it was held that his children’s EU Citizenship (they were Belgian by virtue of their birth there) would be rendered ineffective if Mr Zambrano was not recognised as having EU residence *and* work rights in Belgium. By this move, his labour and social rights are transformed. *Qua* migrant with irregular status, the state’s labour inspectors seek him out for expulsion from the workplace. In contrast, *qua* holder of an EU residence right, his right to work too becomes secure, thereby also mitigating some of the risks unemployment, by providing access to the state’s social security net. The impact of EU status on labour and social rights is apparent.

However, secure status with a right to work is not a panacea, and the fact of working outside one’s home country can nonetheless be a risk factor for labour exploitation, as is discussed below.

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early/2015/10/31/indlaw.dwv034.abstract> accessed 16 January 2016.

<sup>48</sup> *Consistent Group Ltd v Kalwak and others* [2008] IRLR 505 (CA).

<sup>49</sup> L Barmes, ‘*Learning from Case Law Accounts of Marginalised Working*’ in J Fudge, S McCrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing 2012) 32

<sup>50</sup> Case C-127/08 *Metock* [2008] ECR I-6241, para 62. See further, C Costello, ‘*Metock*: Free Movement and “Normal Family Life” in the Union’ (2009) 46 CMLRev 587.

<sup>51</sup> Case C-34/09 *Ruiz Zambrano* [2011] ECR I-01177.

<sup>52</sup> Note this led some to wrongly characterise them as ‘illegal’. See K Hailbronner and D Thym, ‘Annotation of Case C-34/09 *Ruiz Zambrano* (2010) 48 CMLRev 1253 and the reply thereto M Olivas and D Kochenov, ‘Case C-34/09 *Ruiz Zambrano*: A Respectful Rejoinder’ (2012) 1 University of Houston Public Law and Legal Theory Series.

## 2.3 Posted Workers

Posted workers may be EU Citizens,<sup>53</sup> or third country nationals with authorisation to work in the first EU Member State. EU labour lawyers have identified the deep problems the posted workers caselaw poses for labour protections in Europe.<sup>54</sup> However, whether the impact of those problems depends often on the domestic system, and how it receives and transforms EU law.<sup>55</sup> Much of the scholarship on posted workers suggests the legal frictions reflect an unavoidable tension between openness to transnational service provision and labour protections. However, rather than seeing an inevitable clash, I suggest that the anomalous character of the posted workers regime should be borne in mind, particularly when contrasted with the orthodox approach under EU free movement of workers guarantees. The posted workers ‘problem’ comes not from the mobile workers themselves, but from transnational service providers being afforded commercial freedom other operators on the territory of the host state do not enjoy, namely to afford their workers some labour rights at the standards enjoyed in the home state. Indeed, as was noted when the Directive was adopted on the internal market legal basis, it aims to liberalise free movement, not protect labour rights as such.<sup>56</sup> Nonetheless, the EU legislature arguably envisaged that the labour law of the host state would apply to posted workers more comprehensively than has become the case. The CJEU caselaw<sup>57</sup> interpreting the Posted Workers Directive<sup>58</sup> has arguably privileged the liberties of the employing organisations, over the worker-protective concerns.<sup>59</sup>

Posted workers need not hold the nationality of an EU Member State. Indeed, the early posted workers cases concerned workers who did *not* have EU mobility rights themselves: the Portuguese workers in *Rush Portuguesa*<sup>60</sup> did not then have EU Treaty rights, due to transitional provisions, nor did the Moroccan workers transferred from Belgium to France in *Vander Elst*.<sup>61</sup> A closer look at the latter case reveals its strong labour rights dimension. The workers in *Vander Elst* were of Moroccan nationality, migrants authorised to live and work in Belgium. By means of asserting its EU mobility rights as a service provider, the employer was able to bring its workforce (a team in that case of four Belgian and four Moroccan workers) with them to another Member State, thereby expanding the geographical and temporal scope of the Moroccan workers’ migration status. Normally, the Moroccan workers

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<sup>53</sup> See for instance the dispute arising out of Italian and Portuguese workers being posted to the UK to fulfil a building contract at the Lindsey Oil refinery: C Barnard, ‘British Jobs for British Workers: The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market’ (2009) 38 ILJ 245.

<sup>54</sup> See, for example, P Davies, ‘The posted workers directive and the EC Treaty’ (2002) 31 ILJ 298; A Davies, ‘One step forward, two steps back? Laval and Viking at the ECJ’ (2008) 37 ILJ 126; N Reich, ‘Free Movement v. Social Rights in an Enlarged Union--the Laval and Viking Cases Before the ECJ’ (2008) German Law Journal 125; P Syrpis and T Novitz, ‘Economic and social rights in conflict: political and judicial approaches to their reconciliation’ (2008) 33 EL Rev 411; C Kilpatrick, ‘Laval’s regulatory conundrum: collective standard-setting and the Court’s new approach to posted workers’ (2009) 34 EL Rev 844.

<sup>55</sup> See further Mark Freedland and Jeremias Prassl, *Viking, Laval and Beyond* (Hart Publishing 2014).

<sup>56</sup> For a prescient analysis, see P Davies ‘Posted workers: Single Market or protection of national labour law systems?’ (1997) 34 CMLRev 571, in particular 571–73.

<sup>57</sup> See especially Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989; Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

<sup>58</sup> Council Directive (EC) 96/71 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1 (‘Posted Workers Directive’).

<sup>59</sup> See further, C Barnard, ‘The UK and Posted Workers: The Effect of Commission v Luxembourg on the Territorial Application of British Labour Law’ (2009) 38 ILJ 122.

<sup>60</sup> Case C-113/89 *Rush Portuguesa v Office national d’immigration* [1990] ECR I-01417.

<sup>61</sup> Case C-43/93 *Vander Elst* [1994] ECR I-03803.

would not have an EU right to exercise free movement. If they had, the need to create this category of ‘posted worker’ would not have emerged. The case arose out of an inspection by French employment inspectors, which found the Moroccan workers did not have the necessary French permits to take up paid employment.<sup>62</sup> As independent workers, they could not move to France to seek or take up new employment. Their migration status in France depended on their employer. This exacerbates the workers’ dependency on their employer. Moreover, the fact of posting may also exacerbate their precariousness, as they are not only temporary migrants in Belgium, but also transferred temporarily elsewhere.

The point of this re-visitation of the seminal posted worker cases is to highlight the migration and labour law interactions in this field. While posted worker status apparently expands the autonomy of migrant workers, offering them added opportunities to work in other Member States without have to seek a new work permit each time, in fact it does so at the cost of additional dependency, precarity and rights-reduction. The posted-workers route also creates a new migration status, which operates across the EU. This may undermine some of the features of both domestic labour and migration law. For instance, Engblom has argued that the ‘convulsions’ caused by the *Laval* case in Sweden are explained by Sweden’s decision to open its labour market and rely on domestic labour laws and collective structures to ensure that demand for migrant workers was dampened and that high labour standards for all workers on the territory were preserved.<sup>63</sup> *Laval*, in his view, undermined that approach.

This section has emphasised that the posted workers regime ought to be transnationally and temporally limited. Transnationally, its logic is tied to the internal market project. Temporally, posted worker status should only applicable if the employing enterprise is temporarily providing services on a transnational basis in another EU Member State. If the employing enterprise is present in the host Member State permanently, then it ought to be deemed to be exercising freedom of establishment. In that context, its workers would become just that: workers subject to the labour laws of the host state, and requiring a migration status from the host state if they are TCNs. Again, this limited temporal scope of the internal market posted workers regime is important, as in the next section, I examine its use a model in a very different context, namely the ICT Directive.

### **3. Regulating Immigration to the EU**

#### *3.1 EU Competences and Law-making on Migration and Asylum*

Since the Treaty of Amsterdam, the EU has been competent to adopt binding measures on asylum and migration. Its competence on migration, as set out in Article 79 TFEU, is to ensure efficient management of migration flows and fair treatment of TCNs ‘residing legally’ in the Member States. It is also to combat illegal immigration. This competence is framed on the premise that migration status comes predetermined: the EU must combat the illegal variety and ensure fair treatment to the ‘legals’. But of course, EU law can create regular status, so the competence is curiously silent on what positive aims EU immigration policy should pursue. On asylum, the EU has used its competence to create a set of policies it now styles as a ‘Common European Asylum System’, and has regulated asylum fairly comprehensively, with the original set of Directives adopted in the mid-2000s,<sup>64</sup> now ‘recast’ in their second generation.<sup>65</sup>

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<sup>62</sup> *ibid* para 5.

<sup>63</sup> S Engblom, ‘Reconciling Openness and High Labour Standards? – Sweden’s Attempts to Regulate Labour Migration and Trade in Services’ in Costello and Freedland (n 2).

<sup>64</sup> The first phase of the Common European Asylum System consists of: Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L316/1; Asylum Reception Conditions Directive: Council Directive 2003/9 of 27 January 2003 laying down minimum

For the first five years after the entry into force of the Treaty of Amsterdam, legislation was agreed by unanimity in the Council, with a mere consultative role for the European Parliament. Some EU proposals were abandoned for lack of political support, notably the Commission's 2001 proposal for a general labour migration directive.<sup>66</sup> That proposal reflected the aim of having a general regime to treat all migrant workers equally, at least with each other. It was also coherent with the Treaty aim of 'fairness to third country nationals.'<sup>67</sup> However, the proposal failed due to political opposition in the Council. Instead, in order to secure the degree of political consensus required, the Commission switched strategies, and refocused on high-skilled migration, and proposed the Blue Card Directive. Later, the legislative process was altered, so that now measures in this field are subject to QMV in the Council and the EP is a co-decision-maker. The later measures on Single Permit, SWD and ICT involved the EP in this active role, with significant impact on the content of the new policies.<sup>68</sup>

Labour lawyers should note a further important point about the legal competences in this field. Many EU measures in this field also contain explicit labour rights provisions.<sup>69</sup> For this

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standards for the reception of asylum seekers [2003] OJ L31/18; Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1; Council Directive 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L/304/12; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.

<sup>65</sup> The Recast of the Common Asylum System consists of: Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L/337/9; Regulation (EU) No 603/2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L 180/1; Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L/180/31; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L/180/60; Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96; Regulation (EU) No 516/2014 establishing the Asylum, Migration and Integration Fund [2014] OJ L 150/168.

<sup>66</sup> The original proposal was Commission, 'Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities' COM (2001) 386 final. This was later withdrawn, see, Commission, 'Communication from the Commission to the Council and the European Parliament: Outcome of the screening of legislative proposals pending before the Legislator' COM (2005) 462 final.

<sup>67</sup> Article 67(2) TFEU.

<sup>68</sup> See, for example, C Roos, 'EU politics on labour migration: Inclusion versus admission' (2015) 28 Cambridge Review of International Affairs (forthcoming), comparing the Blue Card Directive (n 6) and Single Permit Directive (n 3); G Menz, 'Framing the matter differently: the political dynamics of European Union labour migration policymaking' (2015) Cambridge Review of International Affairs (forthcoming), comparing the Blue Card Directive (n 6) and Seasonal Workers Directive (n 7).

<sup>69</sup> As envisaged under art 153(1)(g) TFEU, which specifies that policies may include 'conditions of employment for third-country nationals legally residing in Union territory.'

reason, the European Trade Union Confederation (ETUC) urged that the proposed Directives on the Single Permit, Seasonal Worker and ICT should also have a social policy legal base. This was because the proposals were likely to have a ‘massive impact on the labour markets and industrial relations systems in the EU and the Member States.’<sup>70</sup> As the ETUC put it ‘The texts are not simply tools to manage movements of migrant workers, but also instruments which define the rights of those workers in an employment relationship, and should furnish better protection for those workers.’<sup>71</sup> By basing the Directives only on the immigration competence, the Commission avoided the consultations with the social partners, required under Article 154 TFEU. However, this argument, cogent as it is from an EU law point of view, fell on deaf ears.

The outcome is an EU patchwork of measures, which do not comprehensively regulate immigration to the EU.<sup>72</sup> EU law in this field is thus distinctly un-federal: in federal systems, the constituent states’ migration control powers tend to be comprehensively pre-empted by federal powers. In contrast, in the EU, there is shared competence over entry and residence for some categories, and Member States retain control over naturalisation. Those who seek to enter EU Member States may derive statuses that are heavily regulated by EU law (asylum-seeker, refugee, researcher, student, Blue Card Holder, intra-company transferee, seasonal worker). However, even in these cases, the status is ultimately granted by national authorities. And many states continue to issue national permits under systems that run alongside the EU ones. For instance, as regards highly-skilled workers, implementation studies reveal quite a complex picture with highly varied implementation.<sup>73</sup> Even where there is an EU status, it is usually without prejudice to Member States’ rights to offer ‘more favourable provisions’.<sup>74</sup> And there remain migrants who fall principally under domestic immigration law, with a largely national status.

#### 4.2 *EU Migration Statuses, Mobility and Security of Residence*

Surveying the range of EU migration statuses granted to TCNs reveals that they differ sharply as regards EU mobility rights. Even statuses regulated heavily by EU law remain principally national in territorial scope. For instance, those admitted under the Single Permit Directive (SPD) are only admitted to one Member State.<sup>75</sup> This also applies to recognised refugees, even though both the procedure and status are subject to common EU rules. This sits oddly with the overarching rationale for EU immigration policy, being to create an ‘Area of Freedom, Security and Justice’. ‘Mobility’ rights across the EU normally only accrue on naturalisation (which confers EU Citizenship). Even under the EU Directive on Long-Term Residents Status, which creates a status conditional on fulfilment of many conditions, the right to intra-EU mobility is highly constrained. In addition, that Directive has been poorly implemented in practice.<sup>76</sup> Only the Blue Card Directive provides for analogous rights after a

<sup>70</sup> ETUC Executive Committee, ‘Resolution on equal treatment and non discrimination for migrant workers’ (1-2 December 2010) 2.

<sup>71</sup> *ibid.*

<sup>72</sup> K Groenendijk, ‘Recent Developments in EU Law on Migration: The Legislative Patchwork and the Court’s Approach’ (2014) 16 *European Journal of Migration and Law* 313.

<sup>73</sup> Commission, ‘Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment’ COM (2014) 287 final. See further L Cerna (2013) ‘Understanding the diversity of EU migration policy in practice: the implementation of the Blue Card initiative’ (2013) 34 *Policy Studies* 180.

<sup>74</sup> See, eg, art 4 ICTD (n 8); art 13 SPD (n 3).

<sup>75</sup> Art 11 SPD (n 3).

<sup>76</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/33 (‘Long-Term Residents Directive’); Commission, ‘Report on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (LTRD Implementation Report)’ COM (2011)585.

shorter time. Otherwise, mobility rights for migrant TCN workers are not usually envisaged. The EU is a single labour market for Europeans, but not TCN migrants.<sup>77</sup> Indeed, intra-EU mobility was perhaps the most fraught issue in the four years of negotiations on the Intra Corporate Transferees Directive (ICTD).<sup>78</sup>

Naturalization remains a national matter.<sup>79</sup> However, the CJEU in *Rottmann*<sup>80</sup> has tentatively established some limits on the withdrawal of nationality (as it entails a possible withdrawal of EU Citizenship), naturalization remains, at least for now, regulated domestically. The question of so-called ‘investor citizenship’, that is commercializing nationality in exchange for financial donation or investment, has provoked some debate at the EU level, but no concrete legal action to curtail this practice.<sup>81</sup>

From a labour law perspective, this means that many migrants with temporary status may depend on their employers for renewal of their work and thus residence permit. They may not have a clear route to naturalization, and the security of residence and work rights that nationality normally entails. This has labour rights implications as their precarious position is also one in which they are more dependent on their employer than other workers. Moreover, while national workers by definition are part of an EU labour market, TCN migrants generally do not have free movement rights, unless they are posted workers under that particular regime. In this respect, they have a more limited range of alternative work opportunities, further exacerbating their dependency.

#### 4.3 The Role of the CJEU and EU Human Rights Protections

The role of the Court of Justice of the European Union (CJEU) in this field is important. The CJEU created many of the basic features of EU Citizenship, in its early foundational period. In particular, for EU Citizens, the fact that migration is of right, and national discretion constrained, and that status is not dependent on employment, is attributable in large part to the Court’s approach. So too is the robust right of residence for the family member of EU Citizens, albeit that this had a basis in early legislation too.<sup>82</sup>

Of great import then is how the Court will respond to the highly discretionary and complex stratified approach to labour migration reflected in the recent EU Directives.<sup>83</sup> Thus far, the CJEU has given some important rulings on the Long-Term Residents Directive (LTRD) and the Family Reunification Directive (FRD)<sup>84</sup> in both instances subjecting national limitations

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<sup>77</sup> E Guild, ‘The EU’s Internal Market and the Fragmentary Nature of EU Labour Migration’ in Costello and Freedland (n 2).

<sup>78</sup> Y Pascouau, ‘Intra-EU mobility: the ‘second building block’ of EU labour migration policy’ (2013) EPC Issue Paper No 74, 19 <[www.epc.eu/documents/uploads/pub\\_3500\\_intra-eu\\_mobility.pdf](http://www.epc.eu/documents/uploads/pub_3500_intra-eu_mobility.pdf)> accessed 13 February 2016.

<sup>79</sup> Case C-369/90 *Micheletti and Others v Delegación del Gobierno en Cantabria* [1992] ECR I-04239, para 19. HUI d'Oliveira, ‘Case C-369/90 *M.V. Micheletti and Others v Delegación del Gobierno en Cantabria*’ (1993) 30 CML Rev 623; C Closa, ‘Citizenship of the Union and nationality of member states’ (1995) 32 CML Rev 487.

<sup>80</sup> Case C-135/08 *Janko Rottman v Freistaat Bayern* [2010] ECR I-01449, particularly paras 39–45.

<sup>81</sup> See A Shachar and R Bauböck (eds), *Should Citizenship be for Sale?* (2014) EUI Working Paper RSCAS 2014/01 <[http://cadmus.eui.eu/bitstream/handle/1814/29318/RSCAS\\_2014\\_01.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/29318/RSCAS_2014_01.pdf?sequence=1)> accessed 13 February 2016.

<sup>82</sup> Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2.

<sup>83</sup> For excellent expositions on this topic, see D Acosta Arca and A Geddes, ‘The development, application and implications of an EU rule of law in the area of migration policy’ (2013) 51 JCMS 179; Groenendijk (n 71).

<sup>84</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12 (‘Family Reunification Directive’ or ‘FRD’).

to the fairly rigorous form of scrutiny that characterised EU law.<sup>85</sup> Moreover, the CJEU has tightened up the duty to issue permits, at least in the context of Directives that set out exhaustively the conditions for their grant. In an important case on Students' Permits, CJEU has asserted that, where EU law sets out exhaustive clear admissions criteria, national authorities must accord a right to enter.<sup>86</sup>

The CJEU also has a further potentially important role in ensuring equal treatment, as a corrective to the stratification of rights attendant on migration status. From a labour law perspective, it is important to note that many labour rights are constitutionalised in EU law, in the sense that they appear in the EU Charter of Fundamental Rights, and are stated to apply to 'everyone' or 'all workers'.<sup>87</sup> Moreover, the Charter contains a chapter on 'Equality', not only prohibiting discrimination, but positively requiring the EU to secure equality. Of particular relevance to migrant workers, Article 15 of the Charter provides:

*Freedom to choose an occupation and right to engage in work*

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. *Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union. (emphasis added)*

Article 15(3) EUCFR contains a clear commitment which seems to be in tension with the EU approach to posted workers and some EU migrant statuses, in particular that of ICTs. The Charter sets the conditions for legality of EU legislative measures. In other words, if a Directive violates the Charter, it is amenable to annulment by the CJEU, or strenuous reinterpretation to avoid that fate.<sup>88</sup> On this basis, EU migration statuses may be open to challenge if they breach Article 15(3) EUCFR. Moreover, the Charter is applicable to all actions of the Member States 'implementing' EU law. This not only includes direct implementation of Directive, but also acts which cover the same material ground as EU acts, in particular if they would impede the effectiveness of EU law.

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<sup>85</sup> See Case C-540/03 *Parliament v Council (Family Reunification)* [2006] ECR I-5769; Case C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I-01839; Case C-571/10 *Kamberaj* (CJEU, 3 May 2012); Case C-502/10 *Staatssecretaris van Justitie v Mangat Singh* (CJEU, 18 October 2012); Case C-508/10 *Commission v Netherlands* (CJEU, 26 April 2012); Case C-40/11 *Iida* (CJEU, 8 November 2012); Joined cases C-356/11 and C-357/11 *O, S, & L* (CJEU, 6 December 2012); Case C-469/13 *Shamim Tahir* (CJEU, 17 July 2014); Case C-338/13 *Marjan Noorzia v Bundesministerin für Inneres* (CJEU, 17 July 2014); Case C-579/13 *P and S* (CJEU, 4 July 2015); Case C-153/14 *K and A* (CJEU, 9 July 2015).

<sup>86</sup> On Council Directive 2004/144/EC of 14 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L375/12 ('Students' Directive'), see Case C-491/13 *Ben Alaya* (CJEU, 10 September 2014). See further D Kostakopoulou, D Acosta Arcarazo and T Munk, 'EU Migration Law: The Opportunities and Challenges Ahead' in D Acosta Arcarazo and C Murphy (eds), *EU Security and Justice Law after Lisbon and Stockholm* (Hart Publishing 2014).

<sup>87</sup> For example, the EU Charter of Fundamental Rights includes, *inter alia*, to protection against unjustified dismissal (art 30) and a right to fair and just working conditions (art 31) both stated to be applicable to 'all workers.'

<sup>88</sup> For examples of this phenomenon, see Case C-236/09 *Association Belge des Consommateurs Test-Achats and Others* [2011] ECR I-00773; Case C-293/12 *Digital Rights Ireland and Seitlinger and Others* [2014] OJ C 175/6 (Data Protection); Case C-540/03 *European Parliament v Council of the European Union (Family Reunification)* [2006] ECR I-05769.

To illustrate another potential interaction, recall that many states run seasonal worker programmes for the agricultural sector, often entailing bilateral agreements with particular sending countries. Moving to an EU Directive may have unintended legal consequences for these bilateral programmes. While the EU Directive will not necessarily pre-empt national programmes, it *may* require that they are run in a manner compatible with EU law (if they are treated as falling within the scope of EU law). Currently, some use dubious means to ensure that workers go home at the end of the seasons. One example, which may be atypical, is nonetheless striking: As mentioned above, a Spanish programme allegedly admits only *mothers* under 40 to enter as seasonal agricultural workers.<sup>89</sup> If this programme were deemed to fall within the scope of EU law, then the EU Charter of Fundamental Rights would be applicable, as would the general principles of EU law. It would be difficult to imagine how such a status would withstand scrutiny under EU equality law, not only as it discriminates directly on grounds of gender. For now, suffice to note that EU-ropeanisation of migration status may have some transformative legal effects, if the CJEU is called on to consider the implications of the Charter for migration status.

### 3.4 EU Migration Statuses Compared and Contrasted

EU migration statuses differ considerably. As discussed above, the status of EU Citizens differs sharply from that of posted workers, as regards both labour rights and the conditions under which they enjoy transnational mobility rights. When we examine each of the EU migration directives in turn, we see that the legislative patchwork has stratified migration status with a strongly divisive impact on the subjects and objects of labour law. This section examines the main labour migration directive in turn, in chronological order. The first of these, the Blue Card Directive, was adopted in the era of where law-making required unanimity amongst national governments, whereas from the Single Permit onwards, qualified majority voting in the Council was accompanied by a strong legislative role for the European Parliament.<sup>90</sup>

#### 3.4.1 *The EU Blue Card*

As mentioned, the Blue Card Directive was adopted under a legislative process requiring consensus across all national governments. While it might be assumed that as there is a ‘race for talent’ between states wishing to recruit the best and the brightest, and that the EU acting together could offer a more attractive status than any single Member State, that rationale did not prevail in practice. As Member States have diverse policies on highly-skilled immigration, consensus produced only a loose minimum framework.<sup>91</sup>

The Blue Card Directive sets loose standards on admission, and clear ones for treatment of ‘highly skilled’ migrants, and their family members, who will be present in the territory of a Member State for more than three months for the purpose of engaging in highly qualified employment.<sup>92</sup> The notion of ‘highly qualified employment’ means with ‘the required adequate and specific competence, as proven by higher professional qualifications.’<sup>93</sup> ‘Higher professional qualifications’ in turn mean ‘qualifications attested by evidence of higher education qualifications or, by way of derogation, when provided for by national law, attested by at least five years of professional experience of a level comparable to higher education qualifications and which is relevant in the profession or sector specified in the work contract

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<sup>89</sup> Mannon and others (n 19).

<sup>90</sup> Roos (n 67).

<sup>91</sup> L Cerna, ‘The EU Blue Card: Preferences, Policies, and Negotiations between Member States’ (2014) 2 Migration Studies 73; Roos (n 67).

<sup>92</sup> Art 1 BCD (n 6).

<sup>93</sup> Art 2(b) BCD (n 6).



or binding job offer.’<sup>94</sup> Importantly, the Directive sets a standard on salary thresholds, providing that ‘the gross annual salary resulting from the monthly or annual salary specified in the work contract or binding job offer shall not be inferior to a relevant salary threshold defined and published for that purpose by the Member States, which shall be at least 1,5 times (or exceptionally 1,2 times) the average gross annual salary in the Member State concerned.’<sup>95</sup> As Roos explains, the Directive achieved consensus by ‘clarifying the minimum threshold of salary levels, but leaving crucial policy detail and considerable regulatory discretion to member states.’ As he explained, salary levels were a ‘hotly contested indicator that touched upon core elements in the labour migration debate, because normative questions regarding the desirability of immigration often hinge upon the exact segment of the labour market into which immigration is being channelled.’<sup>96</sup>

The Directive creates a fast-track procedure for issuing this special residence and work permit, to those who have been offered a job in the EU. Again, while Member States retain control over the issuing of Blue Cards, and can also introduce their own schemes offering better conditions.<sup>97</sup>

The conditions for obtaining a Blue Card are laid out in Article 5. Applicants must have a valid work contract or a binding job offer, demonstrate that they are appropriately qualified for the position under national law, possess a valid travel document, and present evidence that they have, or have applied for, health insurance for periods when coverage is not provided under the applicant’s employment contract. Applicants must not be considered a threat to public policy, public security, or public health.<sup>98</sup> Member States may also determine the duration of the Blue Card, from one to four years renewable.<sup>99</sup> While the first issuance of the Blue Card is subject to broad Member State discretion, once the Card has been issued, other legal consequences ensue. The card-holder is entitled to progressive access to the labour market of the Member State concerned. For the first two years of employment, a card holder can only engage in paid employment that meets the conditions outlined in Article 5, and any change in employer must be authorised in advance by the relevant Member State authorities.<sup>100</sup> After that time, Member States may grant the card holder ‘equal treatment with nationals as regards access to highly qualified employment’. If the Member State does not choose to grant equal treatment in accordance with Article 12(1) after this time, a card-holder is required to communicate any changes that affect the conditions in Article 5 to the competent Member State authorities. From a labour rights perspective, limiting the duration of the ‘tie’ between employment and migration status is important. Such ties create greater dependency between worker and employer, which is liable to render migration workers more vulnerable in the work relation.

The card-holder’s right of residence is unaffected by temporary periods of unemployment.<sup>101</sup> There is an extensive right to equal treatment with home nationals, which extends to: working conditions, including pay and dismissal;<sup>102</sup> freedom of association;<sup>103</sup> education and vocational training;<sup>104</sup> recognition of diplomas and professional qualifications in accordance

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<sup>94</sup> Art 2(g) BCD (n 6).

<sup>95</sup> Art 5(3), Art 5(5) BCD (n 6).

<sup>96</sup> Roos (n 67).

<sup>97</sup> Arts 4(2) and 6 BCD (n 6). See Commission (n 72) and Cerna (n 72) above.

<sup>98</sup> Art 5(1)(a)–(f) BCD (n 6).

<sup>99</sup> Art 7(2) BCD (n 6).

<sup>100</sup> Art 12(1)–(2) BCD (n 6).

<sup>101</sup> Art 13 BCD (n 6).

<sup>102</sup> Art 14(1)(a) BCD (n 6).

<sup>103</sup> Art 14(1)(b) BCD (n 6).

<sup>104</sup> Art 14(1)(c) BCD (n 6).

with national procedures;<sup>105</sup> provisions in national law regarding social security, subject to the relevant EEC and EC Regulations;<sup>106</sup> payment of income related pensions, without prejudice to existing bilateral agreements;<sup>107</sup> access to goods and services generally available to the public;<sup>108</sup> and free access to the entire territory of the relevant Member State in accordance with national law.<sup>109</sup> The right to family reunification is linked to the Family Reunification Directive, but not subject to the integration requirements foreseen in the other measure.<sup>110</sup> Periods of residence as a card-holder may be added together for the purposes of acquiring rights under the Long-Term Residents Directive.<sup>111</sup> Unusually, card-holders may, subject to conditions, move to another Member State after 18 months for the purpose of highly qualified employment<sup>112</sup> with family reunification rights.<sup>113</sup>

This loose framework has produced not only diverse implementation, but many Member States still run their own national high-skills programmes in parallel.<sup>114</sup> It does not liberalise the admission of highly-skilled workers—this remains up to the national authorities. Its contribution to enhancing status and the transnational mobility of Blue Card Holders is difficult to gauge in practice.

### 3.4.2 *Single Permit Directive*

The Single Permit Directive<sup>115</sup> is the only general measure on labour migration. Its abbreviated title (Single Permit) perhaps understates its content, as it aims to establish a single procedure, work and residence permit combined, and a common set of rights. Nonetheless, given that Member States were reluctant to commit to any form of general regulation for labour migration, it is unsurprising that the Single Permit Directive emerged as a rather limited instrument.<sup>116</sup> Some commentators have suggested that its equal treatment guarantee is an ‘empty shell.’<sup>117</sup> However, whether that is so really remains up to the Court. If traditional EU anti-discrimination precepts are brought to bear, it may have significant impact in time.

Concerning its personal scope, the Directive applies to TCNs who apply to reside in a Member State for work, who already reside in a Member State for the purposes of work and who have been admitted to a Member State for purposes other than work.<sup>118</sup> This is particularly significant, as it could include, say, family migrants, admitted for family reunification purposes, but permitted under their migration status to work. ‘Work’ refers to

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<sup>105</sup> Art 14(1)(d) BCD (n 6).

<sup>106</sup> Art 14(1)(e) BCD (n 6).

<sup>107</sup> Art 14(1)(f) BCD (n 6).

<sup>108</sup> Art 14(1)(g) BCD (n 6).

<sup>109</sup> Art 14(1)(h) BCD (n 6).

<sup>110</sup> Art 15 BCD (n 6).

<sup>111</sup> Art 16 BCD (n 6).

<sup>112</sup> Art 18 BCD (n 6).

<sup>113</sup> Art 19 BCD (n 6).

<sup>114</sup> Commission (n 72) and Cerna (n 72).

<sup>115</sup> Directive 2011/98/EU of the European Parliament and of the Council on 13 December 2011 on a single application procedure for a single permit for third country nationals to reside and work in the territory of a Member State and on a common set of rights for third country workers legally residing in a Member State [2011] OJ L 343/1.

<sup>116</sup> S McLoughlin and Y Pascouau, ‘EU Single Permit Directive: a small step forward in EU migration policy’ (EPC Policy Paper, 24 January 2012) <[www.epc.eu/documents/uploads/pub\\_1398\\_eu\\_single\\_permit\\_directive.pdf](http://www.epc.eu/documents/uploads/pub_1398_eu_single_permit_directive.pdf)> accessed 14 February 2016.

<sup>117</sup> A Beduschi, ‘An Empty Shell? The Protection of Social Rights of Third-Country Workers in the EU after the Single Permit Directive’ (2015) 17 EJML 210.

<sup>118</sup> Art 3(1) SPD (n 3).

work ‘in the context of a paid relationship in that Member State in accordance with national law or practice.’<sup>119</sup> Excluded are seasonal workers or au pairs,<sup>120</sup> temporary protection beneficiaries,<sup>121</sup> refugees and asylum-seekers.<sup>122</sup> It also excludes TCNs with preferential status, such as family members of EU Citizens. McLoughlin and Pascouau refer to the scope of the Directive as ‘disappointingly narrow’, in that it reflects the overly-sectoral approach developed in the field of migration’.<sup>123</sup> However, that criticism is hard to square with the inclusion of those admitted for non-work purposes.

Concerning the admission processes, the Directive aims to reduce the process to a single application procedure and a single permit covering both work and residence.<sup>124</sup> However, it is explicitly without prejudice to any prior visa requirements for entering the Member State.<sup>125</sup> The Directive leaves it up to national law to decide how employer-led the process will be.<sup>126</sup> Notably, the single permit may be confined to a specific employment activity.<sup>127</sup> However, the Directive does require greater legality, transparency and time limits surrounding the process, with additional procedural guarantees.<sup>128</sup> Member States may require applicants to pay fees for processing applications, but these must be proportionate. In other areas, EU law has been used to challenge disproportionate fees.<sup>129</sup>

The Single Permit Directive is welcomed to the extent it develops a common set of rights for TCNs.<sup>130</sup> Workers, *prima facie*, are granted equal treatment with national workers as regards working conditions, freedom of association, education and vocational training, mutual recognition of qualifications, social security, tax benefits, access to goods and services made available to the public (including access to housing) and advice services provided by employment offices (Article 12(1)). Workers or their survivors are also entitled to equal treatment concerning old age, invalidity and death, statutory pensions when they move to a third country (Article 12(4)). There are, however, a number of restrictions Member States are permitted to introduce in the contentious areas of social security, education, public services, tax and freedom of establishment. Equal treatment regarding educational and vocational training may be restricted by:

- (i) limiting its application to those third-country workers who are in employment or who have been employed and who are registered as unemployed;
- (ii) excluding [TCN’s admitted under the Students Directive];

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<sup>119</sup> Art 2(b) SPD (n 3). Recital 19 continues: ‘Recital 19 - A third-country worker in this Directive should be defined, without prejudice to the interpretation of the concept of employment relationship in other provisions of Union law, as a third-country national who has been admitted to the territory of a Member State, who is legally residing and who is allowed, in the context of a paid relationship, to work there in accordance with national law or practice.’

<sup>120</sup> Art 3(e) SPD (n 3).

<sup>121</sup> Art 2(f) SPD (n 3).

<sup>122</sup> Arts 2(g) and 2(h) SPD (n 3), both convention refugees and subsidiary protection beneficiaries.

<sup>123</sup> McLoughlin and Pascouau (n 115).

<sup>124</sup> Art 4 SPD (n 3).

<sup>125</sup> Art 4(3) SPD (n 3).

<sup>126</sup> See Recital 10:

The obligation on the Member States to determine whether the application is to be made by a [TCN] or by his or her employer should be without prejudice to any arrangements requiring both to be involved in the procedure. The Member States should decide whether the application for a single permit is to be made in the Member State of destination or from a third country. In cases where the [TCN] is not allowed to make an application from a third country, Member States should ensure that the application may be made by the employer in the Member State of destination.

<sup>127</sup> Art 11(c) SPD (n 3).

<sup>128</sup> Art 8 SPD (n 3).

<sup>129</sup> See, for example, *Chakroun* (n 84).

<sup>130</sup> *Beduschi* (n 116) 220.

- (iii) excluding study and maintenance grants and loans or other grants and loans;
- (iv) laying down specific prerequisites including language proficiency and the payment of tuition fees, in accordance with national law, with respect to access to university and post-secondary education and to vocational training which is not directly linked to the specific employment activity;

In addition, Member States may also limit rights to family benefits for workers resident for less than 6 months (Article 12(2)(b)), tax benefits for workers with a usual place of residence outside the Member State (Article 12(2)(c)) and access to public goods and services, in particular housing (Article 12(2)(d)). Depending on how these restrictions are interpreted, they have the potential to undermine the integration of TCNs into the host Member State.<sup>131</sup> On freedom of association, the right is 'subject to' national laws on public policy and public security. In order to interpret the Directive in a manner compatible with the Charter and the right to associate, this would seem to refer only to those restrictions that are justifiable. It does not seem to permit additional limitations on the labour freedom to associate.

### 3.4.3 Intra-Corporate Transferees

This form of migration is remarkable for its ubiquity, yet invisibility. It seems that many countries have a special visa for this type of transfer, which allows multinational corporations to transfer workers, usually classed as skilled or managerial. The EU's sectoral approach identified this form of migration as one where the EU could set some shared standards. Notably, the ETUC opposed the Directive, and argued that these workers could come under the Blue Card scheme, if at all.<sup>132</sup> The very notion of an ICT System reflects employer privilege, for it is the employers' transnational network that defines the ICT. As mentioned, this Directive was adopted under a process, which granted the European Parliament a co-legislative role. However, while this led to strong labour rights protections in the Seasonal Workers Directive, the same cannot be said for ICTs.

Defining the personal scope of ICT was complex. Intra-corporate transfer means:

'the temporary secondment for occupational or training purposes of a third-country national who, at the time of application for an intra-corporate transferee permit, resides outside the territory of the Member States, from an undertaking established outside the territory of a Member State, and to which the third-country national is bound by a work contract prior to and during the transfer, to an entity belonging to the undertaking or to the same group of undertakings which is established in that Member State, and, where applicable, the mobility between host entities established in one or several second Member States.'<sup>133</sup> 'Group of undertakings' is defined as 'two or more undertakings recognised as linked in national law' in various specified ways, namely majority shareholding, control, or management. (Article 3(1))

The migrant must have a 'work contract' with the undertaking outside the EU, and then moves to another 'entity belonging to the undertaking' or 'the same group of entities.' This loose language could facilitate transfers even to shelf companies, it would seem. However, general notions of 'abuse of rights' in EU law could temper such a move. The 'host entity'

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<sup>131</sup> *ibid* 228.

<sup>132</sup> ETUC (2010) 'Seasonal work and intracorporate transfers', 13–14 October 2010, available at <<https://www.etuc.org/documents/seasonal-work-and-intra-corporate-transfer>> accessed 12 August 2015.

<sup>133</sup> Art 3(b) ICTD (n 8).

must be ‘established’ in the Member State.<sup>134</sup> In order to combat potential ‘abuse’, Member State may refuse applications where the ‘host entity’ has as its main purpose facilitating ICTs or does not have a genuine activity. (Recital 24).

The ICT Directive only covers ‘managers’, ‘specialists’ and ‘trainee employees’.<sup>135</sup> Importantly, both the self-employed and agency workers are excluded.<sup>136</sup> The permit is tied: It allows the transferee only to ‘exercise the specific employment activity under the permit in accordance with national law in any host entity belonging to the undertaking or group of undertakings in the first Member State.’ (Article 17(c)).

“‘Manager’ means a person holding a senior position, who primarily directs the management of the host entity, receiving general supervision or guidance principally from the board of directors or shareholders of the business or equivalent; that position shall include: directing the host entity or a department or subdivision of the host entity; supervising and controlling work of the other supervisory, professional or managerial employees; having the authority to recommend hiring, dismissing or other personnel action.”<sup>137</sup>

“‘Specialist’ means a person working within the group of undertakings possessing specialised knowledge essential to the host entity's areas of activity, techniques or management. In assessing such knowledge, account shall be taken not only of knowledge specific to the host entity, but also of whether the person has a high level of qualification including adequate professional experience referring to a type of work or activity requiring specific technical knowledge, including possible membership of an accredited profession.”<sup>138</sup>

“‘Trainee employee’ means a person with a university degree who is transferred to a host entity for career development purposes or in order to obtain training in business techniques or methods, and is paid during the transfer.”<sup>139</sup>

These definitions are fairly broad, and seem amenable to cover much of the workforce in some economic sectors, in particular those where specialist knowledge and high level of qualification are common. ‘Trainee’ too is broad: the notion is not tied to career stage.

The ICT Directive applies to TCNs residing outside the EU who apply to be admitted as ‘managers’, ‘specialists’ and ‘trainee employees’,<sup>140</sup> excluding both the self-employed and agency workers from its personal scope.<sup>141</sup> An ICT residence permit valid for at least one year and up to three years for managers and specialists but only one year for trainees.<sup>142</sup> The permit is tied to the specific employment which the ICT is admitted for and non-compliance with this condition can lead to a permit being revoked.<sup>143</sup> ICTs may be workers transferred

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<sup>134</sup> This *may* require interpretation in line with freedom of establishment within the internal market context. See Groenendijk (n 71).

<sup>135</sup> Art 2(1) ICTD (n 8).

<sup>136</sup> Art 2(2) ICTD (n 8) states: “This Directive shall not apply to third-country nationals who... (d) carry out activities as self-employed workers; (e) are assigned by employment agencies, temporary work agencies or any other undertakings engaging in making available labour to work under the supervision and direction of another undertaking”.

<sup>137</sup> Art 3(e) ICTD (n 8).

<sup>138</sup> Art 3(f) ICTD (n 8).

<sup>139</sup> Art 3(g) ICTD (n 8).

<sup>140</sup> Art 2(1) ICTD (n 8).

<sup>141</sup> Art 2(2) ICTD (n 8) states: “This Directive shall not apply to third-country nationals who... (d) carry out activities as self-employed workers; (e) are assigned by employment agencies, temporary work agencies or any other undertakings engaging in making available labour to work under the supervision and direction of another undertaking”.

<sup>142</sup> Art 13(2) ICTD (n 8).

<sup>143</sup> Art 8(1)(b) ICTD (n 8).

between various branches or offices of multinational corporations, who have a permanent presence in the host state.<sup>144</sup> Moreover, the duration of their stay is not defined by temporary service provision.

Transferees are guaranteed the rights applicable to posted workers contained in laws, regulations, or administrative provisions as well as universally applicable collective agreements.<sup>145</sup> If there is no mechanism for collective agreements of universal application, Member States have the possibility of making certain collective agreements applicable.<sup>146</sup> Pay is also to be equal to that paid to national workers in a similar position.<sup>147</sup> Equal treatment is guaranteed with national workers as regards the following: freedom of association and trade union membership, mutual recognition of qualifications, social security (unless a bilateral agreement states otherwise), old age, pensions and access to public goods and services made (with the exception of housing).<sup>148</sup> Notably, ICTs also have some family reunification rights.<sup>149</sup>

The Posted Workers Directive served as template for ICTs, although of course the two measures differ significantly. For instance, Article 18(2) ICTD adds matters not covered by Article 3 of the Posted Workers Directive. Using Posted Workers as a template was portrayed as a requirement under GATS, in order to facilitate liberalisation of global transnational service provision. However, as Herzfeld Olsson has demonstrated, there is no GATS obligation to adopt this approach: even if the EU makes commitments under the GATS Agreement to liberalise trade in services internationally, this does not entail an obligation to adopt a 'posted-workers' type approach to labour rights.<sup>150</sup>

### 3.4.4 Seasonal Workers Directive

The final EU labour migration measure deals with seasonal workers. 'Seasonal workers' are defined as third-country nationals (TCNs) who stay 'legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons' under an employment contract.<sup>151</sup> That employment contract is with the employer in the host state.

'An activity dependent on the passing of the seasons' is defined as 'an activity that is tied to a certain time of the year by a recurring event or pattern of events linked to seasonal conditions during which required labour levels are significantly above those necessary for usually ongoing operations'.

When transposing the Directive, Member States must list those sectors that are considered to be seasonal, and, if appropriate, the list should be drawn up in consultation with the social partners. (Article 2(2) SWD) Seasonal work under the Directive is not confined to agriculture, and could include tourism, or even perhaps education. Notably, while the agricultural sector might be thought to have some features that render all agricultural workers vulnerable, only

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<sup>144</sup> Art 17(c) ICTD (n 8).

<sup>145</sup> Art 5(4)(a) ICTD (n 8).

<sup>146</sup> Art 5(4)(a) second para, ICTD (n 8).

<sup>147</sup> Art 5(4)(b) ICTD (n 8).

<sup>148</sup> Art 18(2) ICTD (n 8).

<sup>149</sup> Art 19 ICTD (n 8).

<sup>150</sup> P Herzfeld Olsson 'The Development of an EU Policy on Workers from Third Countries-Adding New Categories of Workers to the EU labour Market, Provided with New Combinations of Rights' in I Stein Evju (ed), *Regulating Transnational Labour in Europe: The quandaries of multilevel governance*. (Institutt for privatrett 2014) 278

<sup>151</sup> Art 3(b) SWD (n 7).

some migrant workers in that sector are seasonal ones. Others may be equally vulnerable, but their position does not attract EU protections.<sup>152</sup>

Agency workers are *not* excluded (unlike under the ICTD). Recital 12 provides that if national law permits, seasonal workers may continue to be agency workers, hired through agencies established on the Member States' territory and which have a 'direct contract' with the seasonal worker.

The SWD allows for TCNs residing outside of the EU to apply to enter the EU as seasonal workers. In order to enter the EU as a seasonal worker, applications must evidence of a binding job offer, sickness insurance and adequate accommodation for the period.<sup>153</sup> Once admitted, seasonal workers may stay only for a maximum period of no less than five and no more than nine months in any twelve-month period at the discretion of the Member State.<sup>154</sup> The re-entry of seasonal workers who have previously been admitted is to be facilitated by the Member State the following year.<sup>155</sup>

Seasonal workers are limited to entry, residence and employment in the Member State which issued the permit alone.<sup>156</sup> The rights of seasonal workers, once admitted, include the right to equal treatment with nationals of the host Member State in the following areas: terms of employment such as the minimum working age, pay, dismissal, working hours and holiday; freedom of association and membership of a trade union; the right to strike; back payments of any outstanding remuneration; social security; public goods and services (except housing) advice services on seasonal worker; education and vocational training; mutual recognition of qualifications and tax benefits.<sup>157</sup> Member States may limit access to educational and vocational training to that which is strictly related to the employment and preventing access to grants and loans for study and maintenance.<sup>158</sup> There is also the option for Member States to restrict equal treatment by excluding access to family and unemployment benefits and by limiting tax benefits to where the seasonal worker usually resides in that Member State.<sup>159</sup> Evidently, the labour rights protections for seasonal workers are significant. A further matter of concern is whether those with such a transient status will be able to ensure their rights are respected.<sup>160</sup>

### 3.4.5 Family Migrants

As discussed above in Part 2.2, family members of EU Citizens share in that privileged status, if they come within the scope of EU law, which means either exercising free movement rights, or showing that the genuine enjoyment of Citizenship would otherwise be impaired (after *Zambrano*.) If EU Citizens are simply living in their home Member States, their TCN family members do not normally enjoy EU rights. As regards TCN family members of TNC migrants, EU law partially regulates their status and admissions. The EU Family Reunification Directive contains a right to enter and reside in the EU for some family members of TCN migrants, if those migrants are likely to accrue a right to permanent

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<sup>152</sup> For an argument looking to other regulatory regimes for labour protections, see J Hunt, 'Making the CAP Fit: Responding to the Exploitation of Migrant Agricultural Workers in the EU' (2014) 30 *International Journal of Comparative Labour Law and Industrial Relations* 131.

<sup>153</sup> Arts 5(1) and 6(1) SWD (n 7).

<sup>154</sup> Art 14 SWD (n 7).

<sup>155</sup> Art 16 SWD (n 7).

<sup>156</sup> Art 22 SWD (n 7).

<sup>157</sup> Art 23(1) SWD (n 7).

<sup>158</sup> Art 23(2) SWD (n 7).

<sup>159</sup> Art 23(1) SWD(n 7).

<sup>160</sup> J Fudge and P Herzfeld Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights' (2014) 16 *European Journal of Migration and Law* 439.

residence. If admitted, the Directive provides that the family member ‘shall be entitled, in the same way as the sponsor, to access to employment and self-employed activity’.<sup>161</sup> In addition, family migrants admitted under the FRD fall under the Single Permit Directive. This provision for a right to work is significant, as some spousal statuses limit spouses’ work rights, thereby creating forms of legal dependency, often reflecting a male breadwinner model.<sup>162</sup>

### 3.4.6 Asylum-seekers, Refugees and rejected asylum-seekers

It is not only the law on labour immigration that affects workers and work rights. Those who enter states seeking refuge have often found themselves excluded from the labour market for some time, in particular as states attempt to deter asylum-seeking, and ‘manage’ migration using highly selective employer-led models.<sup>163</sup> This rationale entails keeping asylum and labour migration separate, and ensure that the asylum process does not attract opportunistic claims.

The EU Reception Conditions Directive permits asylum-seekers to work once they have been on the territory for 12 months, with the Recast Directive now permitting that access after 9 months.<sup>164</sup> The UK is subject to the Original, but not the Recast Directive, part of its objection being the shorter time period before access to the labour market should be granted. Of late, some EU Member States have decided to afford the right to work more quickly, in order to facilitate integration. For example, Germany now offers the right to work after three months, although it appears in practice that employers are often reluctant to hire asylum-seekers whose claims have not been finally determined.<sup>165</sup> Belgium does so after 6 months. Sweden often allows asylum-seekers to work from the outset, and has also facilitated access to the labour market for rejected asylum-seekers who wish to stay as labour migrants.<sup>166</sup>

Once they are recognized as refugees or subsidiary protection beneficiaries, the Qualification Directive (and its Recast) includes work rights as part of those statuses.<sup>167</sup> Indeed, the right to work of refugees is provided for in the 1951 Refugee Convention, on the basis of equal treatment with most favoured foreigners.<sup>168</sup> In contrast, if asylum-seekers’ claims are rejected, their status becomes extremely precarious. They normally lose any right to work they may have been granted. In extreme cases, if rejected asylum-seekers are denied the right to work *and* welfare supports, their enforced destitution may be legally condemned as inhuman and degrading treatment.<sup>169</sup> From a labour rights perspective, of concern is the evidence that there is a clear vulnerability to labour exploitation and forced labour in such situations.<sup>170</sup>

<sup>161</sup> Art 14(1)(b) FRD (n 83).

<sup>162</sup> See generally E Kofman ‘Family-related migration: a critical review of European Studies’ (2004) 30 *Journal of Ethnic and Migration Studies* 243.

<sup>163</sup> See generally P Mathew *Reworking the Relationship between Asylum and Employment* (Routledge 2012).

<sup>164</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (RCD) [2013] OJ L180/96.

<sup>165</sup> See D Thränhardt *Die Arbeitsintegration von Flüchtlingen in Deutschland Humanität, Effektivität, Selbstbestimmung* (Bertelsmann Foundation 2015).

<sup>166</sup> ‘Sweden – Access to the Labour Market’ (AIDA Database 2015)

<[www.asylumineurope.org/reports/country/sweden/reception-conditions/employment-education/access-labour-market](http://www.asylumineurope.org/reports/country/sweden/reception-conditions/employment-education/access-labour-market)> accessed 16 January 2016.

<sup>167</sup> Art 26 Qualification Directive (n 63), art 26 Recast Qualification Directive (n 64).

<sup>168</sup> Art 17 CSR51. Art 18 contains an analogous right to access to self-employment, and art 24 contains a right to equal treatment with nationals as regards labour and social legislation.

<sup>169</sup> *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] AC 396.

<sup>170</sup> H Lewis and others, ‘Precarious Lives: Experiences of Forced Labour among Refugees and Asylum Seekers in England’ (University of Leeds 2013). The authors describe as their ‘most striking finding’



In contrast to the recognised refugee, the rejected asylum seeker is in an unenviable legal position. If she is facing deportation, then some protections under the EU Returns Directive apply, as *Abdida* illustrates.<sup>171</sup> However, if not, then she may stay in a precarious legal position. Many rejected asylum-seekers remain, without a legal right to work, a position that puts them in an extremely vulnerable position.<sup>172</sup> Recall that this was precisely the predicament of the *Zambrano* family. Not recognized as refugees, but not deportable to Columbia, Ruiz Zambrano worked in Brussels, but his right to do so was unclear. It was the fortuity of his children's Belgian nationality that conferred on him an EU right to live and work. Without that, his position would be largely unregulated under EU law. If he was deemed 'illegal' within the meaning of the Employer Sanctions Directive, then not only would his working be illegal, but his employer's actions liable to criminalization.

## 5. Irregular Migrants

There are many migrants whose status does not entail a clear right to live and work in their country of residence. The diversity of that category should be borne in mind. The caselaw illustrates the diversity: *Mr Tümer*, whose case is discussed below, is a Turkish national, lawfully resident and working in the Netherlands for many years, whose migration status came into dispute when his marriage to a Dutch national ended. Indeed, the Commission sought to reopen the question of his 'illegality' before the CJEU. *Mr Ruiz Zambrano* should be recalled: a rejected asylum-seeker with humanitarian leave to remain in Belgium, working apparently with official sanction, but without a formal right to reside in Belgium, notwithstanding his children's Belgian nationality. To some, he was the archetypal 'illegal', to others semi-regular in his residence.<sup>173</sup>

A further example is the young woman, a child when she first came to the UK, in the leading UK case of *Hounga*<sup>174</sup> had been trafficked into the UK, on the basis of false promises, and was unable to alter her own legal status. Like Ms Hounga, some migrants bear little or no responsibility for their irregular status, while others may be flouting migration law. Some may be in predicaments where they cannot regularize their status, although they cannot leave their country of residence. The diversity of the category of irregular migrant should give us pause when we consider how that status should have a bearing on labour rights.

We could ask why migration status should have any bearing on labour rights? The answer usually lies in some variant of the notion that those engaging in illegal activity should not be able to found a cause of action on an illegal or immoral act—*ex turpi causa non oritur*. However, while that rationale might hold in the case of some irregular migrants, some irregular migrants bear little responsibility for their irregular status. Others share responsibility with their agents and/or employers. Accordingly, the principle does not seem to support a categorical exclusion from labour rights for all irregular migrants. Moreover, there is a strong ethical argument that labour and human rights should apply to all workers, irrespective of their migration status.<sup>175</sup> That move would have much to recommend it

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that 'the experience of severely exploitative labour, including forced labour, is often unavoidable for refugees and asylum seekers in order to meet the basic needs of themselves and their families'.

<sup>171</sup> Case C-562/13 *Abdida* (CJEU, 18 December 2014).

<sup>172</sup> Costello, 'Migrants and Forced Labour' (n 13).

<sup>173</sup> See Hailbronner/Kochenov debate (n 51).

<sup>174</sup> *Hounga v Allen* [2014] UKSC 47, [2014] 1 WLR 2889. See A Bogg, 'Hounga v Allen: Trojan Horse Comes to the Rescue of 'Illegal' Migrants' (*OxHRH Blog*, 17 September 2014) <<http://ohrh.law.ox.ac.uk/?p=13660>> accessed 13 August 2015; A Bogg and S Green, 'Rights Are Not Just for the Virtuous: What Hounga Means for the Illegality Defence in the Discrimination Torts' (2015) 44 ILJ 101.

<sup>175</sup> J Carens, 'The Rights of Irregular Migrants' (2008) 22 *Ethics and International Affairs* 163.

instrumentally also, in order to protect local workers from undercutting, and dampen demand for irregular migrant workers.

Some human and labour rights bodies support that view. For instance, the UN Special Rapporteur on the Human Rights of Migrants has endorsed a ‘firewall’ between irregular migration status and rights protection and enforcement.<sup>176</sup> The Inter-American Court of Human Rights’ assertion that irregular migrants should enjoy protection of labour and human rights.<sup>177</sup> The ILO approach to migrant workers in an irregular situation,<sup>178</sup> includes a long-standing commitment to all workers, irrespective of migration status.<sup>179</sup> ILO Convention No 143 provides explicitly for equal treatment of irregular migrants as regards rights arising out of past employment as regards remuneration, social security, and other benefits.<sup>180</sup> The FRA also supports greater rights protection for irregular migrants.<sup>181</sup>

In contrast, the EU competence on migration requires the EU to ‘combat illegal immigration.’ Its approach seeks to reduce employment of the ‘illegals’, in light that the EU’s immigration competence charges it to ‘combat illegal immigration’. The EU Employers Sanctions Directive<sup>182</sup> seeks to deter their employment by penalizing employers, and also by ensuring that they enjoy some labour rights, notably a right to enforce backpay entitlements.<sup>183</sup> The approach of the EU Employer Sanctions Directive contrasts with the position under the common law, particularly in the UK and Ireland.<sup>184</sup>

A further crucial development on the labour rights of irregular migrants is the ruling of the CJEU in *Tümer*,<sup>185</sup> which concerned rights under the Insolvency Directive.<sup>186</sup> The right to

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<sup>176</sup> F Crépeau & B Hastie ‘The Case for ‘Firewall’ Protections for Irregular Migrants Safeguarding Fundamental Rights’ (2015) 17 EJML 157.

<sup>177</sup> *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-198/03 Inter-American Court of Human Rights Series A No 18 (17 September 2003).

<sup>178</sup> They draw on ‘ILO Note on the Dignity and Rights of Migrant Workers in an Irregular Situation’, prepared for the Working Group on Labour Exploitation at the FRA Conference on Dignity and Rights of Irregular Migrants (21–22 November 2011).

<sup>179</sup> R Cholewinski and S Olney, ‘Migrant Workers and the Right to Non-discrimination and Equality’ in Costello and Freedland (n 2).

<sup>180</sup> Migrant Workers (Supplementary Provisions) 1975 (ILO No 143) 1120 UNTS 323, art 9(1).

<sup>181</sup> FRA, *Fundamental rights of migrants in an irregular situation in the European Union* (2013); FRA, *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014).

<sup>182</sup> European Parliament and Council Directive (EC) 2009/52 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L168/24. See Commission, ‘Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals’ COM (2014) 286 final, 7. For instance, only Bulgaria, Cyprus, Greece and Slovenia have included in their laws the right of third country nationals who are (or were) irregularly staying and working to claim outstanding remuneration from their employer.

<sup>183</sup> See generally E Dewhurst, ‘The Right of Irregular Immigrants to Back Pay: The Spectrum of Protection in International, Regional and National Legal Systems’ in Costello and Freedland (n 2).

<sup>184</sup> On the UK position, see, *Hounga* (n 173). See Bogg and Greene (n 173). On the Irish position, see, *Hussein v The Labour Court* [2015] IESC 58.

<sup>185</sup> *Tümer* (n 11). See also, S Peers, ‘Irregular migrants and EU employment law’ (*EU Law Analysis*, 4 November 2014) <<http://eulawanalysis.blogspot.co.uk/2014/11/irregular-migrants-and-eu-employment-law.html>> accessed 13 August 2015.

<sup>186</sup> ‘Should Directive 80/987 and, in particular, Articles 2 to 4 of that directive be interpreted — in the light of Article 137(2) of the EC Treaty (now Article 153(2) TFEU), the legal basis for that directive — as precluding national legislation such as Article 3(3) and Article 61 of the WW, under which a third-country national who is not legally resident in the Netherlands within the meaning of Article 8(a) to (e) and (l) of the [Vw] 2000 is not to be regarded as an employee, even in a case such as that of [a third country national], who has applied for an insolvency benefit, who under civil law must be regarded as

protection in the case of insolvency was applicable to ‘employees’ as defined principally in national law. Dutch legislation expressly excluded irregular migrants from the scope of employment law. However, the CJEU deemed the Dutch legislation precluded by the Directive, in light of the social purpose of the Directive. While terse on reasoning, as is the CJEU’s characteristic elliptical style, the ruling may be read as suggesting that in general, EU labour rights apply to irregular migrants. Notably, AG Bot opined that the ‘only exception that might justify a different solution and deprive a third-country national of his right to a guarantee would be if he had acted fraudulently, in particular by providing the employer with a false residence permit.’<sup>187</sup> This approach conforms with the manner in which EU law regulates the impact of illegality on other contractual relations.<sup>188</sup>

A more limited reading would treat as decisive the facts that in the Netherlands, irregular migrants are entitled to claim contractual rights, and possibly others. On the limited reading, *Tümer* means that a state cannot reject its general employment when implementing the Insolvency Directive.<sup>189</sup> One difficulty with the limited ruling is that it would lead to divergent treatment across the Member States.

The susceptibility of migrant workers in an irregular situation to exploitation and abuse might be reduced through regularisation. In particular, the FRA advises that migrants who have had an irregular status for extended period ought to have their situation regularized.<sup>190</sup> Any regularisation schemes ought to utilise the expertise of those representing the interests of the migrant workers concerned.<sup>191</sup> However, at present, the EU is not involved in regularization, although they are a regular part of the migration policies of many EU Member States.<sup>192</sup> Indeed, the EU could be seen to have an anti-regularisation ethos.

## 6. Migration Status as a Risk Factor for Exploitation

The various EU statuses identified above are but a small sample of the variety of statuses which labour migrants to the EU may be afforded. The complex, stratified picture demonstrates that those who are likely to be better paid and more highly-skilled get a more secure migration status. Migration law disadvantages the already disadvantaged, which itself should give us pause. It is also deeply gendered, and women often find themselves with less advantageous statuses than men.<sup>193</sup>

Even the mostly sought after, highly skilled migrants may have a status that ties them to their employer, a risk factor for exploitation. Moreover, any form of temporary status is liable to render the migrant more willing to accept terms and conditions that local workers would not, if their aim is to remit funds, and build a life in their home country on return. The recent FRA Report on *Severe labour exploitation*<sup>194</sup> (which as mentioned previously considers both EU Citizens and TCN migrants) is framed around the fact of migration. The Report understands severe labour exploitation as entailing exploitation of workers that is a criminal offence under

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an employee and who meets the other conditions for the grant of that benefit?’.

<sup>187</sup> *Tümer* (n 11) Opinion of AG Bot, para 90.

<sup>188</sup> See, for example, on the impact of illegality in commercial contracts in competition law, Case C-453/99 *Courage v Crehan* [2001] ECR I-06297. With thanks to Elaine Dewhurst for this additional point.

<sup>189</sup> With particular thanks to Bernard Ryan for this suggestion.

<sup>190</sup> FRA, *Migrants in an irregular situation in domestic work: fundamental rights challenges in for the European Union and its Member States* (FRA 2011) 9.

<sup>191</sup> *ibid.*

<sup>192</sup> A Kraler, ‘Fixing, Adjusting, Regulating, Protecting Human Rights – The Shifting Uses of Regularisations in the European Union’ (2011) 13 EJML 297.

<sup>193</sup> See further E Kofman, ‘Towards a Gendered Evaluation of (Highly) Skilled Immigration Policies in Europe’ (2014) 52 International Migration 116.

<sup>194</sup> FRA, *Severe labour exploitation: workers moving within or into the European Union* (FRA 2015).

the legislation of the EU Member State where the exploitation occurs. Hence, severe labour exploitation includes coercive forms of exploitation, such as slavery, servitude, forced or compulsory labour and trafficking, as well as severe exploitation within the framework of an employment relationship, in particular employment situations covered by Article 9 (1) of the Employer Sanctions Directive.

The Report identifies what it terms the ‘no-name problem’, which is that the criminal law usually focuses on trafficking, and in some instances forced labour, slavery and servitude.<sup>195</sup> However, other forms of labour exploitation are not always criminalized, notwithstanding the approach of the Employer Sanctions Directive. In particular, the Report suggests that ‘[g]iven the scale of severe labour exploitation there is a pressing need to extend the mandate of institutions dealing with trafficking.’<sup>196</sup> The no-name problem is due to the focus on criminal law, a focus which reveals a regulatory gap. The Report’s empirical evidence-base provides a credible picture of the prevalence of severe labour exploitation. However, emphasising the criminal law dimension, should not side-line the importance of labour law. Elsewhere, I have identified some the elements of a labour law approach to avoiding forced labour. These are largely similar to what is required to avoid severe labour exploitation.

Given its definition of exploitation, the *FRA Report* emphasises the need for criminalisation. However, this could leave a gap in labour law protections. Indeed, an important topic for future research is how to ensure synergies between labour rights enforcement and criminal law. A labour law approach would entail the following three elements: first, insulation of labour rights from migration status; secondly, better collective and institutional protections for labour rights; and thirdly, better regulation of intermediaries.<sup>197</sup> That endeavor would cut across those areas of labour law within and without EU competence.

Some of the most vulnerable labour rights, namely domestic workers, have no status in EU law.<sup>198</sup> The EU has encouraged its Member States to ratify the ILO Domestic Workers Convention.<sup>199</sup> Given that EU law only regulates parts of labour law, the EU dimension of cases may be unclear. For instance, the leading UK case on the rights of irregular migrants, *Hounga*<sup>200</sup> was framed as raising issues of nationality discrimination and trafficking. However, it was not framed as an EU case, as nationality discrimination against TCNs was assumed to fall outside of EU law. Nor were the race discrimination aspects of the facts explored, which would have made the case an EU one. Had the case been framed as raising the enforceability of an EU labour right, the UK common law doctrine of illegality might have been side-lined. The outcome would depend on one’s reading of *Tümer*. But the EU dimension of the case remained dormant.

## Conclusions

EU Citizenship and the internal market have profound implications for migration and labour law. However, those implications arise in startlingly diverse ways. The status of Citizenship of the Union, and the labour mobility at its heart, establish an EU-wide labour market for employers and EU workers. However, this is not obviously at the expense of local workers. EU Citizens’ have both a right to free movement and residence (subject to certain conditions)

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<sup>195</sup> *ibid* 38.

<sup>196</sup> *ibid* 19.

<sup>197</sup> Costello, ‘Migrants and Forced Labour’ (n 13).

<sup>198</sup> See generally FRA, *Migrants in an irregular situation employed in domestic work: fundamental rights challenges for the European Union and its Member States* (FRA 2011).

<sup>199</sup> Council Decision of 28 January 2014 authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189) [2014] OJ L 32/32.

<sup>200</sup> *Hounga* (n 173).

and an enforceable right to equality treatment with national workers in the workplace. Accordingly, in law, they are fairly well protected. In legal terms, their status is the most likely to enable both agency and mobility on the part of workers. The significance of this achievement should not be underestimated. EU Citizenship affords many life-enhancing opportunities, and has created a genuine transcontinental mobility for over 500 million people.

Nonetheless, we know migrant EU Citizens are sometimes victims of labour exploitation. This phenomenon has been subject to some empirical investigation, notably by the FRA, Barnard and Ludlow, and Barnes. However, understanding the sources of EU Citizens' vulnerability to exploitation requires much further investigation. In particular, greater empirical research is required into the lived experience of EU Citizens working in other Member States, and whether they find themselves unable to enforce the labour rights that their status as EU Citizens affords them.

In contrast to the regime on EU Citizen workers, the EU posted workers regime expands mobility at the expense of worker agency, and has led to many concerns the divisive impact on labour protections. The posted workers regime has been subject to much investigation. However, the extent to which it serves as a method to undermine domestic labour rights remains to be seen. Again, often missing in the literature is the experience of posted workers. For instance, while posted is legally a temporary phenomenon, do workers live as posted workers (moving from project to project indefinitely)? This is just one empirical question that could shed light on the precariousness of posting from the workers' perspective.

When we look at patchwork of diverse statuses EU law creates for TCN migrants, the complex relationship between the EU and its Member States in this field is readily apparent. Most statuses created are temporary, precarious, and limited to one Member State. They tend to leave admission to the Member State, but regulate rights and status. This approach creates diverse national implementation, so the practical impact of EU statuses is difficult to assess. EU law offers a strong rule of law approach, which can limit national discretion and provide an important rights-generative role for the CJEU. The Court has given some rights-protective rulings concerning both family migration and the labour rights of some migrant workers. On the other hand, many of those admitted to the EU have statuses that are regulated mainly under domestic law, although they may in time come derive status under the Long-Term Residents Directive, or as EU Citizens, if they naturalise.

The overall impact of EU status on labour rights is unclear. While the EU Charter is premised on equality in working conditions for all regular migrants, EU statuses currently offer highly differentiated protections. Some features of migration status create vulnerability to labour exploitation, in particular where status is temporary and/or tied to a particular employer or sector. Fashioning migrant workers to be additionally dependent and precarious makes them institutionally more vulnerable. EU law also regulates, at least in part, the position of 'illegals'. The Employer Sanctions Directive aims to ensure that irregular migrants are less exploitable, in order to protect local workers from undercutting. The ruling in *Tümer* suggests that EU labour rights in general should apply irrespective of migration status. Whether that expansive interpretation of *Tümer* prevails depends no doubt on its reception in national systems, and future CJEU rulings, both a matter for further research.

Three general themes run throughout this contribution, all of which warrant greater attention from scholars. The first is equality and non-discrimination. EU Citizens enjoy strong equal treatment rights in the workplace with local workers. Article 15(3) of the EU Charter of Fundamental Rights provides that 'Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of

citizens of the Union.’ Migrant workers right to equal treatment is also protected in international law.<sup>201</sup> However, equal treatment sits uneasily with the stratification of rights institutionalised in EU (and indeed domestic) migration status. Careful doctrinal work is required to examine this issue in greater detail. This chapter has simply opened up that research agenda.

There is a further dimension of non-discrimination that recurs in this chapter, and also warrants greater investigation. Migration statuses may also perpetuate discrimination, not only between TCN and nationals of their host states, but also on other prohibited grounds. The chapter gives some examples of migration status that discriminates against women. In one instance that discrimination is direct (only applying to mothers) and in another, I suggest that some forms of family migration perpetuate a male breadwinner model and disadvantage women, who appear to make up most family migrants. The position of domestic workers is also mentioned. Many Member States have particular migration statuses for domestic workers, who tend to be overwhelmingly women. These statuses often entail particular restrictive features, which arguably indirectly discriminate against women. EU law currently does not regulate domestic migration status directly, but there may be ways to find EU issues in cases concerning domestic workers, in order to open up the legality of sex discrimination in migration status. Migration status may also intersect with other grounds of discrimination, including race and religion. That the UK case of *Hounga* was framed as a purely domestic case is surprising, given that race discrimination was present on the facts, and is regulated by EU law. Again, further doctrinal and empirical work on this phenomenon is warranted.<sup>202</sup>

A third general theme is how to avoid exploitation of migrant workers. The chapter suggests that some vulnerability to exploitation is, at least in part, legally constructed in migration status. This suggests reforming immigration law is warranted. However, if that move is politically unlikely, other sources of protection need examination. There appears to be a tendency to focus on criminalisation, in particular of severe labour exploitation, as the FRA Report exemplifies. A labour law approach to combatting forced labour and labour exploitation of migrant workers would take a broader and more holistic view of the sources of vulnerability in labour relations. EU law provides some labour protections for irregular migrants, but without strong practical monitoring, enforcement and firewalls, these will be illusory. EU law makes an important contribution to the practical enforcement of labour equality rights, in that it has fostered the development national equality bodies. However, it has not required the creation of general EU labour rights bodies. And as mentioned above, it does not regulate intermediaries in a comprehensive manner. Further research is required into the question of which regulatory approaches and combinations thereof work best to protect migrant workers from exploitation.

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<sup>201</sup> Shauna Olney and Ryszard Cholewinski, ‘Migrant Workers and the Right to Non-discrimination and Equality’ in Costello and Freedland (n 2).

<sup>202</sup> For examples, see Iyiola Solanke, ‘Black Women Workers and Discrimination: Exit, Voice, and Loyalty...or ‘Shifting’?’ in Costello and Freedland (n 2) 17. Lucy Vickers, ‘Migration, Labour Law, and Religious Discrimination’ in Costello and Freedland (n 2).