CIVIS CAPITALIST SUM: CLASS AS THE NEW GUIDING PRINCIPLE OF EU FREE MOVEMENT RIGHTS

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Abstract

As the last traces of EU citizenship disappear, the definitional boundary between work and inactivity becomes more critical. The ECJ's increasing tolerance of nationality-discrimination creates a moral vacuum at the heart of free movement law, which is being exploited by Member States to impose their own definitions of work. Migrant workers on low incomes and in insecure jobs are at risk of exclusion from any equal treatment, which is especially concerning as labour market patterns change and zero hours contracts proliferate. The working poor are alienated, while the benefits of free movement are reserved for the better resourced. These domestic distortions of EU law feed back into, and distort in turn, EU law at its source – a prime example being the proposed 'in-work benefit brake' in the UK-EU New Settlement.

1. Introduction

Welfare nationalism is washing away the traces of EU citizenship, with decreasing resistance from the Court of Justice. In reassuring Member States that it is not traipsing over national sovereignty or green-lighting benefit tourism, the Court adopts a surprisingly deferential approach in a series of judgments that appear to roll back decades of citizenship-construction. EU citizenship has never been much help when it comes to claiming social assistance within Member States.[1] However, recent ECJ rulings hollow out citizenship at EU level, and endorse nationality-based discrimination, creating a moral vacuum within the free movement framework.

This ethical empty space has been exploited by Member States, whose interpretation of the free movement provisions can be sometimes narrow and exclusionary – not only when applied to those claiming a citizenship-based right to reside, but also when dealing with *workers*. The EU narrative theoretically takes an expansive approach to defining work, but free movement is very differently experienced "on the ground". For those on low incomes, in variable and insecure work, Member States risk regressing not merely to pre-Maastricht, but to pre-Rome. Workers have long been at the apex of the free movement hierarchy, but work is no longer always enough. Increasingly, to pass national thresholds EU migrants must be

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[1]Thanks to the imposition of right to reside tests; see O'Brien, "Real links, abstract rights and false alarms: The relationship between the ECJ's 'real link' case law and national solidarity", 33 EL Rev. (2008), at 643, and O'Brien "I trade, therefore I am: Legal personhood in the European Union", 50 CML Rev. (2013), at 1643.

doing enough of the right type of work, with sufficient stability, and earning enough. Work is disaggregated into valid and non-valid work. States distinguish between work that meets pay or hours thresholds, and work that is dismissed as marginal so treated as economic inactivity. The "right type" of work is one of consistency, security and stability – which is rather out of step with increasing labour market flexibility and job insecurity throughout the EU. [2] This risks the social and financial exclusion of a significant, vulnerable minority of migrant workers. Migrants are more likely than home State nationals to be concentrated in lower paid,[3] less secure jobs, with variable hours,[4] and to bear the brunt of labour market fluctuations.[5] And it is this group of more vulnerable workers who are at risk of being excluded from national welfare systems.

Member States are creating an elitist model of free movement – alienating the working poor, and effectively awarding rights on the basis of socio-economic class. The creation of a non-national working poor, with an entitlement beyond that of third country nationals to engage in the labour market, but a much lower entitlement than own nationals to make claims upon the public purse, is a triumph of capitalist reasoning. There is increased stratification of the labour market, and those among the emerging class of the working migrant poor are alienated from the fruits of their labour. They are disentitled from seeing returns upon their generalized tax contributions, and are made more beholden to exploitative employers.

The national distortions of EU law not only affect how citizens experience their rights and freedoms – they also feedback into, and distort in turn, EU law at its source. The

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[2]Commission Green Paper, "Modernising labour law to meet the challenges of the 21st century", COM(2006)708 final, highlights the "proliferation of atypical forms of contract"; see Commission Communication on the outcome of the public consultation on the Green Paper "Modernising labour law to meet the challenges of the 21st century", COM(2007)627 final.

[3]Throughout the EU "employed migrants are segregated much more often into unskilled and low paid jobs than natives are"; see European Foundation for the improvement of living and working conditions, "Employment and working conditions of migrant workers" (2007), available at: <www.eurofound.europa.eu/ef/sites/default/files/ef_files/docs/ewco/tn0701038s/tn0701038s.pdf> (all websites last accessed 5 May 2016); and in the UK, "when migrants first find work, they typically earn less than British-born counterparts: over 30% less for men and 15% less for women", see Pemberton, Philimore and Robinson, "Causes and experiences of poverty among economic migrants in the UK", IRiS Working Paper Series, No. 4/2014, at 13. Anderson and Jayaweera found evidence of "extremely low pay of new migrants", and noted that in a UK-based survey conducted by the Trades Union Congress, "18.4% workers in the sample over age 21 giving both income and age information said they received less than the minimum wage (£5.35)"; see Anderson and Jayaweera, "Migrant workers and vulnerable employment: A review of existing data" (2008), COMPAS Report for the TUC Commission on Vulnerable Employment, at 35.

[4]Within the EU, migrants are "often employed during irregular hours, as documented for instance in the case of Austria … the Czech Republic, Italy and the UK", see European Foundation report cited *supra* note 3, at 34; EU8 and EU2 workers are the group in the UK most likely to self-report as doing shift work "most of the time" while in low skilled work – 26% compared to 19% UK nationals. Migration Advisory Committee, "Migrants in low-skilled work: The growth of EU and non-EU labour in low-skilled jobs and its impact on the UK – Full report" (July 2014), at 5.66.

[5]"In Spain the economic crisis has impacted upon migrant workers, in terms of wage cuts and reductions in job protections", see McKay, Caldarini and Giubboni "The 'place' of atypical work in the European Social Security Coordination: A transnational comparative analysis", Inca Cgil Accessor Project (Feb. 2014), available at: <www.osservatorioinca.org/section/image/attach/Accessor_EN.pdf>, at 19. See also Commission's Eurostat Report, "Europe 2020 indicators: Employment" (2014), available at <ec.europa.eu/eurostat/statistics-explained/index.php/Europe_2020_indicators_-_employment>, noted that "migrants were especially affected by the crisis, being among the first to lose their jobs"; Koch and Fritz, *Non Standard Employment in Europe: Paradigms, Prevalence and Policy Responses* (Palgrave Macmillan, 2013), noting the relationship between migrant work and "vulnerable" work; Anderson and Jayaweera, op. cit. *supra*, note 3, at 21.

proposed "benefit brake" in the UK-EU new proposed settlement[6] is an especially pronounced example of this. It redefines the meaning of and entitlements attached to migrant work; it dispenses with the fig leaf of equal treatment in opting for nakedly direct discrimination; and it promotes in-work poverty for EU migrants. This measure would be an acute form of labour alienation, and it would not be experienced uniformly, but would seriously qualify the freedom of movement of women.

National practices de-valuing or negating poorly paid work have dramatic effects precisely because of the groundwork done by the ECJ, accentuating the stark distinction between the rights of the economically active versus the inactive. Section two of this piece outlines the current trajectory of free movement law at EU level – "up in the air", arguing that although EU citizenship inspired optimistic rhetoric,[7] the ECJ has recently extinguished citizenship hopes, and in so doing has created a moral vacuum. Attention shifts in section three to the view from the Member States and how free movement operates "on the ground", drawing upon empirical sources – the questionnaire responses received during the compilation of the comparative report on the definition of worker and atypical work, by the Free Movement and Social Security Network for the European Commission,[8] and the findings of the EU Rights Project[9] in the UK.

Some Member States exploit the discretion afforded them in defining work, prospects of work, and retained worker status, so as to create significant social exclusion along nationality lines. Many people labelled inactive are working, but deemed by national rules to be insufficiently so. The UK's new rules[10] are used in this article as a case study, with other national rules being drawn upon. National rules and practices exemplify the increasing chasm between the EU's conception of free movement rights, and the reality of such rights once translated into domestic law. Section four considers the increased relevance of wealth and class for the working poor – in particular the detrimental effects upon those who *have* been defined as workers, but are in low income work, and so whose status is a precarious one. It considers the failure of EU law to protect the working poor, while national practices actively exclude them, as a process of labour alienation.

Section five explores the UK Government's renegotiation of EU membership as an example of feedback – how national distortions of EU law have reflected back and distorted EU law at source, reducing its emancipatory potential. The welfare demands and proposed

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[6]Demands made in David Cameron's letter to Donald Tusk, 10 Nov. 2015, available at <www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf>.

[7]Notably the Opinion of A.G. Jacobs in Case C-168/91, *Konstantinidis* v. *Stadt Altensteig and Landratsamt Calw*, EU:C:1993:115, para 46: "a Community national who goes to another Member State as a worker or self-employed person … is entitled to say '*civis europeus sum*' and to invoke that status in order to oppose any violation of his fundamental rights"; and the Court's judgment in Case C-184/99, *Grzelczyk*, EU:C:2001:458, para 31: "Union citizenship is destined to be the fundamental status of nationals of the Member States".

[8]O'Brien, Spaventa and De Coninck, "The concept of worker under Article 45 TFEU and certain non-standard forms of employment", FreSsco Comparative Report 2015, available at <www.ec.europa.eu/social/BlobServlet?docId=15476&langId=en>.

[9]The EU Rights Project, working directly with EU nationals, Citizens Advice offices, and other advice and advocacy organizations, around England and Wales at: <www.eurightsproject.co.uk>.

[10]The Minimum Earnings Threshold and the Genuine Prospects of Work Test, both covered in Department of Work and Pensions ("DWP") Decision Maker Guidance, "Habitual residence & right to reside - IS/JSA/SPC/ESA" (June 2015), at 073031 and 073092; available at: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/497585/dmgch0703.pdf>. See The Immigration (European Economic Area) (Amendment) (No. 3) Regulations 2014. These rules combine with the Housing Benefit (Habitual Residence) Amendment Regulations 2014 to disentitle many EU nationals from support for housing costs.

compromise[11] would legalize and normalize direct discrimination against EU national workers – excluding them from in-work benefits for up to four years. This analysis highlights the disproportionate impact upon women and the resulting gender asymmetry of free movement rights. While the proposed settlement will only take effect in its current form if the UK stays in the EU,[12] the shift in the terrain and the degradation of the discourse on Union citizenship and equal treatment created by the proposal will be significant whatever the referendum outcome. We have lowered the bar when it comes to equality, so that discrimination is the new norm. Under the guise of compromise, the Union has been dragged away from its fundamental tenets, and States and institutions are bartering away workers' rights.

Those in low paid work, with variable hours, and high levels of job insecurity, are among the most vulnerable workers, and increasingly are the workers propping up European economies.[13] But an anachronistic, parsimonious and disingenuous approach to implementing the ECJ "definition" of work means they are likely to be treated as non-persons for EU purposes. The centre of EU gravity is shifting, and doing so quickly. While the title of an earlier piece of which this forms a follow-up claimed the guiding principle of personhood in the EU was "I trade, therefore I am",[14] this declaration may no longer be sufficient. Recent restrictive cases and Member State practices, combined with a failure to adapt free movement to new labour market patterns, and the threat of a brake on in-work benefits, will result in genuinely free movement and equal treatment becoming the preserve of capitalist-class workers, leaving the working proletariat at greater risk of poverty. This not only increases social injustice, it makes a charade of non-discrimination, if treatment is *less* equal than it was pre-citizenship.

2. Free movement up in air: The moral vacuum developing at EU level

The insubstantial pageant of EU citizenship is now fading entirely from view.[15] Despite some rhetorical flourishes from the ECJ – citizenship being "destined" to be our fundamental status,[16] and entailing a "certain degree of financial solidarity" between all EU citizens[17] –

[11] European Council Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, EUCO 1/16, 19 Feb. 2016, Annex I.
[12] Ibid, at I.4.
[13] "During the economic crisis both its prevalence and the forms it takes have increased", see Lang, Schömann, and Clauwaert, "Atypical forms of employment contracts in times of crisis", ETUI Working Paper 2013.03, available at: <www.etui.org/content/download/11481/96783/file/13+WP+2013+03+Atypical+forms+Lang+EN+Web+version.pdf>.
[14] O'Brien (2013), op. cit. *supra* note 1.
[15] From the title of a EU law analysis commentary, which takes the phrase from Shakespeare's *The Tempest*: "The cloud-capp'd towers … shall dissolve, And, like this insubstantial pageant faded, Leave not a rack behind"; see O'Brien, "An insubstantial pageant fading: A vision of EU citizenship under the AG's Opinion in Case C-308/14 *Commission* v. *UK*", 7 Oct. 2015, available at: <eulawanalysis.blogspot.co.uk/2015/10/an-insubstantial-pageant-fading-vision.html>.
[16] Case C-184/99, *Grzelczyk.*
[17] Ibid., para 44.

and excited (or concerned) pronouncements from academia,[18] EU citizenship never did create much of a safety net for EU nationals falling between the categories of entitlement that had existed anyway.[19] Member States have successfully insisted on reserving a degree of nationality discrimination in their welfare systems – especially where it comes to the safety net of social assistance. Indirectly discriminatory right to reside tests have been implicitly endorsed in the Court's "real link" case law, according to which it is permissible to treat home State nationals and EU nationals differently.[20] The real link concept recognizes that home State nationals do (most likely) have real links with their State of nationality[21] – notwithstanding the legal fiction that nationality itself is not a relevant criterion.[22] EU nationals then have to demonstrate links through other means – primarily through economic activity.[23]

But while citizenship has not exactly provided a safety net in itself,[24] it did hold out some hope, as the Court progressively fashioned the concept to the point where EU nationals and the Commission felt able to challenge national practices that create unequal treatment. This is the point at which it could have created tangible rights on the front line, for EU nationals making claims upon Member States. And this is the point at which, whether cowed by political backlashes,[25] or held ransom by the UK's referendum,[26] the Court has recoiled from that prospect. Even in the expansive rulings on free movement welfare rights, *Teixeira*[27] and *Ibrahim*,[28] there had been a noticeable shift in emphasis, as citizenship did not get a mention. While expanding the rights of *some* primary carers (of the school-age children of former migrant workers),[29] the reasoning conformed to the Member State approach of treating secondary law as the source of free movement rights.[30]

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[18] For excitement, see e.g. Kostakopoulou "The evolution of European Union citizenship", 7 *European Political Science* (2008), at 285; Kochenov, "A real European citizenship; A new jurisdiction test: A novel chapter in the development of the Union in Europe", 18 CJEL (2011), at 55; for concern, see e.g. Hailbronner, "Union citizenship and access to social benefits", 42 CML Rev. (2005), at 1245.

[19] There are exceptions. In the UK a "degree of financial solidarity" was successfully relied upon before a Commissioner (the former title of what are now Upper Tribunal judges) for welfare purposes in one case, in which a worker temporarily ceased work to care for a terminally ill partner; see R(IS) 4/09, CIS/408/2006, 31 Oct. 2007, *Commissioner Mark Rowland*.

[20] Case C-224/98, *D'Hoop*, EU:C:2002:432; Case C-209/03, *Bidar*, EU:C:2005:169; more recently, see Joined Cases C-523 & 585/11, *Prinz and Seeberger*, EU:C:2013:524, and Case C-20/12, *Giersch and Others*, EU:C:2013:411.

[21] O'Brien (2008), op. cit. *supra* note 1.

[22] Case C-209/03, *Bidar*, para 54. This was perhaps most clearly fictional in cases such as Case C-224/98, *D'Hoop*, para 39; Case C-192/05, *Tas-Hagen and Tas*, EU:C:2006:676, para 39, and Case C-503/09, *Stewart*, EU:C:2011:500, paras. 95 and 101.

[23] Case C-140/12, *Brey*, EU:C:2013:565.

[24] E.g., in the UK there is no reference to making proportionality assessments for those reliant upon primary citizenship provisions in the Immigration (EEA) Regulations 2006, S.I. 2006, No. 1003.

[25] On being influenced by political crises, see Spaventa, "Family rights for circular migrants and frontier workers: *O and B*, and *S and G*", 52 CML Rev. (2015), at 777.

[26] UK Prime Minister David Cameron made "ECJ judgments that have widened the scope of free movement" part of the renegotiation and new settlement discourse. See his letter to Tusk, cited *supra* note 6.

[27] Case C-480/08, *Teixeira*, EU:C:2010:83.

[28] Case C-310/08, *Ibrahim and Secretary of State for the Home Department*, EU:C:2010:80.

[29] Under Art. 12 of Regulation (EEC) 1612/68 of the Council of 15 Oct. 1968 on freedom of movement for workers within the Community, O.J. 1968, L 257/002.

[30] The Court only stepped outside of Art. 7 Directive 2004/38 of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. 2004, L 158/77, by relying on Art. 12 Regulation 1612/68; see Case C-480/08, *Teixeira*, para 61.

The later case of *Zambrano*[31] – which some felt took us to the brink of a citizenship revolution[32] since it concerned "core" EU citizenship rights attaching to EU national children who had not exercised free movement - did not tell us much about welfare rights. The UK, which was apparently not alone,[33] acted quickly to recognize a *Zambrano* right of residence, and to exclude it from benefit eligibility.[34] This exclusion is currently being challenged; the Court of Appeal of England and Wales have found in favour of the government,[35] and the case is pending before the Supreme Court,[36] which may well make a preliminary reference to the ECJ. This could be a crucial deciding point on whether EU citizenship rights contain any autonomous substance at all.[37] The UK authorities argued before the Court of Appeal that the rules restrict welfare resources to those with the "greatest connection" with the UK. But the children excluded are *UK nationals*, and they are excluded regardless of how long the family have lived in the UK, how much and for how long the parents have been working in the UK and making tax and national insurance contributions, and even if the child has no significant connections with any other country. The exclusion means those children are treated differently as compared to other UK national children (contrary to *Eman and Sevinger*)[38] and it demotes the value of work and promotes hardship for low-income workers.

It is impossible to predict the outcome of a likely preliminary reference, though we should note the valiant optimism of two recent Advocate General Opinions dealing with *Zambrano* rights. In arguing that *Zambrano* right to reside should not be automatically refused where the carer has a criminal record, Advocate General Szpunar in *Marín*[39] attempts to resurrect the idea of Union citizenship as destined to be the fundamental status of Member State nationals. In assessing whether the genuine enjoyment of citizenship rights were affected by a possible refusal of a residence right in *NA*,[40] Advocate General Wathelet claimed that EU citizenship was the "gateway to residence rights" and that it triggered fundamental rights ("not the other way round"), so interference with fundamental rights should form part of the assessment. These cases may force the Court into addressing the constitutional nature of Article 20 TFEU, but the points at issue really represent quite modest developments of *Zambrano*, and do not ask whether it creates a sub-class of tolerated residents against whom Member States may discriminate with impunity, rather than a citizenship-based right to reside entailing equal treatment.

The most recent judicial trend has seen a diminution of Union citizenship as far as access to benefits is concerned, as the Court steps away from the fray when faced with

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[31] Case C-34/09, *Ruiz Zambrano*, EU:C:2011:124.
[32] Kochenov, op. cit. *supra* note 18.
[33] Note the Dutch cases giving restrictive interpretations of when EU citizenship is engaged: Arnhem court, judgment of 13 Nov. 2012, NL:2012:BY3982, and Council of State, judgment of 17 Oct. 2012, NL:2012:BY0833.
[34] The Immigration (EEA) (Amendment) (No. 2) Regulations 2012, S.I. 2012, No. 2560; the Social Security (Habitual Residence) (Amendment) Regulations 2012, S.I. 2012, No. 2587; the Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012, S.I. 2012, No. 2612.
[35] UK Royal Courts of Justice, *Sanneh and Others* v. *Secretary of State for Work and Pensions and Others,* [2015] EWCA Civ 49.
[36] UK Supreme Court, *R (on the application of HC)* v. *Secretary of State for Work and Pensions and others,* UKSC 2015/0215.
[37] The case is examined in detail in O'Brien, "'Hand-to-mouth' citizenship: Decision time for the UK Supreme Court on the substance of *Zambrano* rights, EU citizenship and equal treatment", 38 *Journal of Social Welfare and Family Law* (forthcoming, 2016).
[38] Which emphasized the general principle of equal treatment as between own nationals in comparable situations in the context of citizenship-based rights: see Case C-300/04, *Eman and Sevinger,* EU:C:2006:545.
[39] Opinion of A.G. Szpunar in Case C-165/14, *Rendón Marín* (pending), EU:C:2016:75, para 107.
[40] Opinion of A.G. Wathelet in Case C-115/15, *NA* (pending), EU:C:2016:259, para 45.

Member States' "right to reside" rules. In confirming the legal irrelevance of the "economically inactive", the Court lays the groundwork for workers, former workers and jobseekers to be left worse off than they might have been pre-citizenship.

2.1. *Brey*

In *Brey*, the Court closed off suggestions that EU nationals ought to have equal access with home nationals to special non-contributory benefits (SNCBs), as part of the legislative compromise that shielded those benefits from exportation.[41] In so doing, it also closed off the avenue of claiming that one's resources were "sufficient" because of being supplemented by SNCBs.[42] SNCBs were found to be part of the "social assistance system" for the purposes of Directive 2004/38,[43] even if they were not "social assistance" within Regulation 883/2004. The social assistance system is to include "all assistance … that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family".[44]

Member States can now subordinate residence rights to the "legitimate interests" of protecting their public finances,[45] and institute right to reside tests, at least in the context of SNCBs. The Court did however, imply that citizenship might play a residual role, in requiring Member States to conduct a proportionality assessment to determine whether the claim made "could place a burden on that Member State's social assistance system as a whole".[46] Reference was made again to "a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties … are temporary". It was not clear what standard of proportionality was to be used[47] – on the one hand no individual is ever going to tip the scales for a Member State "as a whole", but on the other, generalizations about claims upon the public purse do not permit much detailed case-by-case assessment.[48] It should be pointed out that thanks to an Upper Tribunal ruling, even the consolation prize of proportionality was withdrawn in the UK. In *VP*,[49] Judge Ward decided that the *Brey* requirement of proportionality assessments did not apply to the UK, but only to Member States that issued residence cards and performed an ex ante "sufficient resources" test. Since the UK does not do so, it was to be considered entitled to treat later benefit claims as failing a sufficient resources test. So the UK has continued to treat the

[41] See Verschueren, "Special non-contributory benefits in Regulation 1408/71, Regulation 883/2004 and the case law of the ECJ", 11 EJSS (2009), at 221; Dusterhouse "Timeo Danones et dona petentes" 11 ECLR (2015), at 133; Peers "Benefits for EU citizens: A U-turn by the Court of Justice?", 74 *Cambridge Law Journa* (2015), at 195.
[42] See Verschueren "European (internal) migration law as an instrument for defining the boundaries of national solidarity systems", 9 *European Journal of Migration and Law* (2007), at 326.
[43] Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory, O.J. 2004, L 158/77.
[44] Case C-140/12, *Brey*, para 61.
[45] Ibid., para 55.
[46] Ibid., para 64.
[47] For a discussion of different approaches, see Thym, "The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens", 52 CML Rev. (2015),17-50. For an analysis of the "the double assessment of the unreasonableness", see Verschueren, "Free movement or benefit tourism: The unreasonable burden of *Brey*", 16 *European Journal of Migration and Law* (2014), at 177.
[48] Amounting to whether the migrant is deserving or undeserving; see Dougan and Spaventa, "Educating Rudy and the non English patient: A double bill on residency rights under Article 18 EC", 28 EL Rev. (2003), at 706.
[49] UK Upper Tribunal, *VP* v. *Secretary for Work and Pensions (JSA),* [2014] UKUT 32 (AAC).

"economically inactive" as automatically not having sufficient resources at the point of claim.[50]

2.2. *Dano*, *Alimanovic*, *and Garcia Nieto*

The retreat from expansive citizenship rulings was hastened under *Dano*[51] and *Alimanovic*.[52] In *Dano*, the Court was at pains to reassure Member States concerned about benefit tourism.[53] However, the ratio can be read as a confirmation of what was commonly understood in Member States – that special non-contributory benefits are out of bounds for those moving between Member States for the "sole" purpose of claiming benefits.[54] It remained silent on the more controversial question put to it by the German court – whether such benefits could be withheld from those moving between States in search of work. But this could not be avoided in *Alimanovic* and *García Nieto*[55] which focused on the social entitlements of jobseekers.

Alimanovic confirmed the finding in *Dano* that the benefits in question should be treated as social assistance, even in the context of jobseekers. Here, the status of the benefit as a special non-contributory benefit was acknowledged, but, the Court found that where an SNCB also bears the characteristics of social assistance, it should be examined for its predominant function. And if it appears to primarily be a "social assistance" type function, then it cannot be a benefit intended to facilitate access to the job market, and so jobseekers are legitimately excluded. Rather more detailed examination of the benefits in question, to better explain the distinction would have been useful; as it is, we are told in the judgment that the benefits fall under Book Two of the Social Code, on "Basic Income Support for Job-seekers". But then, so did the benefits in *Vatsouras*,[56] in which the Court made clear that benefits that were intended to facilitate access to the job market could not be treated as social assistance in order to be withheld from jobseekers.[57]

The Court found in *Alimanovic* that the "predominant function" of the benefits at issue was "to cover the minimum subsistence costs necessary to lead a life in keeping with human dignity",[58] and that as a result "those benefits cannot be characterized as benefits of a financial nature which are intended to facilitate access to the labour market of a Member State".[59] The Court has flipped *Vatsouras* to find that something that is social assistance

[50] Ibid., at 79, 83.
[51] Case C-333/13 *Dano*, EU:C:2014:2358.
[52] Case C-67/14, *Alimanovic*, EU:C:2015:597. See annotation by Iliopoulou in this *Review*: "Deconstructing the former edifice of Union citizenship? The *Alimanovic* judgment", 53 CML Rev., 000.
[53] Case C-333/13, *Dano*, para 74; Nic Shuibhne analyses the transformation of Directive 2004/38 from an expression of rights into an instrument of protecting national welfare States, see Nic Shuibhne, "Limits rising, duties ascending: The changing legal shape of Union citizenship", 52 CML Rev. (2015), at 889; see also Thym, "When Union citizens turn into illegal migrants: The *Dano* case", 40 EL Rev. (2015), at 249, and Verschueren, "Preventing 'benefit tourism' in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*?", 52 CML Rev. (2015), at 363.
[54] UKUT, *VP*, cit. *supra* note 49.
[55] Case C-299/14, *García Nieto and Others*, EU:C:2016:114.
[56] Joined Cases C-22 & 23/08, *Vatsouras and Koupatantze*, EU:C:2009:344.
[57] Ibid., para 45.
[58] Case C-67/14, *Alimanovic*, para 45.
[59] Ibid., para 46.

cannot facilitate access to the labour market.[60] It may seem a logical inversion, but the difference in emphasis means that it has imported an extra condition into the *Vatsouras* formulation. Under *Vatsouras*, the question is whether benefits are intended to facilitate access to the labour market, regardless of other effects. Under *Alimanovic* the question is one of personal resources - whether a person is too poor to merit a benefit. If they could not maintain dignity without it, then they must actually do without it.

Taken to its logical conclusion, this approach would characterize any means-tested benefit as covering "minimum subsistence costs necessary to lead a life in keeping with human dignity". Which would give only access to contributory benefits, limiting claims to those with the right employment history, at an appropriate level of pay. But claimants of *contributory* benefits need not rely on *Collins*,[61] in which the Court found that it was no longer possible to exclude benefits "of a financial nature intended to facilitate access to employment in the labour market of a Member State" from (what is now) Article 45 TFEU, in the context of *means-tested* Jobseeker's Allowance. EU nationals were already entitled to equal treatment with regard to returns on their contributions made in a host State, where it has been established as being the competent State by virtue of those contributions.[62] They have their contribution records protected by the principle of aggregation,[63] and if they have the requisite contributions are more likely to have retained worker status anyway. Which leaves us with something of a quandary – is there now any such thing as a *Collins* benefit – i.e. a benefit to which an EU national may lay claim *because* it facilitates access to the labour market, and not because they are entitled to it by virtue of specific contributions? A clearer explication of the deciding difference between *Alimanovic* and *Vatsouras* benefits (short versus long term, for instance) would help to answer this question. We also see a departure from the *Brey* requirement of case-by-case proportionality tests – the Court approved the use of automatic exclusions of jobseekers from benefits on the grounds "the accumulation of all the individual claims"[64] might pose a systemic burden to welfare systems as a whole.

By green-lighting the automatic exclusion of jobseekers from the benefits in question, the Court undermined the idea of EU citizenship, according to which "real links" should be examined. The summary of the request for a preliminary ruling notes this issue, highlighting the potentially strong links that might have been found in this case:

"[the test] does not allow a case-by-case examination of the link to the domestic labour market or of any other genuine link to the host Member State .... The facts giving rise to the proceedings in the present case illustrate this. The applicants had previously been economically active in the Federal Republic of Germany, had a longstanding link to Germany and began a professional activity directly following the period at issue. It may therefore be presumed that, despite their residence status as employment-seeking European Union citizens, they at all times maintained a genuine link with the German labour market".[65]

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[60] See Schiek, "A spectacular turnaround on EU citizens' benefits by the ECJ", QPOL, 5 Oct. 2015, available at: <qpol.qub.ac.uk/a-spectacular-turnaround-on-eu-citizens-benefits-for-eu-citizens/>, noting the inconsistency of the approach.

[61] Case C-138/02, *Collins* v. *Secretary of State for Work and Pensions,* EU:C:2005:104.

[62] Under Art. 11 of Regulation (EC) 883/2004 of 29 April 2004 on the coordination of social security systems, O.J. 2004, L 166/1.

[63] Art. 61 Regulation 883/2004, O.J. 2004, L 166/1.

[64] Case C-67/14, *Alimanovic*, para 62.

[65] Case C-67/14, *Alimanovic*, Summary of the request for a preliminary ruling pursuant to Art. 98(1) of the Rules of Procedure of the Court of Justice, para 21. I am grateful to Jason Coppel QC for sharing this with me.

In the absence of clear guidance, there remains a significant risk that Member States will treat all means-tested cash benefits for jobseekers as "more" like social assistance than benefits intended to facilitate access to the job market. Drawing upon responses to a questionnaire issued as part of a report by the Free Movement and Social Security Coordination Network (FreSsco) for the European Commission, it seems some Member States already do so.[66] While in most States surveyed, EU nationals could get some form of financial assistance in return for job seeking, there are notable exceptions. For example, in Italy there is no notion of a connection between jobseekers and the labour market, so EU nationals who enter Italy in search of a job do not have access to any cash benefits.[67] In Germany and Greece cash benefits do not count; the "benefits" are limited to help with job searching, and use of job centre facilities; EU national jobseekers in Portugal are not entitled to benefits from the "solidarity system" (though may be entitled to income for reinsertion into the job market).[68] In the UK, a new benefit – Universal Credit – is being rolled out to jobseekers (and others). Under the proposed regulations EU national jobseekers will have no entitlement to UC.[69] In the Netherlands, jobseekers are excluded – beyond the first three months of residence – from social assistance,[70] but in practice some municipalities give social assistance to jobseekers found to be residing lawfully.

National practice is reshaping Article 45 TFEU, and shifting the policy positions of the Union; the demotion of jobseekers is also adopted in the Decision "concerning a New Settlement for the United Kingdom within the European Union".[71] Although intended to address UK concerns, the decision has universal ramifications within the EU. The Decision reiterates and emphasizes what is one of the most contentious elements of the *Alimanovic* judgment, leaving no room for nuance or proportionality: "Member States may reject claims for social assistance where EU citizens from other Member States do not enjoy a right of residence or are entitled to reside on their territory solely because of their job-search. This includes claims by EU citizens from other Member States for benefits whose predominant function is to cover the minimum subsistence costs, even if such benefits are also intended to facilitate access to the labour market of the host Member States".[72]

Jobseekers appear under the same "Article 21 TFEU" section of the Decision as the economically inactive and benefit tourists. Job seeking, it seems, is no longer treated as an aspect of Article 45 TFEU, and Article 20 TFEU does not offer much alternative help.

The lack of traction of Union citizenship is evident in the *Garcia Nieto* judgment. It affirms the automatic exclusion approach of *Alimanovic*, but suggests that the rationale for not conducting case-to-case assessments is even stronger in cases where a jobseeker is in the first three months of residence.[73] The finding that individual assessments are not necessary to establish unreasonable burdens relies heavily upon generalizations, asserting that individual claims do not ever place unreasonable burdens on a system, so a reasonable burden test must be based on accumulated claims, not individual circumstances.[74] This is blithely at odds with

[66] O'Brien, Spaventa and De Coninck, op. cit. *supra* note 8 (FreSsco Comparative Report 2015).
[67] Art. 19 of the Legislative Decree 30/2007.
[68] Arts. 1, 6 and 7 of Law No. 13/2003 of 21 May 2003 on the "rendimento social de inserção".
[69] Regulation 2 of the Universal Credit (EEA Jobseekers) Amendment Regulations 2015, S.I. 2015 No. 546.
[70] Art. 11(2) of the *Participatiewet*.
[71] Council Decision, cited *supra* note 11, Section D(1)(b).
[72] Ibid.
[73] Art. 24(2) of Directive 2004/38 states that "the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence"; see Case C-299/14, *García Nieto*, para 50.
[74] Case C-299/14, *García Nieto*, para 50.

Brey, with Recital 16 of the Directive, and with Commission guidance.[75] The Court also appears to extend the *Alimanovic* formulation. Rather than requiring the *predominant* function of the benefits to be social assistance and the protection of human dignity, the "benefits at issue" seem to be excluded just by virtue of being a special non-contributory benefit.[76] Which would confirm that any social assistance dimension or means testing warrants exclusion. Notably, the judgment includes "Citizenship of the Union" in the headnote of keywords, but does not mention citizenship, or the related provisions anywhere in the body of the judgment. This suggests that the *limitations* alone, outlined in Directive 2004/38 as it is currently being interpreted, sufficiently constitute "citizenship" in the eyes of the Court. This reversal on citizenship related rights might accelerate should the Court follow the lead of the Advocate General in the Commission's action against the United Kingdom.

2.3. *Commission v. UK*[77]

While the *Dano* judgment transformed Directive 2004/38 from an instrument to promote free movement into one to prevent benefit tourism, the Advocate General's Opinion in the *Commission* v. *UK* case elevates it into a fundamental principle of benefit restriction to be read into other pieces of legislation – in this case, Regulation 883/2004. Child Benefit and Child Tax Credit are both family benefits, so "pure" social security under Regulation 883/2004, rather than special non-contributory benefits as in *Brey*, *Dano* and *Alimanovic*. The UK right to reside test makes their receipt subject to the conditions under Article 7 of Directive 2004/38, so that those claimants who fall through the gaps in the Directive are not entitled to family benefits. The Commission challenged this on two grounds – that the test imports extra conditions into Regulation 883/2004, and that it is discriminatory since UK nationals automatically have a right to reside. The Advocate General's Opinion did not systematically break down the provisions at issue or answer the questions with precision, instead choosing to adopt an approach under which benefits in general are amalgamated and typically subject to a discriminatory regime, so that anything which might have the air of an element of social assistance can probably be withheld on the grounds of nationality.

The right to reside test when applied to family benefits imports the personal scope of Directive 2004/38 into Regulation 883/2004, even though the Regulation has an explicitly different personal scope. It applies to all who "are or have been subject to the legislation of one or more Member States", and exhaustively lists the means for allocating State competence so that nobody falls between regimes. The ECJ has ruled on the matter of the personal scope of the Regulation's predecessor – Regulation 1408/71, in *Dodl and Oberhollenzer*,[78] finding that the key was not employment status but coverage for even a single risk. Regulation 883/2004, far from narrowing the scope of Regulation 1408/71, was

[75] The Commission states that where resources are no longer sufficient, a proportionality test should be undertaken, and elaborates upon the criteria in Recital 16 of Directive 2004/38, which should be taken into account (duration, personal situation and amount): see Commission Communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009)313 final, at 2.3.1.
[76] Case C-299/14, *García Nieto*, reading paras. 36 and 37 together.
[77] Opinion of A.G. Cruz Villalón in Case C-308/14, *Commission* v. *UK*, EU:C:2015:666.
[78] Case C-543/03, *Dodl and Oberhollenzer*, EU:C:2005:364.

intended to "replace and extend" that instrument.[79] Indeed, Recital 42 refers explicitly to "the new category of non-active persons, to whom this Regulation has been extended".

So there is no basis for importing the restrictions of the Residence Directive into the Regulation, which would result in some people being left for whose situation there is no competent Member State. The generic assertion that it is probably lawful to withhold benefits from non-nationals as benefit restrictions are "traditionally associated" with residence requirements is problematic and speaks to a prevailing political distaste for equal treatment.[80] In this way the Advocate General paints a picture in which direct discrimination is simply part of the natural ecosystem of free movement - "one way of looking at it is that this difference in treatment as regards the right of residence is inherent in the system and, to a certain extent, inevitable…. In other words, the difference in treatment between UK nationals and nationals of other Member States stems from the very nature of the system".[81] This may well be, in practice, true. But it is not part of the legal framework. Since the Advocate General found that Member States have an unwritten licence to discriminate, the only thing that needed justification in this analysis was the mechanism of checking whether non-nationals have a right to reside. Such justification could be swiftly and almost automatically discharged thanks to the oddly reverential mention of UK public finances: "Without any need to pursue the argument further, I consider that the necessity of protecting the host Member State's public finances, an argument relied on by the United Kingdom, is in principle sufficient justification for a Member State to check the lawfulness of residence at that point".[82]

No data was required of the UK on this point, which suggests that citizenship rights vaporize when exposed to political heat. So citizenship is not a source of a right to move and reside, it does not protect those originally covered by Regulation 883/2004 from being evicted from its scope, and it does not preclude a licence to discriminate on the ground of nationality. Dougan criticized Union citizenship as "rather Victorian in character" after *Baumbast*,[83] because vulnerable individuals were only offered "equal treatment as regards access to social advantages, but without the security of residence within the host territory necessary to make such equal treatment truly meaningful in practice".[84] However, it no longer tantalizes vulnerable supplicants even with an illusory promise of equal treatment. And it seems it is not just Union citizenship, but the free movement of workers in the hands of Member States that assumes Victorian social values, as States are increasingly only offering help to those workers who can demonstrate a sufficient work ethic (and reproductive restraint)[85] by doing enough of the right type of work, for long enough.

The explicit delineation of rights along a border between economic activity and inactivity makes the definition of work pivotal. But there are no "bright lines" demarcating activity and inactivity. Exclusionary approaches within Member States to defining migrant work make the activity/inactivity line ever more blurry, with increasing numbers of workers and former workers at risk of being found economically inactive. The next section addresses the national manipulations of the definition of work, and rules on retaining worker status, in such a way as to exclude the least well resourced workers from entitlements.

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[79] Schmid-Drüner, "Social security cover in other Member States 09/2015", *Factsheets on the European Union* (2016), at 1, available at: <www.europarl.europa.eu/ftu/pdf/en/FTU_5.10.4.pdf>.
[80] Opinion of A.G. Cruz Villalón in Case C-308/14, *Commission* v. *UK*, para 74.
[81] Ibid., paras. 75-76.
[82] Ibid., para 84.
[83] Case C-413/99, *Baumbast and R*, EU:C:2002:493.
[84] Dougan, "The constitutional dimension to the case law on Union citizenship", 31 EL Rev. (2006), at 622.
[85] Esp. in the case of a potential in-work benefit brake, see *infra* section 4.

3. Free movement on the ground: Member States manipulate definitions of work, prospects of work and retained work

EU migrants are more likely than own State nationals to be in low paid, insecure jobs, and/or fixed term contracts,[86] and as a consequence may need to move in and out of work. Even where they are in work for the considerable majority of the time, thanks to the bright line drawn by the ECJ between work and economic inactivity, there is a significant risk that there is no protection or cushioning for the frictional poverty experienced between jobs, beyond the rules for retaining worker status.[87] They experience all the "flexi" but none of the "curity" in the flexicurity model of welfare,[88] supposed to provide protections for workers in new, flexible patterns of labour.[89] But it also seems that their status *during* their work is at risk. Stringent national approaches to who is a worker, who retains worker status, and who can claim a sufficient resources-based right to reside, combine to penalize workers in low paid, low status and low security jobs.

3.1. *The economic inactivity illusion: National manipulations of the definition of work*

Labour market patterns, and the patterns of working lives, have changed – through the rise in part time, atypical and fixed-term work, and, for example, the rise in zero hours contracts. The EU framework for the free movement of workers has not adapted to keep pace. And Member States have been acting to exclude atypical workers from entitlements.

Results of a recent questionnaire sent to national experts show that a number of Member States set thresholds for determining what counts as work. Here, Member States are making maximum use of the discretion left by the ECJ's undefined terms "marginal and ancillary". The ECJ requires an expansive approach to be taken to defining worker,[90] with a very broad formulation emerging from the combination of *Lawrie Blum,*[91] *Levin*[92] and *Kempf*.[93] Part time work is largely included in this expansive definition, since it is "for a large number of persons an effective means of improving their living conditions" even if it provided "an income lower than what is considered to be the minimum required for

[86] See *supra* note 5.
[87] If they have established worker status to begin with, they may retain worker status in cases of temporary incapacity, unemployment accompanied by work seeking (or vocational training), (Art. 7(3) of Directive 2004/38) and pregnancy/maternity; see Case C-507/12, *Saint Prix*, EU:C:2014:2007.
[88] O'Brien, "From safety nets and carrots to trampolines and sticks: National use of the EU as both menace and model to help neoliberalize welfare policy" in Schiek (Ed.), *The EU Economic and Social Model in the Global Crisis* (Ashgate, 2013), p. 101.
[89] "'External flexicurity' attempts to offer safe moves for workers from one job into another, and good benefits to cover the time span, if needed"; see Commission Communication, "Towards common principles of flexicurity: More and better jobs through flexibility and security", COM(2007)359 final.
[90] With some notable anomalies; see Spaventa, *Free Movement of Persons in the European Union: Barriers to Movement in Their Constitutional Context* (Kluwer, 2007); O'Brien, "Social blind spots and monocular policy making: The ECJ's migrant worker model", 46 CML Rev. (2009), at 1107.
[91] Case 66/85, *Lawrie Blum* v. *Land Baden-Württemberg,* EU:C:1986:284.
[92] Case 53/81, *Levin* v. *Staatssecretaris van Justitie*, EU:C:1982:105.
[93] Case 139/85, *Kempf* v. *Staatssecretaris van Justitie*, EU:C:1986:158.

subsistence". Member States cannot deploy their own definition of work, as otherwise "the effectiveness of Community law would be impaired, and the achievement of the objectives of the Treaty would be jeopardized".[94]

Given the prevalence of part time work, and its importance for a large number of persons, and role in improving living standards, there is a presumption in favour of finding it to be work. This presumption can be rebutted if activities are "on such a small scale as to be regarded as purely marginal and ancillary". In *Genc*,[95] faced with someone working 5.5 hours per week, the Court recalled earlier case law, in particular the fact that a worker's earnings are lower than the level required for subsistence cannot prevent a person from being a migrant worker. The Court suggested that the array of terms and conditions of the work should be taken into account.

In other areas where Member States have attempted to curb the broad definition of work, the Court has pushed back. The Court established that students who also work may be considered workers, if their activity is genuine and effective; such status is not affected by their having entered the State with the intention of pursuing a course of study.[96] And the *Bettray*[97] exception – of rehabilitative work not really being work - was circumscribed in *Fenoll.*[98] Activities performed in "work rehabilitation centres" are capable of being genuine and effective work. The findings that the workers could not work in a "normal" work environment, and that activities were adapted to the workers, did not prevent them from being workers under Article 45 TFEU. The Court went further to state that "it is nevertheless clear from the file submitted to the Court that the very concept of the regime governing the functioning of a CAT [work rehabilitation centre], and the activities carried out by persons with disabilities, is such *that those activities do not appear to be purely marginal and ancillary"*.[99]

The imperative of breadth has been reinforced whenever the Court has engaged with the concept of work. "Marginal and ancillary activity" is a residual category, and marginality must be demonstrated by the State wishing to rebut the presumption of work. It is this line of reasoning that leads commentators to assume that the group of people recognized to be "economically inactive" is a small but important group[100] (important because they provide a yardstick of welfare solidarity between Member States). But the group of those *treated as* economically inactive is considerably bigger than the group of those who *are* economically inactive. The FreSsco[101] study found that some States establish formal or informal earnings or hours thresholds, and some of these are quite high. In most cases these are theoretically supplemented with a second stage test – so that those below the thresholds are assessed on a case-by-case basis. But there is little guidance on how these assessments work, and in a few notable cases, there is some evidence to suggest that the threshold is all-but determinative. In these cases, falling below the threshold creates a presumption of marginality, which must be displaced by the claimant. This can place a heavy burden of proof on the worker.

[94] Case 53/81, *Levin*, para 15.
[95] Case C-14/09, *Genc*, EU:C:2010:57.
[96] Case C-46/12, *LN* v. *Styrelsen for Videregaende Uddannelser og Uddannelsesstotte*, EU:C:2013:97.
[97] Case 344/87, *Bettray* v. *Staatssecretaris van Justitie*, EU:C:1989:226.
[98] Case C-316/13, *Fenoll*, EU:C:2015:200.
[99] Ibid., para 39, (emphasis added).
[100] Thym, op. cit. *supra* note 47, 21.
[101] FreSsco Comparative Report 2015, cited *supra* note 8.

In Belgium, for example, there is a 12 hour per week threshold for determining whether work is genuine and effective.[102] One informant[103] said that below this threshold there is a "quasi-irrebuttable" presumption that work is marginal. In the UK, under the recently introduced Minimum Earnings Threshold a worker must earn £155 per week (the equivalent of 22-23 hours per week at the National Minimum Wage) for three months before automatically being considered a worker.[104] Falling below the threshold creates a presumption of marginality - claimants are required to prove that their work is genuine and effective, while being given little guidance on how to do this. So the burden of proof switches, with quite a high threshold to restore it. The EU Rights Project[105] has gathered evidence of workers regularly working 20 hours per week, whose activities are designated marginal and ancillary solely on an earnings basis; or workers whose jobs are found to be marginal because they are on temporary, short-term contracts. Another State with an apparently high threshold is Finland, in which there is an 18 hour per week work requirement, or 80 hours in four weeks (with hours completed in all four weeks) as well as an earnings threshold of € 1,165 per month.[106] Denmark uses a 10-12 hour per week threshold,[107] and in the Netherlands the individual concerned must either receive income which exceeds 50 percent of the social assistance standard (approximately €670 EUR), or must work at least 40 percent of the normal full-time working time (which may vary from sector to sector).[108] If these criteria are not met, we are told that "a case-to-case assessment will ensue taking into consideration all relevant factors". There is a significant risk that in all States where a "case-to-case" assessment follows a failed threshold, it is up to the claimant to adduce evidence to displace a presumption of marginality.

A significant group of *workers* are being counter-intuitively designated as "economically inactive". To take the UK case as an example, it is important to bear in mind that most relevant decisions are made at first instance by administrators, deploying the "decision maker guidance". The guidance tells them that part time work is "not necessarily always marginal and ancillary".[109] "Not necessarily always" typically means "usually" - creating a rebuttable presumption of marginality. There is no alteration in the threshold for people with reduced working capacity, due to being a lone parent, being disabled, or having adult care responsibilities. This contrasts with the approach taken to UK nationals, who have reduced work obligations in these situations. For example, a lone parent cannot (currently) be obliged by the benefits system to work more than 16 hours per week.[110] The narrowing of the definition of work has multiple immediate effects; lone parents working part time around their children might lose worker status, and lose access to Housing Benefit[111] and to benefits

[102] Ibid. This is set out in "Unpublished guidelines", ibid., p. 64, ; the research on Belgium was conducted by Nicholas Rennuy.
[103] Ibid. Rennuy conducted interviews with independent observers, with the National Employment Office, social inspection services and with EURES-advisors.
[104] See *supra* note 10.
[105] The EU Rights Project, cited *supra* note 9.
[106] Act on the Application on Residence-Based Social Security Legislation (Section 2a) or the Act on Health Insurance, FreSsco Report, ibid., p. 25 (Research by Laura Kalliomaa-Puha).
[107] Ibid., p 27 (Research by Dorte Sindbjerg Martinsen). The Danish Immigration Service states that normally there is the condition that the employment amounts to "at least 10-12 hours" per week, although it is not possible to fix a lower limit. See "Residence in Denmark for Union citizens and EA nationals", *New to Denmark, dk: The official portal for foreigners*, available at <www.nyidanmark.dk/en-us/coming_to_dk/eu_and_nordic_citizens/eu-eea_citizens/residence_in_denmark_for_union_citizens_and_eea_nationals.htm>.
[108] FreSsco Report, ibid. B.10(2) Aliens Circular (*Vreemdelingencirculaire)*. Research by A.P. Van Der Mei.
[109] DWP Decision Maker Guidance, cited *supra* note 10, at 072817.
[110] Regulation 13(4)(c) of the Jobseekers Allowance Regulations 1996.
[111] Housing Benefit (Habitual Residence) Amendment Regulations 2014.

that support childcare.[112] This makes them more likely to become homeless, and more likely to have to give up work. The definition is being applied retrospectively to find that workers who have been resident for a long time, and working in a series of different jobs with variable hours, never having claimed social assistance, have not provided sufficient evidence of the genuineness of their activities for a continuous five year period in order to claim permanent residence. These effects are likely to interact with any "brake" on in-work benefits (explored below in section 5), to make the real ban much longer than four years in practice.[113]

Many people found not to be workers are treated in several Member States in the first instance as jobseekers.[114] But this does not afford them a great deal of protection; not only are we seeing a clampdown in the ECJ on jobseeker entitlements, we are also seeing nationally imposed stricter conditions for simply having a jobseeking based right of residence.

3.2. *National manipulation of prospects of work and retention of work*

Those found to be in marginal work and given jobseeker status may face very restrictive tests of their chances of employment if they wish to continue to reside beyond an initial period of work seeking. Some States, such as Germany, assess chances of employment on a case-by-case basis, and use a range of criteria (possibly producing apparently contradictory cases as a consequence).[115] Belgium and the UK stand out as adopting stringent tests. In Belgium, if part-time work has been found to be marginal and ancillary it does not count as evidence of a genuine chance of employment. In one case, a worker performed 46.33 hours per month, and was found to be neither a worker, nor someone with a genuine chance of employment, so did not have a right to reside as a jobseeker.[116] Another case involved a claimant who had been in genuine and effective work for three months, but was found after two months of marginal and ancillary work not to have a genuine prospect of engagement, because she had not submitted the certificate of equivalence of her degree, and the information provided on her work seeking efforts was considered insufficient.[117]

The UK has recently introduced a "Genuine Prospects of Work" test that kicks in after three months of claiming Jobseekers Allowance. This test requires "compelling evidence" of a genuine prospect of work – which must be a prospect of "genuine and effective work" (i.e.

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[112] Section 146 of the Social Security Contributions and Benefits Act 1992 and Section 23 of the Child Benefit (General) Regulations 2006 (as amended by the Child Benefit (General) and the Tax Credits (Residence) (Amendment) Regulations 2014), and Section 3 of the Tax Credits (Residence) Regulations 2003 (as amended by the Child Benefit (General) and the Tax Credits (Residence) (Amendment) Regulations 2014). These provisions are contested in Case C-308/14, *Commission* v. *UK*.

[113] Thanks to restrictive approaches to recognizing worker status, and a tendency to restart the clock where status gaps appear. Findings of the EU Rights Project, cited *supra* note 9.

[114] O'Brien, Spaventa and De Coninck, op. cit. *supra* note 8 (FreSsco Comparative Report 2015).

[115] Ibid. (Research by Ferdinand Wollenschläger): LSG Berlin-Brandenburg (Social Court of Second Instance), judgment of 17 Feb. 2015, L 31 AS 3100/14 B ER, L 31 AS 60/15 B ER PKH, para. 11 (all circumstances have to be considered); OVG Berlin-Brandenburg (Administrative Court of Second Instance), judgment of 30 March 2011, OVG 12 B 15.10, para. 32 (earnings are the key aspect); SG Heilbronn (Social Court of First Instance), judgment of 18 Feb. 2015, S 10 AS 3035/13, para. 34 (earnings are the key aspect); LSG Nordrhein-Westfalen (Social Court of Second Instance), judgment of 30 Jan. 2008, L 20 B 76/07 SO ER, para. 23 (of €154 per month potentially sufficient); OVG Bremen (Administrative Court of Second Instance), judgment of 28 Sep. 2010, 1 A 116/09, para. 35; OVG Berlin-Brandenburg (Administrative Court of Second Instance), judgment of 30 March 2011, OVG 12 B 15.10, para. 6, 24 et seq. (earnings of €175 per month potentially sufficient).

[116] Council for Alien Law Litigation, 17 Dec. 2012 nr. 93.730

[117] Council for Alien Law Litigation, 27 Feb 2015. nr. 139.948.

must pass the Minimum Earnings Threshold or will be presumed to be marginal and ancillary unless this is rebutted with sufficient evidence).[118] The definition of "compelling evidence" is narrow.[119] There are two types of "compelling evidence" described in the guidance, one of which is a written job offer with a start date, and evidence that it will be genuine and effective work – which in practice, means evidence that it will pass the earnings threshold.[120] Thus an actual job offer with unspecified, variable, or on-call hours will, surreally, not count as sufficiently compelling evidence of a prospect of work.[121] The second type of compelling evidence is proof of a change of circumstances in the last two months which makes it likely that the claimant will imminently receive an offer of work – which can be shown to be genuine and effective – and the claimant is awaiting the outcome of job interviews. If the evidence does not meet the "date of change" criterion, the guidance states that "it is irrelevant whether the evidence is compelling".[122] These narrow, and unprincipled, conditions depart significantly from the ECJ's language of showing a "genuine chance" of being engaged, requiring instead practical certainty. In sum, jobseekers have a dwindling set of entitlements, for a decreasing amount of time, subject to an increasing set of conditions.

Those who fall out of work can seek to retain worker status under Article (7)(3) of Directive 2004/38, but may struggle to adduce evidence to displace the presumption of marginality for a *past* job, in order to show they had a worker status that they should retain. For those who do manage to establish a former worker status, national conditions governing retention can be problematic. Article 7(3)(c) of Directive 2004/38 deals with workers who have worked for less than 12 months and become involuntarily unemployed, and provides a minimum worker status retention of six months.[123] However, it seems that a great number of Member States have turned this floor into a ceiling, so that persons relying on Article 7(3)(c) can retain worker status for *no more* than six months. Treating a minimum as a maximum may be a technically legitimate interpretation, but is arguably out of step with the system the legislators imagine they have created. This ceiling has been reported in Sweden, Poland, the Netherlands, Luxembourg, Lithuania, Latvia, Ireland, the UK, Denmark, France and Germany.[124] The limit was noted in *Alimanovic*, and apparently approved, by the Court. The strict cut off, it was found, served to let people know "without any ambiguity" what their entitlements were; it was "to guarantee a significant level of legal certainty and transparency".[125] This presumably gives approval to similar time limits employed with automatic effect in other Member States.

Member State practices may also prevent poorly paid migrants from plugging gaps in their status between jobs where they have not been able to retain worker status. Those who wish to show that they have been lawfully resident for a continuous period of time to claim permanent residence may wish to show that between jobs they had sufficient resources,

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[118] DWP Decision Maker Guidance, cited *supra* note 10.
[119] Williams, "Kapow to the GPOW", *Child Poverty Action Group* (2015), available at <www.cpag.org.uk/sites/default/files/CPAG-Kapow-GPOW-APR2015_0.pdf>.
[120] DWP Decision Maker Guidance, cited *supra* note 10, at 073099 and 073100, example 5.
[121] DWP, "Habitual residence and the right to reside: JSA", Memo DMG 15/14, at 15; e.g. scenario 5 shows a decision against a claimant having a GPoW because "the income, hours per week and duration cannot be confirmed".
[122] DWP Decision Maker Guidance, cited *supra* note 10, at 073100 (2).
[123] Former workers who have worked for more than one year, and so rely on Art. 7(3)(b), are in a different situation. No responding States in the FreSsco study (cited *supra* note 8) subject such workers to a similar time limit to those under Art. 7(3)(c), apart from the UK (six months, after which they are subject to the Genuine Prospects of Work test); see Regulation 6(7) of the Immigration (EEA) Regulations 2006, S.I. 2006, No. 1003, as amended.
[124] O'Brien, Spaventa and De Coninck, op. cit. *supra* note 8 (FresSco Report).
[125] Case C-67/14, *Alimanovic*, para 61.

pointing to earnings they had saved and relied upon, and the fact that they consequently made no claims upon the public purse. In the UK this is not enough. In the case of *VP*, we are told that in order to claim that one had sufficient resources at any one point, one should be able to "point to "resources" to see them through five years", not just the period between jobs. Having paid one's own way was irrelevant, since that might have been through "a combination of luck and an unusually frugal lifestyle".[126] So to claim, even for just a few months, that one has sufficient resources, EU migrants must show that they had resources sufficient to see them through five years from the outset. This is a requirement of not inconsiderable wealth, and seems to be at odds with the approach taken by the Commission, which suggests that resources need only be sufficient to cover the period of "inactivity";[127] the Commission has repeatedly stated that it is not open to Member States to impose a fixed amount to be defined as "sufficient",[128] as made clear in Article 8(4) of Directive 2004/38. Also, the Commission's statement that "the resources do not have to be periodic and can be in the form of accumulated capital" is made a bit meaningless if it is open to Member States to demand an accumulation of capital.[129] Added to this is the requirement of "comprehensive sickness insurance", which has proved a significant hurdle for EU national claimants in the UK.[130] In 2006, Dougan found that the "primary 'added value' of Union citizenship … is to establish a charitable fund for distressed gentlefolk to help them overcome temporary financial embarrassments" as well as offering "a helping but limited hand to other categories of Union citizens who seem deserving of support because they are trying to better themselves in some orthodox economic sense".[131] It seems that the helping hand is now rather more swiftly retracted from the non-gentlefolk classes.

The increased divergence between EU rights-in-theory and EU rights as manipulated by Member States, combined with the growing moral vacuum in the EU free movement framework, means that the lives of workers in insecure and short term employment are becoming all the more precarious. People who expect to periodically job search between appointments must now produce a significant amount of evidence to demonstrate prior worker status and subsequent entitlement to retain worker status, thanks to narrowing definitions of genuine and effective work, and if they cannot provide this evidence, will be treated as a "mere" jobseeker, which is increasingly akin to being treated as a benefit tourist, so being pushed off a welfare cliff edge. Workers are affected by rules that either negate their worker status, or recognize it but keep them in constant fear of losing it. The only real protection against such fear is to have substantial resources, and a strong labour market bargaining position. In this way, wealth and class are becoming increasingly relevant to the exercise of free movement.

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[126] Case C-67/14, *Alimanovic*, para 84.
[127] Commission, Directorate - General Justice, Freedom and Security, "Right of Union citizens and their family members to move and reside freely within the Union: Guide on how to get the best out of Directive 2004/38/EC", available at: <ec.europa.eu/justice/policies/citizenship/docs/guide_2004_38_ec_en.pdf>, at 14.
[128] Ibid., at 12.
[129] Commission Communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009)313 final, at 2.3.1.
[130] De Mars, "Economically inactive EU migrants and the United Kingdom's National Health Service: Unreasonable burdens without real links?", 39 EL Rev. (2014), at 770; see also UK Upper Tribunal, *VP*, cited *supra* note 49.
[131] Dougan, op. cit. *supra* note 84, at 622.

4. Wealth, class and the alienation of precarious workers

Wealth is not only relevant to those who have been defined as "not workers", or those struggling to retain worker status, but is playing an increasingly large role in determining the rights (and the conditions of enjoyment of those rights) of those who have been found to be workers. Means have long been a decisive factor in matters of national citizenship and immigration law; Anderson notes that "there are multiple ways in which it is easier for the wealthy to fulfil the conditions attached to naturalization than it is for the poor, or even the not particularly wealthy".[132] On a number of fronts, wealth is now emerging as the guiding principle of free movement in the EU. Those in the privileged position of secure, regular, full time, and permanent work are accorded much greater safety in the free movement framework, while larger earnings also help to self-insure against risks.

The binary distinction typically adopted[133] between the economically active and inactive can mask the effects that highly conditional rights have upon low-income workers who *do* meet the definition of worker. The insecurity and fear that stem from lack of social protection take a serious toll upon physical and mental health.[134] They also have a dramatic impact upon autonomy – locking people into situations for fear of the effect of loss of worker status and right to reside. Workers subject to exploitative, or otherwise unlawful, working conditions, might not feel empowered to challenge their treatment or conditions, given the risk of unemployment. This creates a vicious circle, whereby unscrupulous employers aware of their predicament feel able to take liberties with employee rights.[135] Another troubling "locked in" situation is that of partners in abusive relationships. Leaving the situation might involve leaving their job, and would stop them, if they are not married, from continuing to be treated as the family member of a migrant worker.[136] The EU Rights Project encountered a number of abused women facing destitution as a result of leaving their partners. Several had lost contact with "home" States and been in the UK for a very long time – more than a decade in one case. But, thanks to the stringency of the UK requirements to document every detail of the periods of lawful residence, and the systematic requirement to prove that work below the earnings threshold was genuine and effective, they had not obtained permanent residence

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[132] Anderson, "'Heads I win. Tails you lose.' Migration and the Worker Citizen", 68 *Current Legal Problems* (2015), 179-196, at 183.

[133] Adopted in much of the literature: Thym, op. cit. *supra* note 47; Zahn "'Common sense' or a threat to EU integration? The Court, economically inactive EU citizens and social benefits", 44 *Industrial Law Journal* (2015), 573-585; De Mars op. cit. *supra* note 130; Verschueren, "Free movement of citizens: Including for the poor?", 22 MJ (2015), at 1, noting the sometimes blurred line between economically active and non-active persons; see also Nic Shuibhne, op. cit. *supra* note 53, at 932: "If these Union citizens can engage in or even commit to engaging in economic activity, their status radically transforms".

[134] Benach, Vives, Amable, Vanroelen, Tarafa and Muntaner "Precarious employment: Understanding an emerging social determinant of health", 35 *Annual Review of Public Health* (2014), 229-253; Bambra, Lunau, Van der Wel, Eikemo and Dragano, "Work, health, and welfare: The association between working conditions, welfare states, and self-reported general health in Europe", 44 *International Journal of Health Services* (2014), 113-136.

[135] Dwyer et al. noted e.g. that where EU nationals were placed in situations of greater precariousness by the UK's Worker Registration Scheme for A8 nationals, they became a group "particularly susceptible to forced labour"; see Dwyer, Lewis, Scullion and Waite, "Forced labour and UK immigration policy: Status matters", JRF Programme Paper (2011). The Migration Advisory Committee, reporting to the UK Home Office similarly noted that labour market restrictions "has led to some A2 nationals being exploited, or being left vulnerable to exploitation"; see MAC, "Review of the transitional restrictions on access of Bulgarian and Romanian nationals to the UK labour market", Nov. 2011, at 9, available at: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/257232/transitional-restrictions.pdf>.

[136] Only spouses benefit from the protection under Case 267/83, *Diatta* v. *Land Berlin*, EU:C:1985:67.

rights. They faced the dilemma of whether to stay in abusive situations, in which they and their children may be at risk, or to leave and face the risk of making their children hungry and homeless.[137] Lives lived on the brink of destitution are lives vulnerable to harm.

Poorly paid work – even when deemed unequivocally to be "work" was considered to be legally irrelevant in the context of unmarried family members, in *Garcia Nieto*.[138] Here, the family had made a claim for subsistence benefits, while relying on Mrs Garcia Nieto's wage of €600 net per month. Her partner and his son joined her, and they made a claim for subsistence benefits as a family unit. The part of the claim that related to her partner and his son was refused, as it had been made in the first three months of their residence, so the exclusion in Article 24(2) applied. But Recital (21) suggests that this provision does not apply to workers, self-employed people, people with retained worker status, *or their family members*. The judgment does not engage in detail with the rights of the *worker* at the centre of the claim – Mrs Garcia Nieto, and so does not consider the possibility that Mr Peña Cuevas and his son may have rights deriving from her.

We are told that Mrs Garcia Nieto and Mr Peña Cuevas were not married or in a civil partnership. But Article 3 of Directive 2004/38, on "beneficiaries" includes a provision on what the UK terms "extended family members"[139]– "the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons … the partner with whom the Union citizen has a durable relationship, duly attested".[140] If Mr Peña Cuevas was such a partner, then it might have been appropriate to examine how far that provision creates "extended" family member rights echoing those of immediate family members, and to consider the content of such rights.

Here we are faced with legislative ambiguity and judicial simplification. It is not clear in the Directive whether "facilitating entry and residence" might entail eligibility for a discretionary residence right. But the Court did not look at any possible rights stemming from Mrs Garcia Nieto's status as a migrant worker. Up until now, unmarried partners have had limited rights - for example in the case of separation, unmarried partners have not been able to rely upon *Diatta*.[141] The non-consideration of the possibility of a right to reside based upon Mrs Garcia Nieto demotes unmarried partners even further, to having no family member-based right to reside in the first place. By not investigating the kind of rights created by Article 3, nor addressing the limits of Article 24(2), this judgment reifies the importance of marriage – and in so doing, places the children of unmarried partners at significantly greater risk of financial exclusion than the children of married partners. Moreover, it excludes same-sex partners who have been prevented (either in the State of origin or residence) from marrying or entering into a civil partnership by national non-recognition of same sex unions.[142] All of which is rather retrograde.

Not only was the claimant's partnership with Mrs Garcia Nieto not considered as a potential family relationship, it could not be taken account of as a possible "real link" with the host State's labour market; the referring court's third question touched upon the issue of a

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[137] As evident in EU Rights Project cases, cited *supra* note 9, and noted in O'Brien, "The pillory, the precipice and the slippery slope: The profound effects of the UK's legal reform programme targeting EU migrants", 37 *Journal of Social Welfare and Family Law*, 111-136.
[138] Case C-299/14, *García Nieto and Others.*
[139] Regulation 8 of the Immigration (EEA) Regulations 2006.
[140] Art. 3(2)(b) Directive 2004/38.
[141] Case 267/83, *Diatta*.
[142] Registered/civil partnerships do not exist in Bulgaria, Italy, Latvia, Lithuania, Poland, Romania and Slovakia; see European Parliament, "The rights of LGBTI people in the European Union", Briefing, May 2015, available at <www.europarl.europa.eu/EPRS/EPRS-Briefing-557011-Rights-LGBTI-people-EU-FINAL.pdf>.

"real link", asking only whether the *absence* of such a link could be taken account of, if the automatic exclusion as it stood was not lawful.[143] As the automatic exclusion was found lawful, the Court simply declined to consider the third question.[144] So the possible positive effect of the *existence* of a real link was not considered. Mrs Garcia Nieto's work was in effect, legally irrelevant to determining her partner's right to reside, because she did not earn enough to prevent his being reliant upon benefits with an element of social assistance. In effect, it was the whole family unit that could not "sufficiently, cover their subsistence costs on the basis of the income or assets".[145]

EU law is failing to protect the working poor, while national laws are working (against EU principles) to actively exclude them. The resulting carving up of the workforce, in which privilege is accorded to those with greater labour market power, and those in vulnerable positions are least well protected, echoes the separation that Marx identified as a characteristic of developing capitalism, one in which the lower strata of workers become more objectified – treated as means of production, rather than as full human beings (or as full citizens).[146] They are alienated from the economic worth of their labour, not being able to call upon the social contributions they have made. They are also alienated from other workers - EU nationals of greater means, and own-State national workers, and from social systems such as welfare systems. The absence of a safety net adds compulsion to an already unbalanced power relationship – unprotected workers are locked into their activities, and are critically dependent upon their employers, while being subject to the vicissitudes of a flexible labour market. Labour is not merely "estranged", it is also exploited: "Just as he is thus depressed spiritually and physically to the condition of a machine and from being a man becomes an abstract activity and a belly, so he also becomes ever more dependent on every fluctuation in market price, on the application of capital, and on the whim of the rich. Equally, the increase in the class of people wholly dependent on work intensifies competition among the workers, thus lowering their price".[147]

Removing the costs of a safety net at the same time as lowering the price of labour increases the "surplus value" which can be extracted from EU workers – the rate of surplus value being "an exact expression for the degree of exploitation of labour-power by capital, or of the labourer by the capitalist".[148] The disconnect between the economic gains created by EU migrants,[149] and the economic sanctions imposed upon them echoes Marx's description of the "producing" classes, in which the poor are at greater risk of being alienated from the fruits of their labour: "labour produces for the rich wonderful things – but for the worker it produces privation".[150] The rich includes those commanding larger wages in secure, regular work, and with stronger labour market power. The creation of a European working underclass has impacts on all socio-economic strata.[151] The creation of a disenfranchised, indentured, exploited class will have consequences for the stability of the labour market, while greater

[143] Case C-299/14, *García Nieto*, para 34.
[144] Ibid., para 54.
[145] Ibid., para 19.
[146] The "worker becomes all the poorer the more wealth he produces … [and] becomes an ever cheaper commodity"; see Marx and Engels, *Economic and Philosophical Manuscripts of 1844* (Wilder Publications, 2011), Ch. "Estranged labor", pp. 67-83.
[147] Ibid., Ch. "Wages of Labor", pp. 20-35.
[148] Marx, *Capital: A Critique of Policial Economy: Vol. 1* (Progress Publishers, 1887), Ch. 9, Section 1, "The degree of exploitation of labour power".
[149] Dustmann and Frattini, "The fiscal effects of immigration to the UK", 124 *The Economic Journal* (2014), at F593-F643; Vargas-Silva, "The fiscal impact of immigration in the UK", Migration Observatory briefing (2013), COMPAS University of Oxford.
[150] Marx and Engels, op. cit. *supra* note 146.
[151] Wilkinson and Pickett, *The Spirit Level: Why Equality is Better for Everyone* (Penguin, 2010).

risks of destitution for some mean greater potential "crisis costs" for society – e.g. in dealing with homelessness, urgent health needs, and crime. The wealthy suffer directly from conditions of dramatic inequality.[152] And there will inevitably be a detrimental impact upon the character of our society as we become more tolerant of social ills such as child poverty.[153]

The stratification of workers along nationality lines is set to become more explicit and exclusionary. Under the proposed "new settlement" between the EU and the UK, Member States would be entitled to request an "emergency brake" for in-work benefits for those with worker status, for four years. The next section argues that the directly discriminatory brake represents an intense form of labour alienation for migrant workers. This alienation would not be experienced uniformly, but would impact disproportionately upon women on low pay.

5. The benefit brake: National distortions of EU law feed back into the EU's moral vacuum

At the time of writing, the outcome of the UK referendum on EU membership (set for 23 June 2016) is unknown. The new settlement, offered in the event of an "in vote", contains significant departures from the principle of equal treatment under Article 45 TFEU – departures that target EU national workers with children. The settlement shows how national distortions of EU law can seep back into EU law "at source", and alter the normative underpinnings of free movement. This is made all the more possible by the moral vacuum at the heart of the EU free movement framework with the expunging of EU citizenship-based rights.

The settlement requires the Commission to present a proposal amending Regulation 883/2004 to permit indexing of Child Benefit, when it is exported, to the standard of living of the child's State of residence,[154] and a proposal amending Regulation 492/2011[155] to introduce the option of an "emergency brake" on non-contributory in-work benefits for up to four years.[156] The Decision includes a declaration from the Commission that it believes the UK would be justified in applying the brake immediately.[157] Whatever the outcome of the UK's referendum, the concept of the brake has been established – even if the UK were to leave the EU and the current deal to become obsolete, this mechanism seems likely to rematerialize.[158]

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[152] Ibid.; inequality makes for worse mental health outcomes, greater social anxiety and other elevated risks across the socioeconomic spectrum. See also OECD, *In It Together: Why Less Inequality Benefits All* (OECD Publishing, 2015), which concludes that higher inequality drags down economic growth.

[153] Such tolerance might echo the psychological phenomenon of "psychic numbing", whereby care for individuals can become numb indifference when faced with a nameless mass of people.

[154] Which is itself not unproblematic and poses potential Art. 45 TFEU discrimination; see O'Brien, "Explaining the EU deal: Child benefit", *Full Fact*, 17 Feb. 2016, available at <fullfact.org/europe/explaining-eu-deal-exporting-child-benefit/>.

[155] Regulation (EU) 492/2011 on freedom of movement for workers within the Union, O.J. 2011, L 141/1.

[156] European Council Decision, cited *supra* note 11, Section D(2)(b).

[157] European Commission, "Declaration of the European Commission on the Safeguard Mechanism referred to in paragraph 2(b) of Section D of the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union", Annex VI to the European Council conclusions of 18-19 Feb. 2016, EUCO 1/16, CO EUR 1, CONCL 1 19 Feb. 2016.

[158] Note the Economist's claim that populist parties "in Austria, Sweden, Denmark and even Germany are …pushing hard for local versions of Mr Cameron's renegotiation"; see Bagehot, "The 'emergency brake' is only

There are two key ways in which the proposal distorts EU law at source. Firstly, it dispenses with Article 45(2) TFEU and the right to equal treatment on the ground of nationality, endorsing the privilege Member States wish to accord their own nationals, and so changing fundamentally what it means to be a migrant worker. It enshrines the principle of worker-alienation. Secondly, it conflicts with other key principles of equal treatment, impacting disproportionately upon women, rendering female movement less free.

5.1. *Discrimination that alienates: Dispensing with 45(2) TFEU*

The proposal ramps up the risk of in-work poverty for EU migrants, and it does so in conflict with primary law. So far, the discriminatory treatment tacitly accepted in EU law has not been extended to migrant workers. It has long been a key principle of EU law that work provides the requisite link with a host State's economy and society, and entitles them to be treated the same as other workers as regards tax and social advantages – as expressed in Regulation 1612/68 and then Regulation 492/2011. But it is precisely a licence for direct discrimination against workers that is at issue.

The European Council Decision on the new settlement notes that different social security systems may attract members of the workforce to certain territories and adds that "measures avoiding or limiting flows of workers of such a scale that they have negative effects" would be legitimate. But excluding EU national workers from in-work benefits solely on the basis of their nationality is *direct* discrimination which can only be justified based on one of the grounds expressly provided for in the Treaty: public policy, public security and public health (Art. 45(3) and (4)). These limitations have to be narrowly construed.[159] The Decision adds "overriding reasons of public interest" such as "averting the risk of seriously undermining the sustainability of social security systems".[160] The Decision states that "conditions may be imposed in relation to certain benefits to ensure that there is a real and effective degree of connection between the person concerned and the labour market of the host Member State" where they are "based on considerations independent of the nationality of the persons concerned and proportionate to the legitimate aim pursued".[161] The benefit brake is not independent of nationality – it is triggered purely by nationality. It is a disproportionate means for establishing a link with the host State's labour market, since such a link can, according to case law, be established by a short period of work,[162] whereas the brake is for "up to" four years. So it is not independent of nationality, it is not proportionate, and is possibly not pursuing a legitimate aim – since we need to know whether there is a strong public policy reason for imposing a brake. The Commission's declaration states: "the kind of information provided to it by the United Kingdom … shows the type of exceptional situation that the proposed safeguard mechanism is intended to cover exists in the United Kingdom today. Accordingly, the United Kingdom would be justified in triggering the mechanism in the full expectation of obtaining approval".[163]

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symbolic, but it will probably work", *The Economist*, 1 Feb. 2016, available at <www.economist.com/blogs/bagehot/2016/02/david-cameron-s-eu-endgame>.

[159] Case 30/77, *Bouchereau*, EU:C:1977:172; Case 152/73, *Sotgiu*, EU:C:1974:13; Case 149/79, *Commission* v. Belgium, EU:C:1982:195; Case 66/85, *Lawrie-Blum*, EU:C:1986:284.

[160] European Council Decision, cited *supra* note 11, Section D(1)(a).

[161] Ibid.

[162] Joined Cases C-22 & 23/08, *Vatsouras*; Case C-431/01 *Ninni-Orasche* [2003] ECR I-13187.

[163] Commission, Declaration on the Safeguard Mechanism, cited *supra* note 157.

This is quite a dramatic U-turn for the Commission, whose 2013 "fact-finding analysis"[164] suggested that there was little evidence of benefit tourism, but that there was instead evidence that the EU migration rates were largely beneficial to the UK (and more so than to other EU nations) thanks to the youth and employment rate of the EU nationals concerned. It noted a study from 2008/9 in which "A8 nationals were found to have paid 37% more in direct or indirect taxes than was spent on public goods and services which they received" and concluded that A8 nationals were (and are) "net contributors to the public finances, having a higher rate of labour force participation, and making less use of benefits and public services".[165] The Commission also reported the OECD's findings that A8 nationals (who are the subject of much of the political controversy) "make a net contribution of 1.02% of GDP or £16.3bn to the UK, since they are younger and more economically active than the population in general". The Commission also noted the Department for Work and Pensions' response to a Factcheck study on benefit tourism that there was no evidence available to support welfare tourism perceptions.[166]

So this reversal of position suggests that the mysterious information provided must be particularly dramatic and decisive. Given that we are dealing with a tectonic change in the framework of free movement, and we are stripping away equal treatment for migrant workers for a substantial length of time, any State wishing to deploy the brake ought to discharge a heavy evidential burden to demonstrate that its use is merited. The publicly available evidence suggests that EU immigration into the UK has created net fiscal benefits,[167] not to mention less tangible contributions, such as an increase in the level of education within the workforce not paid for by the UK system.[168] Public services are better funded per head of population as a consequence of EU immigration. There is therefore scant evidence to support the proposition that EU migration has increased pressure on public services, or created extra costs to the public purse. And so the reference to the "kind of information" supplied to the Commission is worryingly vague. The primary aim of the UK Government is to reduce migration – evident in the reference in the declaration to "the United Kingdom's concerns about the exceptional inflow of workers from elsewhere in the European Union". The Prime Minister's speech accompanying his letter to Donald Tusk stated there was a need to "reduce the very high flow of people coming to Britain from all across Europe",[169] while the UK Government's press releases on recent welfare changes ascribe them to the purpose of reducing migration.[170] And that aim, whatever one's ideological response, directly conflicts with the *raison d'etre* of the Union and the premise of the free movement.

The emergency brake, as currently framed, allows Member States to assert that they are getting too many EU migrants. But instead of imposing a restriction on free movement *per se*, this allegation is then used as a justification for letting EU migrants in, and then treating them unequally. The logical and legal link required between the two steps is missing,

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[164] Commission. "A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence" Final report Oct. 2013 available at: <ec.europa.eu/social/BlobServlet?docId=10972> last accessed 1 May 2016.

[165] Ibid, 10.5.2.

[166] Ibid.

[167] See *supra* note 149.

[168] Dustmann and Frattini, op. cit. *supra* note 149, at 3.

[169] See s*upra* note 6.

[170] DWP, "Minimum earnings threshold for EEA migrants introduced", Press release of 21 Feb. 2014, available at <www.gov.uk/government/news/minimum-earningsthreshold-for-eea-migrants-introduced>; DWP, "Further curbs to migrant access to benefits announced", Press release of 8 April 2014, available at <www.gov.uk/government/news/further-curbs-to-migrant-access-to-benefits-announced>.

not least as there is little or no evidence to show that benefits determine migratory choices.[171] In *Sotgiu*,[172] it was shown that the Treaty exceptions to free movement (in that it was the public service exception), are not a licence to discriminate against workers *once they have been admitted to the labour force*. States may invoke them to restrict free movement, but if a State has not chosen to exclude them from the job market, then once they are here, they are entitled to full equal treatment. This raises an interesting question of legitimacy and decision making - should a unanimous political consensus among heads of Member States trump EU case law and legislation – and itself be a source for creating new limitations and grounds for discrimination? And if so, should they be held to a lower standard of objective justification than individual Member States, who must show that there is a logical connection between the means employed and the legitimate aim?[173] It seems baffling that such a means of short-circuiting the workings of EU law and judicial review should have existed all along.

If it is possible to charcterize the current UK situation as "exceptional", then it is plausible that attempted applications of emergency brakes around the EU could become the new norm. Without a definition of "non-contributory in-work benefits" there is a risk that the scope of the exclusion will be cast wide, potentially including any means-tested benefit that can be claimed by a worker, such as Housing Benefits (without which those on low incomes may not be able maintain a home, especially in areas with high property prices),[174] or even non-means tested circumstance-based benefits, such as family benefits. It is worth noting that Child Tax Credit, which is at issue in the UK, is not a special non-contributory benefit, nor social assistance, but is "pure" social security – a family benefit under Regulation 883/2004. A similar logic may therefore be applied to non-contributory disability benefits, for instance. So anyone with any extra costs or potential obstacles to work may find themselves priced out of free movement – making it the preserve of male and able bodied workers, ideally childless, or with someone who looks after the kids for free.

Being a migrant worker will no longer mean what it once did. In a country attempting to apply a brake, it means being perceived as an unwanted burden. In a country that successfully applied a brake, it would mean being a member of an underclass – a sub-citizen put at significant risk of in-work poverty, representing "production factor labour",[175] suitably commodified,[176] for capitalist citizenship. A Member State would be entitled to extract the economic worth of the migrant, offering no recognition of integration, or protection, in return. It is quite the model of labour alienation.[177]

EU citizenship would in this situation be meaningless. Workers would contribute their tax and National Insurance, and not be entitled to in-work return on that to support their

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[171] Commission, Final report cited *supra* note 164; Dustmann and Frattini, op. cit. *supra* note 149.
[172] Case 152/73, *Sotgiu*
[173] In the context of restrictions on gambling, see Joined Cases C-338, 359 & 360/04, *Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio*, EU:C:2007:133. Note that the UK courts have acknowledged the need for a "rational connection between the measures and their legitimate aim"; see UK Royal Courts of Justice, *Sanneh*, cited *supra* note 35, at 98; and the ECtHR has stated that in discrimination cases, there must not only be a legitimate aim, but also a "reasonable relationship of proportionality between the means employed and the aim sought to be realized"; see ECtHR, *Bah* v. *UK,* Appl. No. 56328/07, judgment of 27 Sept. 2011, para 36.
[174] Birmingham Law Centre complained that *Zambrano* families who were excluded from Housing Benefit, despite working, could not afford tenancies and were "hamstrung by the prospect of not being able to earn the kind of salary that will cover … rent and living expenses [without]…the kind of support available to other low income families"; see Birmingham Law Centre, "*Zambrano* and *Pryce*: Does the homelessness duty mean anything?", 23 Feb. 2013, available at <ilegal.org.uk/thread/7425/zambrano-pryce-homeless-duty-mean>.
[175] Term used by Van der Mei in *Free Movement of Persons within the European Community: Cross Border Access to Public Benefits* (Hart, 2003).
[176] Marx and Engels, op. cit. *supra* note 146.
[177] Ibid.

work, even if they remain in continuous, full time work, unless and until four years of such work have been clocked up. And thanks to the difficulties in attaining, and retaining, worker status for some, it may well take longer than that. Lengthy exclusion from in-work benefits may make childcare unaffordable, pricing some EU nationals out of the labour market and making free movement all the more perilous for women.

5.2. *Alienation that discriminates: Disproportionate impact upon women*

While the discriminatory application of the benefit brake serves to alienate low-paid EU national workers, that process of alienation has in turn a discriminatory impact upon female low-paid EU national workers. Women who carry within them the possibility of pregnancy carry the possibility of destitution. While not intending at the outset to need benefits throughout a course of four years, if a female migrant were to become pregnant during this time the ban would bite, making returning to work much harder. Tax credits are mostly paid to women,[178] and support their labour market activity since they contain a component to help pay for childcare. The UK has a largely market-based child care system,[179] so unsupported workers could be priced out of the labour market. A female EU worker, working full time, in a secure and continuous job, but on low pay, would struggle to continue working if she were to have a baby within the first four years of work.

What is more, the ban may in practice be considerably longer than four years. This is because national practices defining work could result in excluding those EU migrants who are not in stable, typical, full time employment. Those whose hours are variable, or who move between jobs, may find it difficult to establish worker status in the first place. Once it is established, they may find that the "four year clock" is restarted every time there is a gap between work, or each time their wages dip. These variables are of course interlinked – the longer a female EU migrant is resident, the greater the possibility of having a baby while in a host State. And lone parents are more likely to be concentrated in low status, low pay, low security jobs, so clocking up the four years is even more difficult. In-work poverty causes child poverty to escalate.[180] Re-defining part time workers as "not workers" increases risks of family homelessness and destitution.[181] Under the brake, all EU lone parent families would face such risks, even where the mother is working full time. This imbues free movement with gender asymmetry, since the ability of a woman to continue working will be seriously

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[178] Lansley, "Women lose out from government cuts", *Poverty and Social Exclusion*, available at <www.poverty.ac.uk/articles-government-cuts-gender-welfare-system-tax-government-policy-uk/women-lose-out-government>.

[179] Glaser, Price, Montserrat, di Gessa and Tinker, *Grandparenting in Europe: Family Policy and Grandparents' Role in Providing Childcare* (Grandparents Plus, 2013), available at: <www.grandparentsplus.org.uk/wp-content/uploads/2013/08/Grandparenting-in-Europe-Final-PDF-with-ISBN.pdf>; Saraceno, "Childcare needs and childcare policies: A multidimensional issue", 59 *Current Sociology* (2011), at 78; Janta, "Caring for children in Europe: How childcare, parental leave and flexible working arrangements interact in Europe" (2014), RR-554-DG Employment, available at: <europa.eu/epic/studies-reports/docs/rr-554-dg-employment-childcare-brief-v-0-16-final.pdf>.

[180] Kenway, "Addressing in-work poverty", JRF Report (2008), available at <www.jrf.org.uk/sites/default/files/jrf/migrated/files/2269-poverty-employment-income.pdf>; Belfield, Cribb, Hood and Joyce, "Living Standards, poverty and inequality in the UK: 2015", Institute for Fiscal Studies Report (2015), available at: <www.ifs.org.uk/uploads/publications/comms/R107.pdf>, found that "nearly two thirds of children in poverty live in working families".

[181] EU Rights Project, cited *supra* note 9; see also O'Brien op. cit. *supra* note 137.

compromised without support to pay for child-care. As Currie has noted,[182] in *Saint Prix,* the Court failed to explicitly address sex discrimination in the free movement framework, or to assert sex equality "as a constitutional principle" bound up with free movement. Had the Court then taken seriously the need for free movement to be made equally accessible to men and women, then the way might have not been left quite so wide open for the authors of the new settlement to conjure up the concept of a benefit brake without a thought for the impact on gender equality.

If pregnancy carries the risk of having to stop work, and then face either destitution or departure, then the exercise of free movement becomes more perilous for women, and remains so for (at least) the duration of the four-year equal treatment freeze. The production factor labour model of migrant work is in many ways a throwback – it does not easily accommodate the world of atypical and varied labour market patterns, nor a world in which near on half of the working population are women, and in which pregnancy and child-care are normal, not avoidable or unwanted, factors of working life. A world in which we can say "*civis capitalist sum*" is not merely one of depersonalized free movement, emphasizing the economic rather than the political; it is one in which the model of the economic as applied to EU migrants is an anachronistic, patriarchal one, vested in ideas about productivity, de-valorizing reproductivity, and failing to speak to women as primary agents of migration or as heads of families.

The scheme of free movement has long been subject to feminist criticism, thanks to the emphasis placed on "traditional" economic activity,[183] and the exclusion of care work, and the reliance upon "traditional, ideologically-loaded and outmoded models of family relations".[184] However, once a woman was able to forge a "traditional" economic nexus, it was recognized that the concept of worker had been "interpreted generously … in a way that was 'generally beneficial to women'".[185] But that concession no longer applies. The patriarchal current that sacralized the "economic nexus" in the first place has now weakened it. A connection with the normal labour market is not enough; workers must fully emulate traditional male working patterns. The desire to extract maximum economic worth from migrants, through tinkering with the definitions of worker, jobseeker and retained worker, or through the more dramatic introduction of a benefits brake, reveals a tainted and inadequate idea of what the "economic" is. Nationality discrimination alienates low paid EU workers, and that alienation, stripping in-work benefits, in turn discriminates against female low paid EU workers. These are amplified versions of the effects of national exclusionary practices analysed in part 2. The crumbling of EU citizenship in the ECJ has created a vacuum that Member States are seeking to fill with projections of their own distorted versions of EU law. The new settlement shows how national manipulations of EU law can retro-distort the EU legal framework.

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[182] Currie, "Pregnancy-related employment breaks, the gender dynamics of free movement law and curtailed citizenship: *Jessy Saint Prix*", 53 CML Rev. (2016), at 543.
[183] Hervey, "Migrant workers and their families in the European Union: The pervasive market ideology of Community law" in Shaw and More, *New Legal Dynamics of European Union* (OUP, 1995); Everson, "Women and citizenship of the European Union" in Hervey and O'Keeffe (Eds.), *Sex Equality Law in the European Community* (Wiley, 1996).
[184] Ackers, *Shifting Spaces: Women, Citizenship and Migration Within the European Union* (Policy Press, 1998), p. 314.
[185] Ibid., p. 315.

6. Conclusion: Poverty, prejudice and social protection

An EU migrant worker might claim "I trade, therefore I am", but under the emerging model of capitalistic citizenship, the response is "do you trade enough?". Work is being displaced as the gateway to free movement rights. Those with sufficient means, or those who earn enough income, and have sufficient labour market bargaining power to protect them against the risk of being found to be in marginal work, or the risk of being reliant upon means-tested unemployment benefits, or the risk of needing to pay for child-care, have the freest movement. Rather than sitting at the apex of the migrant hierarchy, the migrant worker category is being disaggregated according to means and class.

The great promise of EU citizenship had only ever really taken hold in the ivory towers of academic imagination and the ECJ. With the exception of a few optimistic Advocates General,[186] it no longer has much purchase on either – Currie terms it a "safety net with ever gaping holes".[187] As a residual status it offered little to migrants seeking to claim a right to reside and entitlement to support.[188] But it offered an interpretative prism, through which the fundamental rights of migrant workers should be protected. Now, judicial fervour over EU citizenship has burned out. The EU has beaten a hasty and deferential retreat from the notion of financial solidarity between Member States' citizens. This creates a moral vacuum within the theory of free movement at EU level as notions of equal treatment become mutable and pragmatic, not fundamental and principled. The steepened cliff edges between work and economic inactivity mean that EU migrants could at best only claim recognition through and during work – their personhood is one of production factor labour. Recent ECJ case law redefines the Residence Directive, not as an expression of rights, but as an expression of limitations protecting Member States' welfare systems,[189] and dramatically expands the definition of social assistance benefits that can be withheld from EU migrants. The principle of proportionality has also taken a hit, with approval given to automatic benefit exclusions, and to restrictive time limits.

The licence being given at EU level to discriminate against those who are not workers makes the national processes by which people are defined as workers (free movement on the ground) all the more pivotal. The somewhat instrumental turn of EU law, more explicitly aligning rights with continued economic activity, might have been offset by the expansive approach historically taken in the ECJ; although you might only attain EU personhood through work, most people engaging with the labour market would qualify. But there is evidence of a divergence between EU theory and national practices, where Member States employ restrictive definitions, with a presumption that part time work is marginal. The risk of being found to be economically inactive is greater for those in precarious work, or work with variable hours and/or earnings, in short term, fixed term work, and/or on on-call or zero hour contracts. The more vulnerable the worker, the greater the risk of their being re-defined as economically inactive, and so losing protections, presenting the prospect of a financially excluded *working* underclass, reserved for those who do not do enough of the "right type" of work. The EU is seeing an increasingly flexible labour market, for which, we are told, we need an increasingly flexible labour force. Atypical work and zero hours work are on the

[186] Opinion of A.G. Wathelet in Case C-115/15, *NA* (pending), para 45; A.G. Szpunar has stated that the Court had made citizenship of the Union an "effective reality" through a "vast jurisprudential endeavour … carried out progressively and in close cooperation with national courts … cementing the fundamental status of citizen of the Union"; see Opinion of A.G. Szpunar in Case C-165/14, *Rendón Marín* (pending), EU:C:2016:75, para 110.
[187] Currie, op. cit. *supra* note 182.
[188] O'Brien, op. cit. *supra* note 1.
[189] Nic Shuibhne, op. cit. *supra* note 53.

rise.[190] But these developments are not matched with enhanced security; they steepen the precipice and deepen the gaps.

Equal treatment rights are being reserved for those in the privileged position of work with regular hours and pay, while retention of worker status is harder for those on casual contracts, and for those who struggle to produce evidence of the "genuineness" of their prior work. Those who fall to be considered "mere" jobseekers must be able to rely upon means of their own, since they are being excluded from means-tested benefits, and are being elided with benefit tourists. Wealth and class are ascending as presiding principles of free movement – and not just for those struggling to demonstrate that they should be considered workers. Those who *do* meet national thresholds are in considerably more precarious positions than own State nationals. The risks attendant upon loss of worker status have impacts upon health, autonomy and safety – placing workers at greater risk of exploitation by employers, and stripping female workers suffering domestic abuse of assurances or alternatives. The EU's failure to offer support or protection to the working poor is reminiscent of the process described by Marx in which workers are alienated from the economic worth of their labour.

The disaggregation of rights and freedoms according to class, the increasingly explicit alienation of EU migrants, and the ascendance of the wealth principle, all result in national distortions and degradations of EU free movement law tainting EU law at source, as is evident in the proposed "emergency brake" on in-work benefits. The very idea of the brake mechanism attacks the foundations of Article 45 TFEU. The proposal accepts that there is such a thing as "too much" free movement, and the Commission's declaration suggests that the UK has already reached that stage. It accepts the idea of Member States insisting on their own, potentially arbitrary limits, and it responds to such insistence by giving a licence to directly discriminate, in spite of case law making clear that limitations on Article 45 cannot be invoked to justify discriminatory treatment against people admitted to the labour force. EU nationals with low incomes would be treated as an underclass, whose labour is readily extracted and exploited, to the detriment of the pay, conditions and employment prospects of the workforce as a whole.

A benefit brake that directly discriminates on the grounds of nationality represents labour alienation – separating the worker from the economic worth of their labour. This process of alienation in turn discriminates, since it has particularly acute impacts upon women in low pay. During a lengthy benefit ban, lone parents (who are likely to be women) may not be able to afford to work, because they need in-work benefits to meet child-care costs. The simple capacity for pregnancy becomes another factor making EU migrant women's lives more precarious. Removing access to in-work benefits solely because of nationality, no matter how much an EU national works, or has worked in the last three years and eleven months, entrenches in-work poverty on directly discriminatory lines. In practice, it may do so for longer than four years, as some migrants will have difficulty proving that they have been in continuous work meeting pay or hours thresholds for four years (women are

[190] As is "very" atypical work: European Foundation for the Improvement of Living and Working Conditions, "Very atypical work: Exploratory analysis of fourth European Working Conditions Survey", Background paper EF/10/10/EN, available at: <www.europarl.europa.eu/meetdocs/2009_2014/documents/empl/dv/studyveryatypicalwork_/studyveryatypicalwork_en.pdf>; Work and Pensions Select Committee, "Trends in part-time working and short-term employment contracts and the impacts on benefit claims", Labour market seminar, 26 Feb. 2014, at 17, available at: <goo.gl/1LyNvh>; Department for Business, Innovation and Skills, "Consultation: Zero hours contracts", Dec. 2013, at 5 and 11, available at: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/267634/bis-13-1275-zero-hours-employment-contracts-FINAL.pdf>.

more likely to be in "very" atypical work, according to a Eurofound study).[191] Periods may be discounted, and the clock restarted several times.

The re-defining of migrant work, the narrowing of other categories of protection, and the proposal for a benefit brake, all serve the same depersonalizing trend of getting maximum, narrowly defined, economic worth from EU nationals. Since evidence to back up the claims that EU migration is unsustainable, or putting "excessive pressure on the proper functioning of public services",[192] is in short supply, there is strong reason to suppose that these developments are fuelled by political concerns and prejudice.[193] Nationality is resurgent as a ground for lawful discrimination, and patriarchal capitalism provides the framework for separating desirable from undesirable workers. As our fundamental destiny ebbs away, as the rights attached to work are eroded and confined to well-resourced workers, and as our societal tolerance of in-work poverty of non-nationals is more loudly articulated in law, equal treatment is becoming the exception to the general rule of exclusion. If we wish to tackle spiralling inequality in the EU,[194] it is necessary to tackle the divergence between the theoretical rules propounded at EU level and the national practices curbing EU rights. But before the EU can credibly challenge Member States, it must reclaim the moral dimension of its own laws, by adapting systems of protection to an increasingly "atypical" workforce,[195] confronting the promotion of non-national in-work poverty, and reversing the reconstruction of free movement rights as the corollary of class.

[191] European Foundation for the Improvement of Living and Working Conditions, op. cit. *supra* note 190.
[192] As specified in Section D(2)(b) of the Decision, cited *supra* note 11.
[193] Given the electoral success in the UK of the Eurosceptic UK Independence Party in the 2014 European elections; see European Parliament, results of the 2014 European elections, Results by country: UK, available at <www.europarl.europa.eu/elections2014-results/en/country-results-uk-2014.html >.
[194] Commission, "What to do about rising inequality", 2 June 2014, available at: <ec.europa.eu/programmes/horizon2020/en/news/what-do-about-rising-inequality>; GINI, "Growing inequalities impacts: Summary of results", Sep. 2013, available at: <www.gini-research.org/system/uploads/543/original/GINI_1-2_ResultsOutput_201309.pdf?1380620989>; Fredriksen, "Income inequality in the European Union", OECD Economics Department Working Papers No. 952, ECO/WKP(2012)29; Oxfam, "A Europe for the many, not the few: Time to reverse the course of inequality and poverty in Europe", 206 Oxfam Briefing Paper, 9 Sept. 2015, available at <www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp206-europe-for-many-not-few-090915-en.pdf>; Allmendinger and Von Den Driesch, "Social inequalities in Europe: Facing the challenge", Berlin Social Science Center (WZB) Research Area Discussion Paper 2014-005, available at: <www.wzb.eu/sites/default/files/u6/p14-005.pdf>.
[195] "Increased non standard work can lead to more inequality"; see OECD, cit. *supra* note 152.