

ANOTHER EUROPE IS **POSSIBLE**

Brexit and immigration: **prioritising the rights of all workers**

A policy briefing from Another Europe is Possible
by Zoe Gardner and Luke Cooper

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CONTENTS

4	Introduction
5	Executive summary
8	Recommendations: the case for free movement+
10	What has been proposed?
12	Key issues in the debate
	<i>Significant cuts to net migration are economically unviable</i>
	<i>EU citizens, Tier 3 and the importance of unskilled labour</i>
	<i>Human rights, cultural diversity and UK nationals in the EU</i>
14	Free movement and labour standards in the UK
	<i>What does a free movement agreement with the EU mean in practice?</i>
	<i>How does EU free movement protect against discrimination and exploitation?</i>
	<i>How has low/unskilled EU migration impacted the UK labour market?</i>
	<i>What kind of work have EU citizens undertaken in the UK?</i>
17	Migrants with fewer rights: more vulnerable to super-exploitation
	<i>Free movement ‘with a job offer’</i>
	<i>Time limited and employer sponsored visa for unskilled/low skilled migrants</i>
	<i>The risk of creating a large undocumented labour market</i>
	<i>Abolishing a ‘free choice of employment’?</i>
20	Case studies
	<i>Qatar World Cup preparations 2020</i>
	<i>Guest worker systems in Canada and Germany</i>
	<i>Domestic Workers Visa Scheme for non-EEA nationals</i>
	<i>‘Posted Workers’ in the EEA</i>
24	Conclusion and recommendations
	<i>The case for a free movement+ system of rights and protections</i>
26	Footnotes and references

INTRODUCTION

Manuel Cortes General Secretary, TSSA



By the end of 2016, Britain's population stood at 65.6 million. In the year end to March 2017, the Office for National Statistics showed the net migration of European Union citizens to the UK was just 127,000.

So net EU migration currently stands at a minuscule 0.19 per cent of the total population, and that figure is expected to fall even lower by the time the next EU migration figures are published. Yet without the skills, hard graft and dedication of these workers we would all be poorer, and public services like our NHS would be on the brink of collapse.

A failure to examine the facts surrounding free movement, and the vital contribution workers from across the EU make, has led some sections of the left to involve themselves in a debate which pitches worker against worker.

That's why it's a privilege to introduce this policy paper. Another Europe is Possible lay out the benefits of freedom of movement as it exists and develop the much needed case for 'free movement+'.

This improves on the current set up and shows how EU workers with rights to collective bargaining can benefit all UK workers. It represents the beginnings of a coherent strategy to resist the Tory-led Brexit that is already proving to be an economic and social disaster for working people. And it provides a programme for positive migration rights and a blueprint for a better world for all workers.

The Conservatives have stated that free movement will end by the end of March 2019. This is already damaging both our living standards and public services, as EU citizens look less and less likely to come to Britain. Many of the people most concerned about immigration – those left behind by globalisation – are the first to be impacted by the absence of these workers from our public services and vital food industries. In July 2016, 1,304 EU nurses came to work in the UK. That number crashed to just 46 by April 2017. The Health Foundation report a

shortage of 30,000 nurses in England alone. Our NHS simply cannot afford restrictions on free movement.

Other sectors of the British economy – from agriculture, to food and drink, hotels and restaurants, and more – are equally dependent on EU workers.

The Labour Party's marvellous 2017 manifesto 'For the Many' signposts the way to a new economic settlement to ensure no one is left behind. Migrants are being made the scapegoats for a crisis in public services, wages and housing – but it is the Tories' post-Brexit plans for immigration that stand to make our country poorer and even more divided. Wages will decline further as more and more workers will be left with fewer rights and lower pay.

Many Tory Brexit enthusiasts look to the US for inspiration. There, from southern California to New England, millions of so-called 'illegals' toil hard without rights to keep the biggest economy in the world motoring on.

I believe that for all their weasel words, ultimately the Tories are indifferent to immigration provided it gives bosses a pool of cheap labour to boost profits, a task which, so far, they have attempted to achieve through deregulation of the labour market.

Perhaps some of them even consciously think of the Brexit process as a tool to create an underground, black market economy in Britain, in which the penalty for standing up to your boss is deportation.

The antidote to this agenda is not the restriction of free movement, but an end to workers' exploitation. We need a properly regulated labour market and a trade union in every workplace.

The Tories and bosses seek to divide us. Our job is to create unity on the basis of class, not national origin.

In this report, Another Europe is Possible stands up to reactionary Brexit by building on Marx's original vision of a world without borders where workers of all lands unite. And, like Marx, they do not stipulate visa requirements as a prescription for unity. They are right.

Without the skills, hard graft and dedication of EU workers we would all be poorer, and public services like our NHS would be on the brink of collapse



EXECUTIVE SUMMARY

Britain currently has two parallel systems for economic migrants. One system covers migrants from the European Economic Area (EEA: all other EU states, plus Norway, Iceland, and Liechtenstein) and Switzerland. Citizens of these states have the right to work and study in the UK. This right is reciprocated for UK nationals in the EEA and is widely referred to as ‘free movement’. The other system covers non-EEA nationals from the rest of the world and is a points-based system with various different ‘tiered’ categories of visa. This system generally prioritises those with high incomes or skilled workers.

Key sectors of the British economy are dependent on a regular supply of unskilled migrant labour. Cutting off this supply would cause serious supply-side issues in the labour market. For instance, there would not be sufficient workers to undertake seasonal jobs such as fruit picking, leading to a decline in the economic output of the sector. Because these workers also consume goods when they are in the UK, there would be a further knock on effect to other parts of the economy. Migrants also make a significant net contribution to the public finances. Reducing the number of migrants by cutting off opportunities to come and work in the UK would therefore have very serious negative impacts on the UK economy. By the same token the number of

migrants coming to the UK will also reflect levels of economic demand. When the economy is growing demand will be high and when it is contracting there will be reduced demand and a lower number of immigrants coming to the UK.

Free movement is a long-standing cornerstone of the UK economy on which employers depend. Regular inflows of both skilled and unskilled labour are critical to addressing shortages in the UK labour market and EU citizens have played a key role over recent decades in fulfilling these needs, contributing as equals to the UK workforce and increasing the cultural diversity of British society. While EU citizens often take up skilled positions, they have been particularly important in the unskilled labour market. This is because under the current visa system for non-EEA nationals used by the UK government it is almost impossible for employers to recruit outside the EEA for these roles. Because the UK economy needs low/unskilled migration in order to fill labour gaps employers are dependent on EEA nationals to meet these shortages. As a consequence as many as three in four migrants from the EEA could not meet the current requirements of the UK points system for non-EEA nationals.

The future of low or unskilled immigration is a critical part of the UK-EU negotiation with huge ramifications for major sectors of the UK economy.

For workers, free movement provides opportunities to live and work in other EEA countries without facing major economic or administrative obstacles.

EEA citizens living in the UK (and, conversely, UK citizens living in the rest of the EEA) have a series of social and political rights, e.g. to not be discriminated against in the labour market and a conditional right of residency.

Under the current system these social and civil rights are relatively strong. They not only protect migrant workers but also put up a barrier (which is far from insurmountable but real) to the super-exploitation of these workers. This is especially important in the British labour market which has some of the most restrictive anti-trade union laws in the world. Standards for employment rights also tend to only observe the minimum EU requirements and in recent years the costs of pursuing claims through the tribunals system has risen.

Policy-makers are currently discussing a post-Brexit immigration policy. Positions vary from continuing a similar system to the one we have at the moment to various levels of restrictions on the rights of EU citizens to work in the UK (from relatively moderate restrictions to banning unskilled migration).

Migrants with fewer rights will be more vulnerable to super-exploitation. Whenever and wherever this happens, *all* workers suffer.

A recurring proposal has been the use of time-limited visas for unskilled workers to meet the needs of specific sectors. These temporary worker visas would fill gaps in the economy and go alongside the end of a system of free movement. A currently suspended category of the points based system for non-EEA nationals, 'Tier 3', is based on this idea.

Not only is this visa time-limited but it is also tied to specific employers that act as the guest workers' sponsor. Workers would not therefore have a right to move between employers without risking deportation from the UK, significantly increasing their vulnerability to super-exploitation. These workers would not have the protections that EU citizens currently do in the system of free movement, which includes a conditional right of residency.

Case studies clearly demonstrate the risks inherent in these types of visa system. They place too much power in the hands of the employer sponsor and violate important principles of a free labour market such as the right to move between jobs. As a result, the risk of super-exploitation is high. This is the conclusion the report draws from analysis of the following evidence:

- Qatar World Cup 2022
- Guest worker systems in Canada and Germany
- UK Domestic Workers Visa for non-EEA nationals
- 'Posted Workers' in the EEA

This system could have the unintended consequences of boosting regressive practices in the UK labour market, which free movement offers some protections against (even though it is often wrongly associated with these methods). For instance, it could strengthen foreign only recruitment practices for the new guest worker schemes and empower the international agencies that have been accused of deliberately using migrants to undercut UK workers.

By increasing the vulnerability of migrant workers to exploitation, the return of Tier 3, or a similar system of guest worker visas, could create downward pressure on the pay and conditions for other workers in the labour market.

This is particularly concerning given the relatively weak workplace rights and extremely poor trade union rights that are features of the UK labour market.

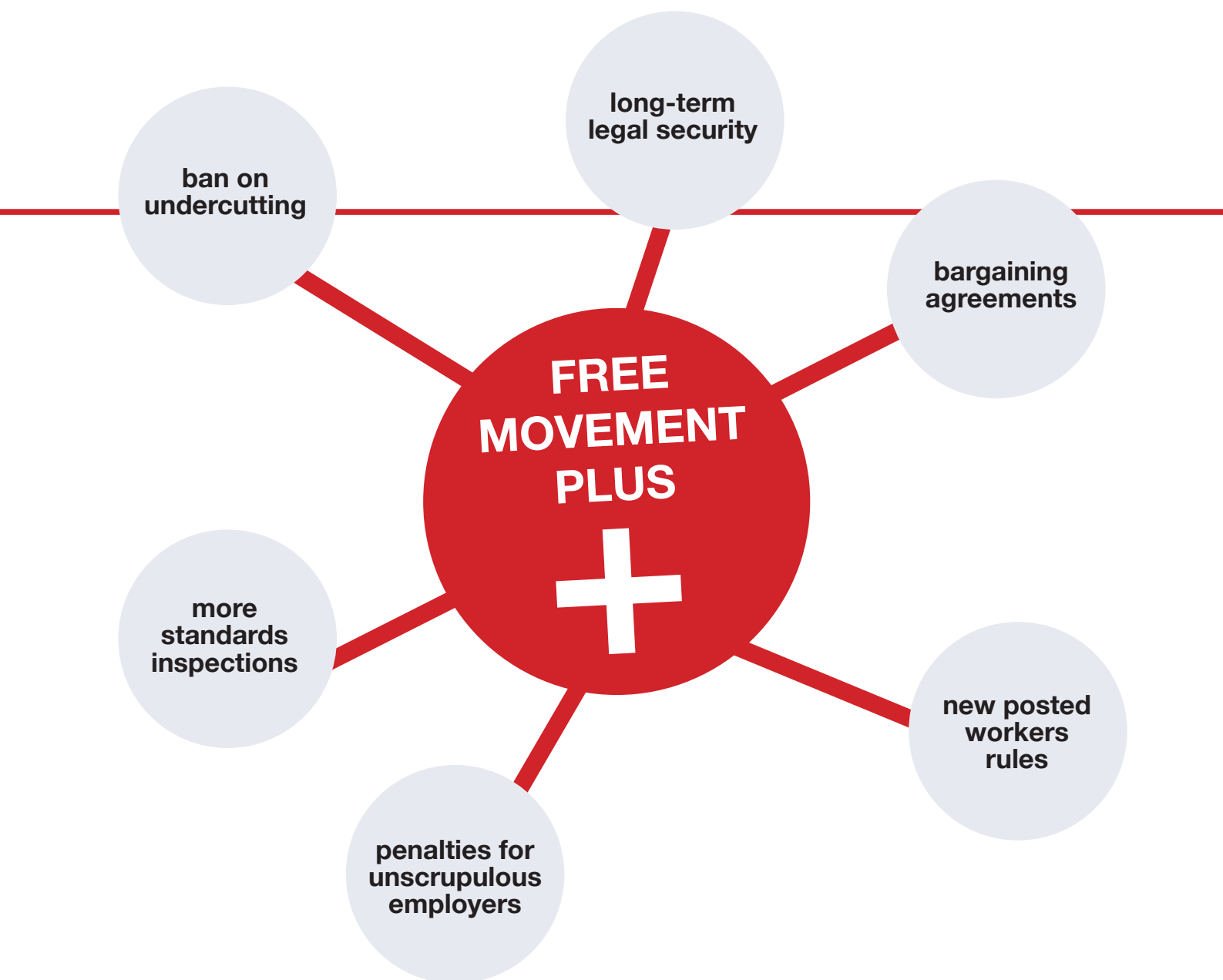
RECOMMENDATIONS: THE CASE FOR FREE MOVEMENT+

Following a review of this evidence the report recommends retaining the *rights based* system of free movement. However, in order to ensure unscrupulous employers do not exploit it better workplace protections are needed. This can primarily be achieved through new UK legislation.

We call this system a **free movement+** approach, where the ‘plus’ indicates how we should prioritise a strengthening of social rights and protections for *all* workers. This is particularly important in the UK labour market context.

The report recommends the following reforms:

- Using UK legislation to establish sector-by-sector bargaining agreements in industries dependent on unskilled migrant labour. These agreements would be negotiated between representatives of employers and trade unions in the sector. The aim would be to establish minimum standards for pay and conditions for all workers.
- An EEA-wide review of the Posted Workers Directive¹ with the aim of establishing an anti-undercutting principle and a formal legal position for trade union negotiated agreements in sectors using posted workers.
- Reinforcing the non-discrimination principle by banning ‘foreign only’ recruitment practices and agencies, as well as the deliberate use of migrant labour to undercut the pay and conditions of UK workers.
- Greater resources and powers for the inspection of sectors with large numbers of low/un skilled workers to ensure standards are maintained.
- A system of strictly enforced penalties for unscrupulous employers failing to maintain the minimum standards of care for their workers.



- In order to provide the greatest possible reassurance to EU citizens currently living and working in the UK and to ensure a the long-term legal security of new immigration arrangements with the EU, this rights based system should be administered with reference to the EU Fundamental Charter of Rights and under the jurisdiction of the ECJ.

These policies could complement other measures (e.g. banning of zero hour contracts, more rights for insecure self-employed workers, etc.) that have been raised to moderately tighten the excessively flexible UK labour market. The aim is to rebuild public trust in immigration by establishing a stronger set of social protections for all workers regardless of their nationality or status.

The economic and cultural benefits of immigration for the UK have been profound and the risks associated with cuts to migrant numbers are severe. By taking steps to reform our system of labour rights we can ensure the social benefits of migration are shared more equally across the British economy.

WHAT HAS BEEN PROPOSED?



There is a considerable amount of uncertainty on what exact form the UK immigration policy with the EU/EEA will take following Brexit. At the time of writing we know that a new immigration bill will appear in the two-year timeframe of the current Queen's speech, but not the specific parliamentary timetable. Because the new immigration rules will inevitably be affected by the EU negotiations themselves, most immediately with regard to the rights of EU citizens in the UK and UK citizens in the EU, this adds further to the uncertainty. The government have however made clear their overall aim is to seek to end free movement and some documents have been leaked.² Across the political spectrum a range of policy have also been proposed. These are some of the key policy positions:

- **Continuing the current system of free movement.**³ This would be the simplest to implement administratively because it does not require a new immigration system for EU and EEA nationals. Because a precedent exists for a similar arrangement with the EEA states and Switzerland

it would be relatively simple to negotiate politically with the EU. It would likely be combined with continued membership of the single market and some form of legal oversight of the European Court of Justice (ECJ).⁴

- **Time-limited ('guest worker') visas for EU citizens.** These would provide EU nationals with the right to work in the UK for a limited period.
- **Employee sponsorship.** This would mean EU citizens would need the sponsorship of an employer or proof of a job offer before having their right to work in the UK accepted.
- **A complete ban on unskilled migration to the UK.** One of the more extreme proposals made in the current policy debate.
- **Free movement with a job offer.** This would allow EU nationals to activate their free movement rights if they could show they have a job offer.



Leaked Home Office report (Sept 2017)

Free movement is a rights-based system. This means that EU/EEA citizens, including UK citizens when in other EU/EEA countries, all have the same right to work and study in other EU/EEA countries without being discriminated against. An example of an alternative system to this is the very complex rules that the UK applies to those from non-EEA countries seeking to work here. This is sometimes referred to as a **points-based system** with various visa categories based on different skills levels.

Requiring employee sponsorship is already necessary for skilled workers coming from non-EEA countries ('Tier 2'). Employers have to show that the sponsored worker is meeting a skills shortage and must be formally licensed by the government as a recognised agent.⁵ A system of employee sponsorship also exists under the currently unused Tier 3 visa category for unskilled non-EEA nationals, which contains some extremely regressive limits on the rights of migrant workers (see below). Some have suggested using a Tier 3 style visa system for EU citizens.⁶

There are clear similarities between the suspended Tier 3 visa category and some of the proposals made in the Home Office policy document leaked in September 2017. However despite running to 82 pages the document remains very vague on the specifics of the policy that they intend to introduce. The government have also refused to comment on whether this reflects the current thinking of the cabinet.

Key points in this document are:

- The use of time limited visas:⁷
 - Suggestion of 3 to 5 years for skilled workers;
 - Suggested up to 2 years for unskilled workers;
 - Suggested introduction of some kind of points based system for EU migrants with stricter time limits for unskilled migrant labour.
- Employer sponsorship and having to demonstrate proof of a job offer.⁸

KEY ISSUES IN THE DEBATE

Significant cuts to net migration are economically unviable

The Conservative Party have maintained a manifesto commitment, to which they have been formally committed since 2010, to radically reduce the numbers of migrants coming to the UK in order to bring annual net migration increases down to the tens of thousands. It is difficult to see how a reduction on this level would be viable without bringing about significant levels of harm to the British economy. Quarterly net migration figures show that immigration of non-EEA citizens using the points system tends to exceed, or be approximate to, the number of EU migrants. For instance, in the twelve months running up to the June 2016 EU referendum net non-EEA immigration to Britain was 196,000 compared to 189,000 for non-UK EU citizens using their free movement rights.⁹ Given that levels of non-EEA immigration are currently in excess of their net migration target, achieving the target would require both the end of free movement with the EU and significant new restrictions on non-EEA migration.

A curtailment of unskilled labour in this way could bring about very serious supply-side issues within the labour market potentially risking the viability of whole sectors of the British economy. It would also significantly increase the bureaucratic and administrative burden on employers seeking to fill skilled roles with EU workers.

These problems would be amplified by the more extreme versions of this policy. Leave Means Leave, a right wing pressure group that has the backing of some Conservative MPs, aims to reduce net migration inflows to 50,000 per annum. This would represent an 80% reduction on the 2016 figure of 248,000.¹⁰ To achieve this a five-year ban on all unskilled migration would be introduced. The only sector they specifically offer an opt out from these arrangements to would be UK agriculture, with a special temporary workers' visa regime limited to six months and tied to a specific job, i.e. no movement between employers across this time period would be allowed. Even in this case the number of visas proposed (50,000) by the campaigning group¹¹ would be below the current level of seasonal migration into this sector, which has been estimated at around 80,000 with Brexit related shortages already reported.¹²

The Office for Budget Responsibility has estimated that merely moving net migration to below 200,000 per year would lead to a cumulative loss in tax revenues of £17.3bn by 2020-21 - a figure that would be expected to rise significantly in the event of these more severe reductions.¹³ All workers would feel the negative economic impacts of this policy through a reduction in the overall demand for labour in the economy. British workers should not therefore expect to experience uplifted pay and conditions, or a reduction in labour market competition, as the overall numbers of jobs available is likely to be significantly depressed following the fall in economic demand.

EU citizens, Tier 3 and the importance of unskilled labour

Our focus on unskilled labour in this report reflects the role that EU citizens have played in meeting the demand for low or unskilled labour in the UK. The Exiting the EU Committee has estimated that up to three quarters of the current EU migrant labour force would not meet the more restrictive requirements of the various other tiers of UK visa open to non-EEA nationals.¹⁴ If the Tier 3 visa category was unsuspended, workers from outside the EEA could fill these labour shortages, but they would have far fewer rights than EU citizens utilising free movement. Employers sponsoring workers under this system are responsible for their accommodation and return overseas. Meanwhile, for the migrant workers these visas give them no right to move employer, or stay in the UK when their visa expires (see below).

This poses a major problem for critics of free movement on the left.¹⁵ They have alleged that ending the free movement agreement we have as members of the EU would boost the pay and conditions of British workers. As we outline in this report, however, workers who have a less secure right to reside on time limited or employer/sector specific work permits may well be more vulnerable to exploitative work practices, not less. Because of the potential vulnerability of these workers to super-exploitation, the use of these visas could put downward pressure on the pay and conditions of British workers. This means the key justification put forward by progressives for ending free movement rights does not stand up to serious scrutiny.

It is hard to see how reducing migration to the tens of thousands would be possible without significant harm to the British economy

Workers on visas from outside the EEA could fill labour shortages, but would have far fewer rights than EU citizens utilising free movement

When free movement is explained as giving British citizens the freedom to work and study in other countries it wins support even from Leave voters

Human rights, cultural diversity and UK nationals in the EU

Any discussion of immigration must recognise the real lives impacted by policy changes and not just consider it in narrowly economic terms. EU citizens have become a central part of twenty-first century British society contributing in numerous small and large ways to the cultural diversity of our towns and cities. Many of these citizens have felt vulnerable as a result of the UK's decision to leave the EU, the rise of hate crime that followed the referendum and the uncertainty that exists over their current status. The position the UK comes to over its EU immigration policy will also require negotiation. This will not only inevitably link it to other parts of the UK-EU Brexit talks, such as access to the single market, but also have a reciprocal effect on UK nationals living in EU states (or those wishing to do so in the future).

The commonly held assumption that those supporting the existing system of free movement cannot hope to win the public to this position in the post-referendum climate has also been challenged by recent evidence. When free movement is explained as a set of reciprocal rights giving British citizens the freedom to work and study in other countries, majority support has been recorded in opinion polls.¹⁶ One piece of polling even found that 60 per cent of Leave voters support free movement when the question explains what it means for British citizens.¹⁷ This suggests a rights-based approach can win more support than is commonly assumed.

FREE MOVEMENT AND LABOUR STANDARDS IN THE UK

What does a free movement agreement with the EU mean in practice?

Freedom of movement has been widely characterised within the UK debate as the unconditional right of any EU citizen to come and go as they please to the UK, including unfettered access to the labour market, as well as to welfare, benefits and social housing. The reality, however, is not quite so dramatic, with the right of residence or to work in other member states under EU treaties qualified in many key respects. These qualifications on the rights of EU nationals exercising freedom of movement to live and work in other member states¹⁸ can be summarised as follows:

- Citizens are entitled to travel to another Member State for a period of up to 3 months. During this period, they do not have an automatic right to claim state support.
- After the initial 3 months, citizens are permitted to stay if:
 - They are employed, self-employed, or studying at a recognised institution;
 - Or, they have comprehensive sickness insurance and have sufficient resources to ensure that they or their family do not need to rely on welfare in the host-state;
 - Or, they have comprehensive sickness insurance and are family members of EU nationals fulfilling the above criteria.
- If the EU citizen becomes unemployed while exercising these rights, they have the right to remain as a jobseeker for up to 6 months providing they have a 'genuine chance' of finding new employment. After this time, their right to stay is dependent on an assessment of their likelihood of finding work, and their access to jobseeker benefits may be curtailed.
- After 5 years of residence in compliance with the above conditions, EU citizens may apply for permanent residence.
- EU citizens may also be denied entry to another member state on an individual basis on grounds of public policy, public security or public health.

How does EU free movement protect against discrimination and exploitation?

Crucially, however, EU nationals who fulfil the criteria outlined above are protected from discrimination, and must be treated no differently from nationals of the host state. This means that they cannot be taxed differently, or excluded from employment on the basis of their nationality, except in specifically exempted public-sector jobs.

Neither can they be denied equivalent levels of state support to the native population so long as they have fulfilled the above conditions. They are also able to take up employment easily and flexibly, without bureaucratic constraints on themselves or their employer. These measures are intended to ensure the impossibility of creating an “underclass” of EU workers – that is, a group who have the right to live in a country but are subject to exploitation due to a lack of protection of their employment and social rights.¹⁹

How has low/unskilled EU migration impacted the UK labour market?

As the TUC have observed one of the most popular perceptions of the impact of immigration on the labour market lies in the belief that it negatively affects wages, conditions or unemployment.²⁰ There is however little evidence that this is the case.

Studies generally agree that there is no causal relationship between unemployment levels and increases or decreases in immigration.²¹ In relation to wages, there is however some evidence that increased immigration may have a small positive effect at the upper end of the income distribution and a small negative impact at the lower end. The Migration Observatory at Oxford University published one of the more negative studies. They found wages for the bottom 5 per cent of workers on the income distribution could be reduced by around 0.6 per cent for each one 1 per cent increase in immigration levels.²² However, the Centre for Economic Performance at the London School of Economics found there was no correlation between levels of immigration and UK wages, including amongst unskilled and low skilled workers.²³ This has led the TUC to describe the impacts on the low and unskilled component of the labour market as at most ‘very nugatory’.²⁴ However they added that

looking at overall averages is perhaps unhelpful given that there are a minority of specific instances where migrant labour has been deliberately used to undercut conditions:

‘There are still pockets where low-skilled workers have been brought in from the European Union specifically to undermine terms and conditions in a very particular sector. We would say there are other ways of addressing that than broad-brush approaches to the economy generally.’²⁵

Often these practices are undertaken under the auspices of the EU Posted Workers Directive, which tends to be wrongly conflated with workers activating their rights under free movement. As we discuss below these workers do not have the same rights as those drawing on EU treaty rights under free movement and, within the UK context of weak employment and trade union protections, can be vulnerable to exploitation.

Free movement rights are very important to the British labour market because of the weak rights and social protections for workers that exist in UK domestic law. Indeed, the UK has some of the most restrictive anti-trade union laws in the world²⁶ and standards for employment rights also tend to only observe the minimum EU requirements.²⁷ Since 2013 new rules introduced by the Conservative have also meant those seeking redress through the employment tribunal system have faced huge costs (but in a recent judgment by the Supreme Court these court fees were held to be unlawful).²⁸

What kind of work have EU citizens undertaken in the UK?

Due to the difficulties faced by employers seeking to fill positions requiring unskilled labour with workers from outside the EEA they have tended to recruit citizens from inside the single market. In the year ending September 2016 EU citizens accounted for 76% of migrants working in low/unskilled jobs.²⁹ Some key sectors are particularly dependent on the use of unskilled or low skilled labour. According to the Institute of Public Policy Research, EU migrants are critical to the labour supply in a range of sectors, including making up over 40% of all packers and bottlers, over 20% of fork lift truck drivers, and

over 25% of cleaners (including managers and supervisors).³⁰ Indeed, agriculture, manufacturing, and hotels and restaurants are especially reliant on a regular inflow of new migrants from the EU.³¹

As a result of decades of free market economic reform in Britain the conditions faced by workers in low or unskilled jobs can often be exploitative and insecure. The Community union have shown that the inexcusable use of zero hours contracts by British employers is heavily concentrated in lower pay occupations 'with nearly 60% classified as unskilled or in caring, leisure, and other service occupations'.³² These conditions reflect a failure of successive UK governments to address poor labour standards and have no relationship to EU policy or immigration rules. They also affect both British workers and those from other EU states equally and should not be confused with the impacts of migration.

Similarly, the fact that the UK labour market has looked to EU citizens to meet the demand for jobs in low and unskilled roles should not be read as implying that all EU citizens in the UK undertake this kind of work. They also make up a central component of the skilled labour force, accounting, for example, for some 10% of all doctors in the English NHS.³³ The potential impacts of Brexit on the skilled labour market are also significant with many workers now reconsidering their life in the UK. The law firm Baker McKenzie undertook

a survey of EU nationals working at large private sector firms (FTSE 250 or with revenues of over £50 million) and found that 56% intend on leaving the UK before the outcome of the Brexit negotiations are known and 70% felt more vulnerable living here than they did previously.³⁴ A severe brain drain created by the reasonable perception that the post-Brexit UK has become a less welcoming place for EU citizens is already underway and threatens both the cultural diversity of British society and the future prosperity of the UK economy.

Our focus on the unskilled labour market in this report seeks to address directly key themes in the current UK immigration debate. This is not to legitimise its multiple misperceptions but to interrogate whether a strict visa-based migration system could seriously be expected to deliver the uplift in pay and conditions for the poorest UK workers, which has often been promised. The role EU citizens have played in the low skilled labour market simply reflects the severely diminished opportunities employers have to bring in unskilled workers from outside of the EEA as a result of current UK immigration rules. There is a clear case for reviewing the UK's current harsh immigration regime for non-EEA nationals (particularly the obstacles it puts in the way of family reunion) but these issues lie outside the terms of reference for this report.



MIGRANTS WITH FEWER RIGHTS: MORE VULNERABLE TO SUPER-EXPLOITATION

Two key proposals have featured regularly in the UK policy debate: free movement ‘with a job offer’ and time limited employer sponsored visas (usually referred to as a guest worker system). Here we consider these proposals in more detail before reviewing case studies that highlight the dangers that a guest worker system invariably entails for the social rights of migrant workers with insecure status.

Free movement ‘with a job offer’

While the specifics of this potential proposal have still not been fleshed out, in broad brushstrokes there are at least two major issues with this policy:

Little substantive change. As we have shown at present free movement rights are not unconditional, but subject to restrictions. Currently EU citizens can travel unrestricted to other EU countries and live for up to three months for any purpose. However, after this initial three month period the right to move is more conditional with requirements, such as being in work, study, running a business, or being economically self-sufficient in some other way (e.g. with pension), then kicking in. Despite suggestions often made in the British media, there is no right to move to another EU state and claim social security benefits. Importantly, no one has suggested that the new immigration policy should restrict the freedom of EU citizens to travel to the UK and live visa-free for up to three months. This means they could use this period to look for work in the same way that they currently do under the existing system. Once they had a job offer they would activate their longer-term free movement rights in the same way that they do under the current framework. This change therefore seems more about language than anything concrete and substantial.

Unintended consequences. Shifts in language can be important however, particularly by leading to changes in behaviour by EU citizens seeking to work in the UK. If EU nationals believed that they had to have a specific promise of work before they arrive, then it could lead to cultural changes in how they go about seeking employment. One possible consequence is that they may be more likely to approach an international recruitment agency. An

important concern in the current system has been the use of these organisations to carry out foreign only recruitment practices for specific sectors. Even though on average migration in the low skilled sector has not been shown to significantly drive down pay and conditions, there are specific instances where this has undoubtedly occurred through the direct use of cheaper foreign labour to undercut UK workers pay and conditions. This has led British trade unions to call for a ban of these ‘foreign only’ recruitment practices as unfair and discriminatory. The TUC have already warned that the ‘free movement with a job offer’ system could carry with it the unintended consequence of strengthening this type of recruitment practice.³⁵

Time limited and employer sponsored visa for unskilled/low skilled migrants

Across the political spectrum the use of time-limited visas for low and unskilled migrants has been suggested. While the specifics of the system are still unknown, the conditions put in place on the (currently suspended) Tier 3 visa category for unskilled non-EEA nationals provide some indication of how it might operate in practice.

In *Controlling Our Borders; Making Migration Work For Britain*³⁶ the Blair government outlined the following strict conditions for the use of this visa category:

Strict employer or agency control. The migrant is placed under the strict tutelage of what the Blair government referred to as ‘bona fide operator or agent’, which would be responsible for sponsoring the migrant worker, overseeing the specified employment, ensuring they stay in the specific job for which the visa was granted, and for the return home at the end of the period.

This gives a huge level of political and economic power to the employer and undermines the principle of a ‘free labour market,’ which states that workers should have the ability to move from one job to another without obstacle or hindrance.

Empowering recruitment agencies. Under the suspended system the licensed organisation did not have to be the operator, but could be an agent working under contract, such as an international

recruitment agency.

By allowing an agent to become the sponsor and controller of the migrant labourer this would further legitimise and encourage employment practices often associated with the erosion of pay and conditions of workers, in particular complex pyramids of outsourcing and the overseas recruitment of international workers deliberately to reduce costs and erode existing labour standards.

Quota based. The system would see different sectors of the UK economy and individual agents making 'bids' for the right to bring in a certain number of unskilled or low skilled migrant workers on an annual basis.

The system would be complex to administer and highly bureaucratic. Despite many supporters of Brexit being committed to what they see as a 'free market' economics, this would introduce a level of state planning in the distribution of the labour supply which is associated with very 'statist' economic systems.³⁷

'Return arrangements'. The Tier 3 visa was closed to nationals from states 'without adequate returns arrangements' with the UK.

This underlines the time-limited nature of the visa and the potential exploitation of workers without a right of residency or the freedom to move between employers.

No right to family reunion. Under the suspended Tier 3 visa family dependants were unable to move with the migrant worker.

This puts the visa tier at odds with the principle of family reunion in human rights law, which recognises that placing legal obstacles in the way of families living together can be a cause of distress and unnecessary suffering. Any visa category for unskilled migrants which rules this out could therefore be open to legal challenge under Article 8 of the European Convention of Human Rights (the 'Right to Family Life') and in conflict with recognised international law and norms in this area.³⁸ Recent comments by the UN Special Rapporteur on the Human Rights of Migrants are highly instructive in this regard. On their visit to Australia to report on the country's immigration system, they described family reunion as a 'fundamental right for all, Australians and non-citizens alike.'³⁹ This formed part of a call on the

Lacking the freedom to walk away, workers on employer-sponsored visas are acutely vulnerable to unfair workplace practices

Australian government to lift barriers to family reunion 'at all levels'.⁴⁰

In sum, these visa conditions raise serious concerns for labour and human rights by giving the employer a draconian level of control over the life of the migrant worker.

The risk of creating a large undocumented labour market

There has been no suggestion in the debate that the UK would create a tourist visa, or other types of short-term visa, for EU nationals, which is widely

regarded as unworkable and undesirable given the sheer number of journeys made in both directions across the UK-EU border everyday. Despite the regular references to ‘controlling our borders’ in the UK public debate, border control has little to do with UK-EU immigration policy. Because policy-makers accept borders will remain relatively open for those able to afford the journey and show their passport, this means the immigration control the Conservative government appears to want will only ‘kick in’ at the level of the labour market and not at entry points into the UK.

Creating a very bureaucratic system of time limited work permits in this context is therefore likely to have the unintended consequence of incentivising the rise of an undocumented economy for migrant labour. Because workers entering the legal labour market would expose themselves to the authorities, taking on work illegally would offer a means to avoid the return arrangements entailed by a guest worker visa (or a means of staying if they had reached the end of their time). These workers would be particularly vulnerable to super-exploitation and again this could potentially risk undermining the pay and conditions of all workers in the sectors where this occurred.

Abolishing a ‘free choice of employment’?

A principle of a free labour market is the right of the employee to move between different employers. This is often taken as a distinguishing feature of the modern commercial labour market, marking it out as different to earlier economic systems.⁴¹ Even though the contractual relationship between an employer and employee is still an unequal power relationship, the ability to move between different jobs is a fundamental right that makes a free labourer less exploitable than someone being forced to work against their will (e.g. a slave or otherwise ‘bonded’ labourer). As such, ‘the free choice of employment’ is recognised under Article 23 of the Universal Declaration of Human Rights as a fundamental freedom that all individuals hold.

Workers applying for a Tier 3 visa, or a similar system predicated on employer sponsorship and control, have ultimately chosen to do so. However, because their right to reside in the UK is based on

the continued goodwill of their employer sponsor it stands to reason that they have very little bargaining power over their pay and conditions. Lacking the basic freedom to walk away from their employment and seek work in the same country, they are acutely vulnerable to unfair workplace practices. Because certified employers/agents also risk losing their validation as a sponsoring employer if the worker absconds to work elsewhere illegally, they have a clear interest in asserting an unacceptable level of control over the lives of migrants under their auspices. For instance, it is common within these types of visa system for migrants to live in accommodation provided by the sponsor, a practice that abolishes a boundary between work and home life in a manner that many migrant workers are likely to find highly oppressive. The negative social effects of linking residency to a specific employer are also considerable. While workers in these conditions would still be formally protected by health and safety and employment law, and other standards, they are unlikely to want to ‘rock the boat’ by seeking redress given their precarious status.

For these reasons these types of visa regime have been described as systems based on ‘transient servitude’, because employers assume effective control of both the labour and the labourer for the duration of their stay in the host country.⁴² As we see from the case studies below there is clear evidence this leads to human rights breaches.

‘Choice’ itself can also be a complex issue in the modern global economy. With unskilled and low skilled workers often leading very precarious lives in many countries, particularly those with high levels of unemployment, they may feel they have had little option but to move overseas to seek work through this type of visa system. The European refugee crisis also shows how the absence of legal routes like a visa process or free movement will not necessarily reduce migrant numbers. Instead it will simply lead to a class of undocumented workers forming with even fewer rights, potentially more vulnerable still to super-exploitative employment practices.

A visa system based on ‘transient servitude’ may seem like an unusual and extreme labour practice when looked at in these terms. There is, however, a considerable range of both past and contemporary examples of this system, including here in the UK.

CASE STUDIES

Case study: Qatar World Cup preparations 2020

This is a well-known case of severe labour and human rights abuses, which might be seen as an extreme or unhelpful comparison. However, it is important to note the points of similarity that exist between the suspended Tier 3 visa category in the UK and the system of regulation under which migrants, largely drawn from South Asian countries, have travelled to the Gulf state to build World Cup football stadiums.

The key similarity that exists between these and the Tier 3 system is the time-limited nature of the employment and the inability to move between jobs once the worker arrives in the country (the system of 'transient servitude'). In Qatar, the level of servitude is particularly extreme, indeed could be seen as a system of 'transient slavery'. This is because it is regular practice for workers to have their passports confiscated by the employer who also needs to formally acquiesce to a workers' request to the authorities for an 'exit permit' to leave the country. Many workers have alleged that they have been denied permission to leave and effectively forced to work.

Another similarity is the potential use of on-site accommodation with the implications this has for the lack of home and private life it entails. Amnesty International has also described the workers' dwellings as 'squalid and cramped' and said that using them amounted to the active abuse of the migrants by the employing organisations.⁴³ They also claim on the basis of their interviews that workers were not allowed to leave the stadium or camp - a practice that again amounts to a modern form of slavery.

Migrant workers were also charged fees by foreign recruitment agencies, promised far better pay and conditions than they received, and threatened with non-payment of wages if they challenged their conditions and sought redress. These practices, including the charging of fees,⁴⁴ would be illegal in the UK. But while this is an extreme case it underlines the dangers inherent in this type of immigration system.⁴⁵

Case study: Guest worker systems in Canada and Germany

The provisions of the suspended Tier 3 visa are in essence an example of a 'guest worker' scheme. There is a long and well-documented history of this type of immigration policy, which was utilised in West Germany for most of the post-war period.⁴⁶ As the economy underwent its post-war boom key sectors experienced a shortage of unskilled and low skilled workers with immigrants from Italy (1955), Spain and Greece (1960), Turkey (1961), Portugal (1964), Tunisia and Morocco (1965) and Yugoslavia (1968) brought in to plug these gaps. As the 'guest worker' name suggests, these visa arrangements were also time limited and, as in the Qatari case, workers were collectively housed in army-style barracks.⁴⁷ Whereas Britain began the post-war period with a relatively open, albeit imperial,⁴⁸ conception of citizenship and, over time, narrowed access to these rights, Germany began with an ethnically narrow conception of citizenship and only opened this up in the 1990s.⁴⁹ Between 1950 and 1993 net immigration was 12.3 million accounting for 80 per cent of population growth, but these individuals did not have a pathway to citizenship, including for second and third generation migrants.⁵⁰ It was only thanks to the judicial activism of the constitutional court, rather than governments, that rights such as family reunion were recognised and legal avenues to avoid deportation opened up.⁵¹

Despite the initial opposition of the German unions to guest workers being placated by a commitment to equal pay and conditions,⁵² the experience underlines how collectively negotiated agreements in themselves can be insufficient if the migrant workers do not have corresponding political rights, such as rights of residency or pathways to citizenship. For instance, under the 'Foreigners Law' of the mid-1960s migrant workers did not have 'the right to freedom of movement [within West Germany], the right to assembly, freedom of association, place of work, or place of education'.⁵³ In other words, they were treated purely as labourers and not as citizens with

political and social rights in relation to other aspects of public and social life.⁵⁴

A contemporary example of a similar system can be found in Canada's Temporary Foreign Workers' Program, which has been in place in various forms since the 1970s. It allows employers to apply to the government if they wish to bring a migrant worker into the country on a temporary basis. Numbers are therefore employer (i.e., market) driven, rather than being based on sector quotas allocated by the government. Like the old German system there are fairly strict rules that the temporary worker should be paid the normal market rate for the job (determined by the government).⁵⁵ However, it has been alleged that some employers fail to meet this requirement when the temporary worker is actually brought in.⁵⁶ In addition, it was only in 2009 that the temporary foreign workers won the right to be recognised under the same terms as those established in a collective bargaining agreement in unionised workplaces.⁵⁷

Under this system workers have limited freedom to move occupation, having to seek permission from immigration officials to do so, and are required to leave the country as soon as their employment authorisation (based on having a job with a specific employer accredited under the scheme) expires.⁵⁸ Importantly, they are not 'normal' members of the Canadian labour market because they can only apply for their employment status from overseas, significantly empowering international brokers as intermediaries between operators and the state. The implications for labour rights are stark and the levels of exploitation reported⁵⁹ confirm some of the worst fears the TUC have expressed about further empowering recruitment agencies in the UK.

Once again the same concern arises with this system: that the inability of the migrant labour to move freely between jobs once they are in the country creates a system of transient servitude significantly increasing their vulnerability to super exploitation.

The response of the Canadian Labor Congress has been to recognise the crucial link between workplace economic standards and citizen rights for migrant workers.

This led them to formulate a series of key policy proposals:

- To replace the *temporary* workers scheme with a *settled immigration* programme (with rights of residency, etc.) for un/low skilled workers;
- Ban the international recruitment agencies and brokers;
- Better systems of inspection and willingness to revoke licenses from employers super exploiting migrant workers;
- End practices of harassment and abuse of migrant workers through these inspection systems;
- Abolish employer-specific permits.⁶⁰

These proposals are consistent with policies that have come out of the British labour movement in recent years and underline the central role that trade unions can and must play in pushing for stronger democratic and social rights for *all* workers.



Case study: Domestic Workers Visa Scheme for non-EEA nationals

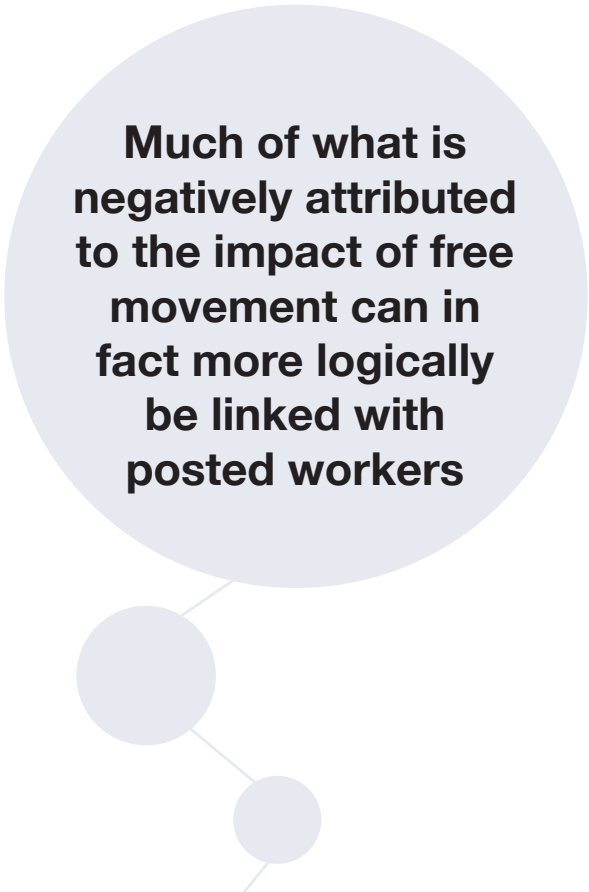
Looking at the historical and international examples above, even in relation to a country with a similar political tradition to the UK such as Canada, is inevitably open to the reaction, 'it couldn't happen here'. However, the current British points system for non-EEA nationals does include a visa category for unskilled workers that is time-limited and tied to specific employee sponsorship. The little known 'Domestic Workers in a Private Household' visa scheme allows non-EEA nationals to be brought to the UK to work for a wealthy family. Until 2016 the visa was exclusively tied to the family employing them, meaning that workers lost rights of residency completely and became 'undocumented' if they decided to leave their host family.

Significant human rights breaches occurred as a result, which follow the same pattern of the other cases discussed here: the worker is placed in a condition of transient servitude to the host family owing to their inability to change employers.

Researchers have found extreme levels of exploitation to occur under the auspices of this visa regime, such as the non-payment of wages, confiscation of passports, and physical as well as psychological abuse.⁶¹ With these workers also exempted from British Working Time Regulations,⁶² and lacking the ability to move between different employers once in the UK, it has been argued this visa system (introduced in 2012) encourages behaviour that is prohibited by the Modern Slavery Act (2015).

Changes to this visa regime with the Immigration Bill (2016) did not meet the demands of a government initiated independent review. Undertaken by barrister James Ewins QC, the review had recommended introducing a universal right of domestic workers to move between employers, abolishing the system where the visa regime was tied to a specific host family, and allowing the workers to stay for a up to two years in addition to the initial period of six months.⁶³ While the government accepted that workers suffering abuse needed an 'escape route' from it, they merely gave them a right to change employment within their visa period of six months, making the 'freedom' to change jobs largely meaningless in practice.⁶⁴ For instance, if a domestic

worker left an employer after four months they would face deportation if they did not then leave the country two months later once their visa expired. While the 'hidden' nature of this work within a private household makes these workers especially vulnerable, this is evidently aggravated severely by their lack of proper legal status within the UK, which, like the other case studies, places them in a position of bondage, requiring the goodwill of the host family to sustain their status in the UK.



Much of what is negatively attributed to the impact of free movement can in fact more logically be linked with posted workers

Case study: ‘Posted Workers’ in the EEA

Not all EEA workers taking up work in another member state are exercising their freedom of movement rights. A relatively small number of EU workers come to the UK on a temporary basis as ‘posted workers’. This means that they remain formally employed in their country of residence, despite taking up work in another country for a period of up to 24 months (however, most posted work is cyclical, and does not exceed a period of 4 months). Posted workers have featured very little in the UK debate surrounding immigration from the EEA. It is generally even less well understood than freedom of movement and often conflated with it. The EU Posted Workers Directive, however, falls not under the EU’s free movement of persons, but rather another of the EU’s four freedoms,⁶⁵ namely the free movement of services.

Posted workers do hold certain rights to protect them from discrimination in employment in their host country, but this falls below that accorded to citizens exercising their freedom of movement rights. Posted workers must receive the following standards in line with the minimum requirements in the host country:

- Maximum and minimum work periods and rest periods;
- Minimum wages, including overtime, but not including supplementary retirement schemes;
- Minimum annual paid holiday allowances;
- Health, safety and hygiene standards at work;
- Protection from discrimination on the basis of gender.

The posting of workers tends to fall into two broad categories, one driven by shortages of highly skilled professional workers, and the other, of primary interest to this briefing, by labour cost differentials, particularly affecting un/low skilled workers. Where this second motivation is at play, significant concerns have been raised about the lack of clarity in the rules around posted workers’ minimum pay and conditions, and the danger that this can result in the deliberate use of migrant labour by employers to reduce costs, leading to undercutting for workers in some sectors.

There is a lack of data on the number of posted workers across the EU, but estimates from the European Parliament⁶⁶ suggest that it is a small but


fast-growing phenomenon. Furthermore, despite its small scale, because it is concentrated in certain countries and industries, such as construction, transport or agriculture, it can have a significant impact on these sectors even when its overall impact is low. There is an emerging trend that has been observed towards posted workers being sent from lower to higher-wage member states of the EU, reinforcing the idea that employers are getting around the fact that some jobs cannot be outsourced to lower-wage countries due to being inherently tied to a location, by exploiting this directive.

This system is therefore in need of urgent review. Positively, in March 2016, the European Commission have proposed such a re-evaluation of how the directive is working review which would address many of these concerns, and is focused on the principle of ‘equal pay for equal work at the same place’⁶⁷ – in short, an ‘anti-undercutting principle’. However, for this to be fully effective, a stronger legal position for trade unions and better systems for inspection are also needed.

In the UK debate around immigration from the EU, it is apparent that much of what is negatively attributed to the impact of free movement, e.g. poor labour standards and undercutting, can in fact more logically be linked with posted workers. However, regardless of where the workers come from or which EU freedom they are activating in coming here, it is within the UK government’s gift to regulate working pay and conditions more strictly than is required as a minimum in the EU treaties and directives. This means that whatever the outcome of the EU review of posted workers’ legal status and the UK-EU negotiation, it is within the competency of the UK government to legislate now to provide a stronger set of employment protections for all workers.

As the TUC put it in their evidence to a House of Lords investigation:

“The UK operates a system that does not enforce the rate for the job, as decided by collective bargaining, for posted workers. That means that where you have workers brought over from other countries who would be covered by the posted workers directive, their wages tend to be lower than the going rate, for instance in engineering and construction.”⁶⁸



CONCLUSION AND RECOMMENDATIONS

The case for a free movement+ system of rights and protections

Concerns about the supposed negative effects of free movement on wages and conditions of UK workers undoubtedly drove many to vote for Brexit in 2016. As we have seen there is little evidence that such effects exist on a widespread or generalised scale across the British economy. But tragically the immigration systems currently being discussed, which focus on controlling numbers and creating a class of migrant workers with less secure social and political rights, risk enabling conditions which are *much more likely* to result in the normalisation of super-exploitative practices, risking the undercutting of the pay and conditions of British workers.

The simple reality is that migrants with fewer rights will be more vulnerable to super-exploitation. Whenever and wherever this happens all workers will suffer.

By increasing the vulnerability of migrant workers to exploitation, the return of Tier 3, or a similar system of guest worker visas, could create downward pressure on the pay and conditions for other workers in the labour market. This is particularly concerning given the relatively weak workplace rights and extremely poor trade union rights that are features of the UK labour market. A danger in the current situation is the creation therefore of a *worst of both worlds* system with all of the downsides of the highly flexible domestic labour market (poor employee and trade union protection) and none of the protections, including free movement rights, currently accruing from the EU.

A rights based agenda is critical to addressing exploitation and injustice in its many forms, improving the life chances of all workers through stronger social protections and political and civil rights. Maintaining the system of free movement, which is such a *rights based and anti-discriminatory* legal framework, is an essential part of this.

However, in order to ensure unscrupulous employers do not exploit the freedoms that workers in the EEA enjoy to move across borders, better workplace protections are needed here in the UK. This can primarily be achieved through domestic legislation.

We call this system a **free movement+** approach where the 'plus' indicates how we should prioritise a strengthening of social rights and protections for all workers. This is particularly important in the UK labour market context for the reasons given above.



In order to achieve *the plus* the report recommends the following reforms:

- Using UK legislation to establish sector-by-sector bargaining agreements in key sectors dependent on unskilled migrant labour. These agreements would be negotiated between representatives of employers and trade unions in the sector. The aim would be to establish minimum standards for the pay and conditions of all workers.
- Support for the current review of the Posted Workers Directive proposed by the European Commission with the aim of establishing not only an anti-undercutting principle but also a formal legal position for trade union negotiated agreements in sectors using posted workers.
- Reinforcing the non-discrimination principle by banning ‘foreign only’ recruitment practices and agencies, as well as the deliberate use of migrant labour to undercut the pay and conditions of UK workers.
- Greater resources and powers for the inspection of sectors with large numbers of low/unskilled workers to ensure standards are maintained.
- A system of strictly enforced penalties for unscrupulous employers failing to maintain the minimum standards of care for their workers.
- In order to provide the greatest possible reassurance to EU citizens currently living and working in the UK and to ensure the long-term legal security of new immigration arrangements with the EU, this rights-based system should be administered with reference to the EU Fundamental Charter of Rights and under the jurisdiction of the ECJ.

These policies could complement other measures (e.g. banning of zero hour contracts, more rights for insecure self-employed workers, etc.) that have been raised to moderately tighten the excessively flexible UK labour market. The aim is to rebuild public trust in immigration by establishing a stronger set of social protections for all workers regardless of their nationality or status. The economic and cultural benefits of immigration for the UK have been profound and the risks associated with cuts to migrant numbers are severe. By taking steps to reform our system of labour rights we can ensure the benefits of migration are shared more equally across the UK economy.

FOOTNOTES AND REFERENCES

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- 15 Frank Field et al, 'Labour MPs urge leadership to curb free movement within EU' <http://www.frankfield.co.uk/latest-news/news.aspx?p=102724> (Accessed 7 September 2017).
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