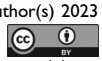
Academic Contribution

ELLJ

European Labour Law Journal
1–27



DOI: 10.1177/20319525231222165
journals.sagepub.com/home/ell


Quasi (-social) Citizenship, the Common Travel Area, and the Fragmented Protection of Employment Rights in the United Kingdom after Brexit

Niall O'Connor
Essex Law School, University of Essex, Colchester, UK

Abstract

Irish citizens living in the United Kingdom (UK) enjoy a privileged immigration status, which in turn facilitates access to a number of economic and social rights, perhaps most importantly a right to—and thereby rights in—work. European Union (EU) law played an important role in facilitating the latter, but with freedom of movement and the right to work of Irish citizens now dependent on the Common Travel Area (CTA) and associated legislative protections. This article argues that the CTA constitutes a workers' rights 'intervention', which necessitates a clearer articulation of how this instrument fits within the wider context of post-Brexit UK employment law, including the rights deriving from the withdrawal arrangements governing the UK's departure from the EU. There are a number of asymmetries in the CTA that undermine its value as an employment rights conduit. Brexit, it is argued, has led to further fragmentation of the category of 'Irish citizen' in the UK, despite the purported recent recognition of such citizens as a distinct class within UK immigration law. More significantly, the CTA lacks normative purpose, and is a rather weak employment law instrument, in that it represents no more than a facilitation of national legislative intervention to ensure (roughly) equivalent treatment between British and Irish citizens in matters of employment (among other economic and social rights). The current CTA arrangements are thereby devoid of any underpinning (social) objectives or values and lack explicit recognition of their role as a facilitator of access to fundamental economic and social rights. Non-political, and rights-based conceptions of social citizenship are suggested as potential normative groundings for the CTA and derived (employment) rights in the absence of the protective framework offered by EU free movement and labour law.

Keywords

Brexit, Common Travel Area, social citizenship, immigration, the right to work

Corresponding author:
Niall O'Connor, Essex Law School, University of Essex, Wivenhoe Park, Colchester, CO4 3SQ, UK.
Email: n.oconnor@essex.ac.uk

I. Introduction

Irish citizens living in the United Kingdom (UK) enjoy a privileged immigration status, which in turn facilitates access to a number of substantive rights, notably the right to—and rights in—work.[1] These rights may be accessed by citizens from elsewhere, but the protections offered to UK and Irish citizens under the Common Travel Area (CTA) and related instruments, are characterised by their (essentially) reciprocal nature, as well as the absence of requirements to obtain permission to enter, reside, or to work. These reciprocal arrangements reflect a long history of worker migration, colonisation, economic necessity, and more recently, a joint interest in the preservation of peace in Northern Ireland.[2] Until Brexit, the employment rights granted to Irish citizens in the UK were further reinforced by EU rules governing the free movement of workers, as well as the substantive provisions of Union labour law, but are now entirely dependent on the CTA and associated legislative protections.

Analysis of the CTA, to date, has mostly been confined to its implications for immigration and border controls.[3] There is also recognition of the weaknesses of the existing regime, including the fact that the CTA by-and-large grants rights to British and Irish citizens only.[4] The manner in which the CTA has been accommodated within EU law has also been examined.[5] Less attention has been paid to the substantive rights of Irish citizens in the UK, although these are beginning to garner academic scrutiny, particularly in the context of the risks posed by Brexit.[6] This article assesses the implications of Brexit for an important substantive area of protection deriving from the CTA, namely employment rights, by examining the manner in which the legal protections granted to the rights of Irish workers in Great Britain can be (re)conceptualised post-Brexit, particularly in the absence of the protective framework provided by EU free movement and labour law.

While there have always been a number of asymmetries embedded within the CTA, Brexit has further emphasised the fragility of these arrangements, resting as they do on rather ad hoc legislative interventions, with the right to work essentially being constructed on the basis of exemptions from domestic immigration law. EU law has never directly regulated the CTA, but it did play a significant role in facilitating the free movement of workers.[7] It was not, therefore, an exaggeration to

1. Explanatory Notes to the Immigration and Social Security Co-Ordination (EU Withdrawal) Bill, 4 March 2020; The Irish-born population of England and Wales, as of the 2021 census was 523,014.
2. John Coakley, 'The British-Irish Relationship in the Twenty-First Century' (2018) 17 Ethnopolitics 306, 318; Enda Delaney, *Demography, State, and Society: Irish Migration to Britain, 1921-1971* (Liverpool University Press 2000).
3. Bernard Ryan, 'The Common Travel Area between Britain and Ireland' (2001) 64 MLR 885, 860; Elizabeth Meehan, 'Free Movement between Ireland and the UK: From the "Common Travel Area" to the Common Travel Area', Studies in Public Policy: 4, The Policy Institute, 2000.
4. Tobias Lock, 'Citizenship beyond Irish and British' in Christopher McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (CUP 2022) 194; Graham Butler, 'Not a "Real" Common Travel Area: *Pachero v Minister for Justice and Equality*' (2015) 54 Irish Jurist 155.
5. Elaine Fahey, 'A Jagged-Edged Jigsaw: The Boundaries of Constitutional Differentiation and Irish-British-Euro Relations after the Treaty of Lisbon' in Martin Trybus and Luca Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy* (Edward Elgar 2012) 133.
6. Imelda Maher, 'The Common Travel Area' in McCrudden (n 4) 173; Michael J Walsh, 'The Common Travel Area: Past, Present and Future after Brexit' (2019) 18 Hibernian LJ 23; Imelda Maher, 'Crossing the Irish Land Border after Brexit: The Common Travel Area and the Challenge of Trade' (2018) 11–12 Irish Yearbook of International Law 51; Sylvia de Mars and CRG Murray, 'With or Without EU? The Common Travel Area After Brexit' (2020) 21 Ger Law J 815; Sylvia de Mars and others, 'Discussion Paper on the Common Travel Area' (2018) IHREC and NIHRC.
7. Graham Butler and Gavin Barrett, 'Europe's "Other" Open-Border Zone: The Common Travel Area under the Shadow of Brexit' (2018) 20 CYELS 252, 271.

suggest that Brexit posed (poses) an existential risk to the CTA itself.[8] Despite the special reciprocal status granted to UK and Irish citizens, there are obvious tensions between the desire to maintain a (relatively) open border between the UK and Ireland and the general thrust of Brexit, which was pitched as taking back control of immigration policy and ultimately, of who is permitted to work in the UK.

Irish citizens who obtained post-Brexit settled status can continue to rely on their EU-derived rights as preserved by the EU-UK Withdrawal Agreement (WA), while those who did not obtain such status, or who arrive in the UK from January 2021 onwards, will need to rely on domestic legislation in order to enforce their substantive rights. As such, Irish citizens may have been well advised to apply for settled or pre-settled status in the face of the British Government's insistence that this was not necessary. The consequence of this advice was to leave a substantial group of EU citizens essentially outside the scope of the worker protections offered by the Withdrawal Agreement. At the same time, Brexit—and the consequent removal of the direct influence of EU labour rights over the domestic legal system—has, somewhat paradoxically, and albeit indirectly, reinforced the employment rights of Irish workers under the CTA by: (1) necessitating domestic legislative intervention reaffirming the special immigration status of Irish citizens, which in turn facilitates access to the right to work; and by (2) the inclusion of provisions within the Trade and Cooperation Agreement (TCA) governing the consequences of labour rights divergence between the EU and the UK. Neither development provides a convincing account as to why the right to—and thereby rights in—work of Irish citizens in the UK *should* be granted particular protection in the absence of joint (EU) citizenship and autonomous Union law conceptions of 'worker' status.[9]

The rights of Irish workers are here discussed in two senses, namely: (1) the right to work under the CTA, which ultimately derives from Irish citizenship, albeit that this right is protected within UK immigration law; and (2) the protection of employment rights of (all) workers within domestic employment law, and which has repercussions for the quality of protections offered under—and thereby the reciprocal nature of—the CTA. Immigration arrangements such as the CTA have clear implications for the right to work and rights in employment, as well as for wider economic and social rights enjoyed by workers.[10] The CTA is perhaps an unusual immigration law instrument, in that it is intended largely to be facilitative rather than restrictive of immigration and access to employment, albeit for a particular citizen group. This necessitates a clearer articulation of how the CTA and related legislative instruments fit within the broader context of the post-Brexit employment law landscape.

The rights afforded to Irish citizens living in the UK have always lacked transparency, and continue to be scattered across various legal instruments and international agreements, leading to distinctions between categories of Irish citizen, despite more recent legislative efforts to recognise their distinct, and thereby unified status as a class, within UK law.[11] It is argued here that the weaknesses in the existing arrangements undermine the value of the CTA as a social rights conduit. In particular, the CTA has implications for the concept of worker solidarity and the universality of employment rights, by granting preferential—albeit indirect—access to employment for a distinct category of non-citizen. Marshall's theory of 'social citizenship' is proposed as a means of resolving some of

8. Coakley (n 2) 306.
9. Case C-53/81 *Levin* ECLI:EU:C:1982:105.
10. Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014).
11. Bernard Ryan, 'Recognition After All: Irish Citizens in Post-Brexit Immigration Law' (2020) 34 JIANL 284.

these contradictions, by providing the CTA with a clearer purpose in the absence of the normative framework offered by EU law governing the free movement of workers.[12] Social citizenship, as reconceptualised in the context of the *transnational* CTA, is suggested as a potential grounding for the CTA and derived rights as 'social' rights interventions, within the wider context of the disintegration of the EU-derived labour rights protections that once underpinned the UK-Ireland relationship.

Work, and the ability to move to obtain employment, have long been central to the relationship between Great Britain and Ireland, while employment law is perhaps the substantive field that is most vulnerable to change in the absence of the interpretative and review standards provided by EU labour rights, and the attendant oversight of the Court of Justice of the European Union (CJEU). Thus, while a reconceptualisation of the CTA as a social rights instrument can encapsulate the full range of economic and social rights enjoyed by Irish citizens in the UK, employment rights have particular resonance given their ultimate derivation from domestic immigration, and thereby citizenship, status, but also in their particular fragility in the face of greater divergence between the EU and the UK post-Brexit. More broadly, the relationship between citizenship and employment rights also has implications for transnational worker mobility, with relevance for wider debates as to the relationship between 'work' (workers) and 'citizenship' (citizens), including within the context of EU labour law.[13]

The article is structured as follows. Part II explores the sources of rights of Irish citizens in the UK as they derive from the CTA arrangements, domestic immigration law and latterly the Withdrawal Agreement. It is argued that domestic law exhibits a number of deficiencies compared with EU (withdrawal) law when it comes to the protection of residence status and substantive rights deriving from citizenship or worker status. Part III explores fragmentations in the protection of the substantive employment rights conferred under the CTA, as well as the fragmented conceptions of Irish citizenship that have emerged in relation to these sources of rights post-Brexit. These fragmentations are examined through the lens of rights to (and in) work, to demonstrate the unstable foundations upon which these rights have been constructed, despite Irish citizens being entitled to essentially the same employment rights granted to British citizens. In particular, it is argued that Brexit has created fragmentations in the normative values supporting the employment rights of Irish citizens in the UK, and which expose these rights to further changes, as the UK and EU begin to diverge in the level of employment rights protections granted after Brexit. To resolve these fragmentations in the protection of workers' rights, a new normative underpinning is proposed for the CTA, reinforced by overarching values such as social citizenship rights that go beyond existing *transactional* foundations of the sources of CTA-derived rights, and which are illustrative of the complex relationship between immigration law, 'citizenship', and access to employment.

II. The sources of rights of Irish citizens in the United Kingdom

A. The Common Travel Area and domestic immigration arrangements

Since the Irish State was established in 1922, efforts have been made to reconcile the unique position of Irish citizens in the UK with Ireland's status as an independent nation. The rights

12. T H Marshall, *Citizenship and Social Class: And Other Essays* (CUP 1950).
13. Jennifer Gordon and RA Lenhardt, 'Rethinking Work and Citizenship' (2008) 55 UCLA LR 1161; Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 CMLRev 1597.

of Irish citizens within UK law have since depended on a combination of the arrangements governing the CTA and domestic (immigration) law. The CTA emerged in its modern incarnation in 1952 as the result of negotiations between Ireland and the UK—with the addition of the Isle of Man and the Channel Islands—and has influenced the special reciprocal legal status for nationals of each of these component territories residing elsewhere within the CTA.[14] The CTA is notable for its longevity, having outlasted wartime and terrorism-related restrictions, and with the substantive economic and social rights which derive from the CTA remaining largely intact in the face of past anti-Irish sentiment in Great Britain, which included discrimination in access to employment.[15]

There are several rationales that have been suggested for the initial development of the CTA, namely: the administrative cost of extending UK immigration law to Irish nationals; the political, social, and economic difficulties associated with policing the Irish border; the impracticality of immigration controls; and finally, the need to recruit Irish labour after the Second World War.[16] The alternative to controls on the Irish land border, would be controls within the UK itself, which, despite having been introduced between the entire island of Ireland and Great Britain during World War II, would likely be unacceptable to unionists in Northern Ireland. For a long time, therefore, Irish citizens were granted special status under UK nationality law, but remained subject to UK immigration law, albeit that entry from Ireland was not controlled.[17] From an Irish perspective, the importance of the CTA primarily lies in its facilitation of the absence of controls on movement between the UK and Ireland, notably at the land border. At the same time, largely unrestricted emigration to the UK provided an outlet to address unemployment within Ireland, albeit one with attendant economic, cultural, and social costs for the nascent Irish State.[18]

There is no single, legally binding international Treaty establishing the CTA. From the outset, these arrangements have instead rested on an unstable and informal foundation.[19] The term 'Common Travel Area' is itself somewhat of a misnomer in that it is not 'common' at all, with the arrangements instead reflective of varying degrees of reciprocity, and with differing instruments chosen to protect substantive rights in UK and Irish law. Similarly, the CTA is not exclusively a free 'travel' arrangement in that it also facilitates access to substantive (economic and social) rights. Finally, the CTA is not an 'area' as such, in that it is largely for the benefit of British and Irish citizens only.[20] Different rules apply to non-CTA nationals, who require permission to enter the UK under immigration rules, although controls on entry to Great Britain from Ireland are unlikely.[21] The Home Office describes the CTA as an 'administrative arrangement', which is 'implemented in UK domestic law and statute'.[22] It has also been referred to as an area in which 'internal borders are subject to minimal or non-existent border controls'.[23] Only rarely, however, have the

14. Art 3 Aliens Order 1953 (SI 1953/1671).
15. Meehan (n 3) 10.
16. Ryan (n 3) 860.
17. ibid 860, 861.
18. John Fitzgerald, 'One Island, Two Labour Markets' (2022) 2 Irish Studies in International Affairs 316.
19. Butler and Barrett (n 7) 254.
20. ibid 272; Art 3 Aliens (Amendment) (No 3) Order 1997 (SI 1997/227).
21. Terry McGuinness, Melanie Gower and Hannah Wilkins, 'The Common Travel Area, and the Special Status of Irish Nationals in UK Law', House of Commons Library Briefing Paper No 7661, 16 October 2019 5; Josie Laidman, 'Will I need Electronic Travel Authorisation to enter the UK?', Free Movement Blog, 15 June 2023.
22. Home Office, 'Common Travel Area', 14 April 2020.
23. McGuinness, Gower and Wilkins (n 21) 3.

operations of the CTA as a genuine 'free movement' zone (for certain third-country nationals (TCNs)) been expressly concretised, for example through the joint British-Irish visa scheme.[24]

Until Brexit, it was within the EU Treaties that the only reference to the CTA in an international treaty could be found. The CTA is presented as a derogation from the Union's borderless Schengen acquis, although crucially, the arrangements are not dependent on the UK's continued membership of the Union.[25] This is further confirmed by the Ireland/Northern Ireland Protocol to the Withdrawal Agreement (now known as the Windsor Framework (WF)), subject to the condition that Ireland continues to abide by its EU law obligations and that both states fully respect the rights of natural persons under EU law.[26] It remains to be seen, however, what pressures Ireland may come under in the future to decide between its commitment to the totality of the European integration project—including the Schengen zone—and the existing bilateral arrangements governing the CTA.

Most significantly, there is a tendency on the part of both governments to conflate the (itself limited) free movement zone contained in the CTA with the distinct rights and obligations of those using that zone.[27] As argued here, the precise influence of the CTA as a conduit for—indeed, underpinning of—the reciprocal economic and social rights enjoyed by British and Irish citizens is usually only indirectly recognised, with those rights framed as essentially a by-product of the CTA.[28] One of the difficulties with the existing arrangements is that many of the rights that Irish citizens living and working in the UK have long taken for granted actually lack a self-evident legal basis in UK domestic law, particularly since Brexit.

The four-page joint Memorandum of Understanding (MoU) between the British and Irish governments, issued in May 2019, reaffirming the CTA and 'associated reciprocal rights and privileges', has failed expressly to clarify the legal position. The MoU is not legally binding and merely 'represents the common understanding' of the Parties to the CTA arrangements, which have 'benefited from a degree of flexibility and the detail (…) may continue to evolve'. The purposes of the MoU are then set out, notably to *reaffirm* the status and rights enjoyed by Irish and British citizens in each other's state. Particular emphasis is placed on the fact that the rights deriving from the CTA long pre-date either country's membership of the EU and are not dependent on EU citizenship.

The Memorandum then briefly sets out the substantive rights that both British and Irish citizens enjoy in each other's jurisdiction, including the right to work, but which is addressed only briefly despite the importance of that right, not just in itself, but also as a gateway to accessing other economic and social rights. The MoU does not specify precisely how these rights are to be protected, with implementation to take place via 'any necessary legislative steps and further, more detailed, bilateral agreements', with specific substantive fields such as healthcare and education being the subject of additional and equally vague MoUs.[29] A further complication derives from the fact that the protection of certain substantive CTA rights actually requires multilateral reciprocity from the devolved institutions, albeit that the privileged status of Irish citizens rests on the foundation of UK-wide immigration law, which in turn grounds their right to work.[30]

24. Immigration (Control of Entry through Republic of Ireland) (Amendment) Order 2014.
25. Art 2 of Protocol (No 20) on the Application of Certain Aspects of Article 26 of the TFEU to the UK and Ireland.
26. Art 3 WF; Maher (n 6) 175; UK Government, 'The Windsor Framework: A New Way Forward' CP 807, February 2023.
27. de Mars and Murray (n 6) 819.
28. UK Government, 'Common Travel Area: Rights of UK and Irish Citizens', 22 February 2019.
29. Imelda Maher, 'The Common Travel Area: The Limits of Codification', DCU Brexit Institute, Working Paper 17/2021.
30. de Mars and others (n 6) 10.

The Irish have enjoyed different and overlapping categories of (preferential) status in the UK from the foundation of the Irish State. Since the recognition of a separate status for Irish citizens in domestic UK law, Irish citizens have no longer been recognised as British subjects, but nor have they been considered 'aliens', with Irish citizens essentially being treated as if they *are* British subjects under UK nationality law, and continuing to enjoy—on an ongoing basis—the same common law and legislative rights of entry and residence granted to such subjects.[31] This treatment has been justified on the basis of the need to preserve the workings of the CTA and to avoid controls on entry to Great Britain from the island of Ireland. As such, the substantive rights of Irish citizens in the UK, have continued to be based on a series of opaque exemptions from immigration rules. There remains no explicit reference to the substantive rights of Irish citizens in UK law, with certain economic and social rights, notably the right to work, flowing instead from rights of entry and residence, whilst other rights are also (indirectly) protected in relevant legislation.

Section 3(1) of the Immigration Act (IA) 1971 requires all persons without a right of abode to obtain permission before entering the UK (unless exempt). Section 1(3) of the 1971 Act provides that leave to enter is not required for persons arriving in the UK from elsewhere in the CTA. This provision should be read in conjunction with accompanying regulations, which provided for deemed leave arrangements for those entering the UK from Ireland having first entered Ireland from elsewhere, arrangements from which initially only Irish citizens—and later European Economic Area (EEA) citizens—were excused.[32] The effect of these provisions was to create a limited exemption from leave to enter requirements for those Irish citizens arriving in the UK from within the CTA. To some extent, the onset of EU membership allowed the gaps in this protection—for Irish citizens entering the UK from outside the CTA—to be overlooked, as they could instead rely on the protections offered by EU law, as implemented in UK immigration law, but which were also subject to their own restrictions, notably the criteria for qualifying residence.[33]

In the aftermath of the vote to leave the EU, the UK Government had sought to reassure Irish residents of the UK that their right to enter and reside would continue despite wider efforts to end free movement with the EEA—through the Immigration and Social Security Co-Ordination (EU Withdrawal) Act 2020—particularly given the Government's insistence that Irish citizens could—but need not—apply for settled status under the EU Settlement Scheme (EUSS) but without explaining the consequences of failing to apply, which may well amount to an infringement of the Withdrawal Agreement's requirement that information concerning citizens' rights be disseminated.[34] The Explanatory Notes to the then Bill made clear that the Act would not modify the status of Irish residents in the UK. Instead, it would set out the 'immigration status' on which their rights depended. Nevertheless, the Act does make an important change to the existing regime through the insertion of Section 3ZA into the Immigration Act 1971 which provides that '[a]n *Irish citizen* does not require leave to enter or remain in the United Kingdom, unless certain exceptions apply'.[35]

31. Ryan (n 11) 290; s 3(2) British Nationality Act 1948; s 2(1) Ireland Act 1949.
32. Art 4 Immigration (Control of Entry through Republic of Ireland) Order 1972 (as amended).
33. S 7 Immigration Act 1988; Immigration (European Economic Area) Order 1994 (SI 1994/1895); Immigration (EEA) Regulations 2016.
34. Art 37 WA; Sylvia de Mars and Charlotte O'Brien, 'Inevitably Diminished: Rights of Frontier Workers in Northern Ireland After Brexit' (2022) 73 NILQ 119, 140.
35. Amendments have also been made to s 9 and sch 4 of the IA 1971.

As such, the specific category of 'Irish citizen' is now expressly exempt from the leave to enter and remain requirements found in UK immigration law. The changes brought about by the 2020 Act therefore represent the first recognition of Irish citizens as a distinct category within domestic law, and ensure that CTA protections are extended to all Irish citizens regardless of their point of entry.[36] Nevertheless, it is suggested here that these developments belie the genuine procedural and substantive loss in status incurred by the post-Brexit undermining of the more robust foundations of the right of residence and right to work found within EU free movement law, as largely reflected in the EU-UK Withdrawal Agreement, and which now also apply to those Irish citizens who made a successful application under the UK's post-Brexit Settlement Scheme.[37]

B. The European Union-United Kingdom Withdrawal Agreement

Irish citizens were not required to apply for settled or pre-settled status under the EUSS, but where granted, the rights protected under the Agreement are guaranteed for life, so long as the individual continues to meet the relevant conditions.[38] As already noted, the UK Government advised Irish citizens that they did not need to apply for settled status since their rights were already protected through a combination of the CTA arrangements and UK legislation. Irish citizens were not prohibited from applying and if successful, their substantive rights in the UK would be legally guaranteed by their newly acquired settled status, but as of 30 June 2023, only 17,150 Irish citizens had applied for settled or pre-settled status.[39] The consequence is that responsibility for the post-Brexit protection of a not insignificant group of Union citizens has been entrusted to UK (and Irish) reassurances that the CTA provides adequate protections.

Non-Irish and non-British family members of Irish citizens *were* required to apply for settled status, but without the need for the Irish citizen to apply themselves.[40] The gap in access to withdrawal rights for Irish citizens is also surprising given the emphasis placed more generally on the need to protect citizens' rights both during the Brexit negotiation process, but also in the Withdrawal Agreement.[41] The CTA itself is recognised in Article 38(2) WA as not contravening the principles of non-discrimination and equal treatment found in Articles 12 and 23(1) of the Agreement. In other words, that provision allows for *more favourable* treatment to be granted to Irish (and British) citizens under the CTA, but does not foresee their exclusion from the baseline of citizens' rights protections offered by Part Two of the Agreement.

In contrast to UK immigration legislation, which merely provides for rights of entry and residence for Irish citizens, the Withdrawal Agreement *itself* specifies the full range of rights granted to EU citizens resident in the UK at the end of the transition, including protections for workers found in Articles 24–26, which are ultimately derived from the rules governing the free movement of workers under the EU Treaties and relevant secondary legislation, and which have now been implemented into domestic law.[42] These provisions guarantee—among other rights—a right to non-discrimination as regards to employment and conditions

36. Ryan (n 11) 305.
37. Arts 10(1)(a)–(b) and 18 WA; Appendix EU Immigration Rules.
38. Art 39 WA; art 13(1) WA.
39. Home Office, 'EU Settlement Scheme Quarterly Statistics, June 2023', 24 August 2023.
40. Home Office, 'Common Travel Area Guidance', 4 October 2021.
41. Michael Dougan, *The UK's Withdrawal from the EU: A Legal Analysis* (OUP 2021), ch 7.
42. Art 45 TFEU; Regulation 492/2011 [2011] OJ L141/1; Directive 2014/54 [2014] OJ L128/8; Directive 2005/36 [2005] OJ L255/22; ss 5 and 14 EU(WA)A 2020.

of employment, as well as protections for the self-employed. The Agreement contains specific provisions governing the continued recognition of existing (including pending) professional qualifications and social security entitlements for protected persons.[43] Provision is also made for citizens living in the UK, but working in the EU at the end of the transition period (and vice versa).[44] Such 'frontier workers' have long received varying degrees of protection from both EU law, and in the case of Irish citizens, the CTA, but with their rights now being substantially reinforced by the provisions of the Withdrawal Agreement.[45] Despite the close connection to EU law concepts, access to withdrawal rights is dependent on a successful application under the EUSS, which is a creature of domestic law, albeit one that must comply with the requirements found in the Withdrawal Agreement.[46] Similarly, frontier workers were required to apply for frontier worker status in accordance with domestic law, but with Irish citizens again being advised that they need not apply.[47]

The Citizens' Rights part of the Withdrawal Agreement has been transposed into UK law by the European Union (Withdrawal Agreement) Act (EU(WA)A) 2020 and enjoys primacy and direct effect in UK law.[48] The Citizens' Rights provisions are also subject to the jurisdiction of the CJEU for eight years post-Brexit, as well as the oversight of the Independent Monitoring Authority.[49] Irish citizens with settled status enjoy access to these withdrawal rights, while all Irish citizens are exempt from the requirements of the UK's new points-based immigration regime, which now applies to new arrivals from the EU.[50] The rights granted under the Withdrawal Agreement may be lost due to absence from the UK for five continuous years, which will lead to Irish citizens with former settled status relying on domestic immigration law instead. Frontier worker status can also be lost due to inactivity, with particular implications for those engaged in infrequent or irregular frontier work.[51]

In contrast to the approach adopted by Ireland in relation to British citizens, the UK scheme is constitutive—as opposed to declaratory—in nature. In other words, access to the rights deriving from the Withdrawal Agreement require an application for settled or pre-settled status.[52] Having said that, 'residence' was the principal criterion upon which applications under the UK's EUSS were assessed, meaning that access to withdrawal rights, including the right to work, derived ultimately from the applicant's EU citizenship, in contrast to the stricter requirements found within EU free movement and citizenship law.[53] Absent a successful application, EU citizens are subject exclusively to domestic immigration law, and do not enjoy the qualitative and procedural protections that were previously guaranteed under EU law. The Withdrawal Agreement also contains family reunification rights that are considerably more generous than the same provisions found within domestic immigration law, despite also being more restrictive than the equivalent rights

43. Arts 27–29 WA; Title III of Part Two WA.
44. Art 9(b) WA; art 24(3) WA.
45. de Mars and O'Brien (n 34) 127.
46. S 7C European Union (Withdrawal) Act (EU(W)A) 2018.
47. Art 26 WA; s 8 EU(WA)A 2020; The Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020.
48. Art 4 WA; s 5 EU(WA)A 2020.
49. Art 158 WA; art 159 WA.
50. Melanie Gower, CJ McKinney and Georgina Sturge, 'The UK's new points-based immigration system', House of Commons Research Briefing, 27 September 2022.
51. de Mars and O'Brien (n 34) 137.
52. Arts 18(1)(b), (c), 18(2) and 18(3) WA.
53. Directive 2004/38/EC [2004] OJ L158/77.

found within ordinary EU law, the latter of which continue to bind Ireland in its potential future treatment of British citizens as TCNs.[54]

Despite their unique circumstances, no separate provision was made for Irish citizens in those UK immigration rules implementing the Withdrawal Agreement, with Irish citizens instead being explicitly included within the definition of EEA citizens for the purposes of settled status applications.[55] The overarching purpose of the Citizens' Rights part of the Withdrawal Agreement is to enable both EU and UK citizens—as well as their respective family members—to continue to exercise their EU law derived rights in each other's territories. As such, it might be argued that the Withdrawal Agreement should be interpreted in such a way as to protect the EU-derived rights of Irish citizens. The difficulty remains, however, that the Withdrawal Agreement and relevant domestic provisions include the Irish within the definition of EEA citizen and make clear that, in the absence of settled status, EEA (including Irish) citizens will not be able to benefit from the workers' rights contained in the Withdrawal Agreement.

UK law has long taken the (flawed) approach of treating Irish residents of Great Britain essentially as if they were British. Post-Brexit, Irish citizens are being treated simultaneously as both within and outside the definition of EEA citizen. While Irish citizens can always rely on the rights protected as a consequence of the CTA, Brexit has led to further fragmentations in the protection of the substantive rights enjoyed by Irish workers in the UK, both in terms of the source and qualitative nature of those protections, but also in their personal scope. One of the consequences of these fragmentations is that the CTA represents a weak medium for the protection of economic and social rights, with rights in employment particularly vulnerable to being undermined as a consequence of Brexit.

III. The Common Travel Area as a fragmented conduit for the protection of employment rights

A. Fragmented conceptions of Irish citizenship

Irish citizens now straddle both the EU and UK systems and can continue to live and work in both largely unhindered, and yet closer inspection reveals that there are different categories of Irish citizen within the CTA to whom different rules, requirements, entitlements, and obligations might apply, even if they happen to fall within the new category of 'an Irish citizen' for the purposes of UK immigration law. There have even been suggestions for additional categories of Irish citizenship, for example through the removal of EU citizenship rights for Irish citizens in Northern Ireland, but which would be difficult to reconcile with the GFA, CTA and EU law as it currently stands, with Member States continuing to enjoy significant latitude in granting national, and thereby EU citizenship.[56] The author was able to identify at least nine categories of Irish citizen relevant for the ongoing protection of workers' rights in the UK and which can be characterised by varying degrees of dependence on the rights deriving from the CTA.

54. Art 9(a) WA; Dougan (n 41) 240.
55. S 17(1)(a) EU(WA)A 2020; Appendix EU.
56. Clemens M Rieder, 'Irish Citizenship Law after Brexit: Implications for Northern Ireland' in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on EU Citizenship Law and Policy: Navigating Challenges and Crises* (Edward Elgar 2022) 364.

First, there are British citizens born and living in Great Britain, and who are entitled to Irish citizenship by descent, but whose substantive rights are protected as British rather than Irish citizens. Second, there are British citizens born in Northern Ireland, living in either Great Britain or Northern Ireland, and who have asserted their right to Irish citizenship, but do not need to rely on CTA rights. Third, there are Irish citizens born in Ireland, living in Great Britain or Northern Ireland who have obtained British citizenship through naturalisation and no longer need to rely on CTA-derived rights. Fourth, there are Irish citizens resident in Ireland who were born before 1949 and who may be able to claim British subject status. Fifth, there are Irish citizens living in Ireland—or anywhere outside of the UK—to whom the existing CTA arrangements (and until the transition period ended, EU law) could—but did not yet—apply, as they had not exercised those rights (by moving to the UK). Sixth, there are Irish citizens born in Ireland, but living in Northern Ireland to whom both the CTA and EU law applied until the end of the transition, but who are now covered by a combination of the CTA and potentially the Withdrawal Agreement, and who also benefit from the additional protections against discrimination provided for in the Good Friday Agreement (GFA) and Windsor Framework. Seventh, there are Irish frontier workers, resident in Ireland, but who cross the border into Northern Ireland to work, or commute to Great Britain to do so.[57]

More complex is the eight category, namely, Irish citizens who form part of the 'people of Northern Ireland', while identifying exclusively as Irish, to whom CTA-derived rights (if residing in Great Britain) and aspects of the Withdrawal Agreement (for example, the provisions on family reunification) may—but need not—apply.[58] This group also enjoy additional rights by virtue of being part of the people of Northern Ireland, for example greater access to reserved civil service positions.[59] The people of Northern Ireland also derive rights from the GFA and the related (although uncertain) commitment to the non-diminution of rights found within Article 2 WF.[60] The latter also creates divisions between British citizens forming part of the people of Northern Ireland and those who do not.

Finally, the ninth category relates to Irish citizens, born in Ireland, but living and working in Great Britain. This category is the most 'detached' from both the territory of Ireland and from UK citizenship. As illustrated above, the category of Irish citizen, born in Ireland but resident in Great Britain can also be broken down further into: (1) those Irish citizens who were resident in Great Britain at the end of the Brexit transition period and who obtained settled status; (2) those who were resident in Great Britain at the end of the transition but who did not obtain settled status and, finally; (3) those Irish citizens who move to Great Britain post-transition. The first category will be able to rely on the above-discussed EU-derived rights. In contrast, the latter two categories will have to rely on the CTA arrangements and relevant provisions of UK domestic legislation in order to enforce their substantive rights.

B. Fragmentation in the protection of employment rights

The above categorisation of Irish citizens demonstrates that the territorial and personal scope of rights associated with Irish citizenship in the UK are not always easy to define. Whilst Irish

57. de Mars and O'Brien (n 34) 122.
58. *Secretary of State for the Home Department v Jake Parker De Souza* [2019] UKUT 355; Home Office, 'EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members', 2 December 2020 16.
59. Civil Service Nationality Rules (2007) (UK) Annex A.
60. Eleni Frantziou and Sarah Craig, 'Understanding the Implications of Article 2 of the Northern Ireland Protocol in the Context of EU Case Law Developments' (2022) 73 NILQ 65.

citizens are now treated as a distinct class within UK immigration law, regardless of their point of entry, there is a continued failure to recognise that there are different categories of Irish citizen to whom different sources of rights might apply. A number of challenges to the substantive rights of Irish residents of Great Britain also emerge from the above discussion. The first is the inherent informality and ambiguity of the existing CTA arrangements. The second is the potential pressure placed on Ireland by the EU to align its immigration regime more closely with the Schengen Zone rather than the UK. The third threat comes from the national governments, which may at any point decide to change the workings of the CTA and related legislation, unilaterally. Fourth, is the lack of any concrete enforcement mechanism to sanction deviations from the CTA. Fifth, is the potential reaction to public pressure in the UK to strengthen border controls and reduce immigration, perhaps coupled with a fear that Ireland could be used as a 'backdoor' into the UK.[61] Sixth, is Brexit itself, which necessarily involves increased divergence between the UK and Ireland, but with EU employment standards particularly vulnerable to erosion.

In addition to these challenges, there is also increased differentiation in the protection of the rights granted to Irish citizens working in the UK both in the sense of the above-discussed personal scope of those rights i.e., the category of citizen to whom they apply, but also in the legal instruments chosen to protect them. It will be seen that the absence of an express protection of some of the substantive rights of Irish citizens within domestic legislation actually goes relatively unnoticed, for example in the context of the UK's permission-based right to work rules, which apply in largely the same way as for British citizens, but which are also reinforced by secondary legislation governing right to work checks, and thus also *indirectly* protect the rights of Irish citizens as well as other categories of leave-holder. The right to work is perhaps the most important substantive right granted to Irish citizens under the CTA given its role of facilitating access to other economic and social rights, including employment rights while working.

i. The right to work. The manner in which the right to work of Irish citizens is protected is particularly unusual in that no such right explicitly exists anywhere within UK legislation, with the right to work of *everyone* in the UK depending instead on immigration status and the attendant need—or exemption from the need—to obtain 'permission' to work. It has already been noted that Irish citizens as a class have been granted leave to enter and remain in the UK under Section 3ZA IA 1971, thereby deriving a negative right to work in a similar way to British citizens. This provision must be read alongside Section 24B of the same Act which provides that any person who requires leave to enter or remain in the UK and has not been granted such leave—or such leave is invalid or has ceased to have effect—commits an offence if that person undertakes employment. Given that Irish citizens do not require leave to enter or remain, it follows that they are not committing an offence under the Immigration Act 1971 if they work in the UK. The same is true of Irish citizens who have made a successful application under the EUSS, whose residence rights—and thereby right to work—are governed by the Withdrawal Agreement as implemented in domestic law. Irish citizens who applied for a frontier worker permit, are required to retain that status continually in order to access the rights provided for in the Withdrawal Agreement.[62] Irish citizens are, however, exempt from the requirement to produce a frontier worker permit.[63]

61. *Kweder v Minister for Justice* [1996] 1 IR 381.
62. de Mars and O'Brien (n 34) 137.
63. Regs 5 and 6 Frontier Workers Regulations 2020.

In practice, it is likely that most Irish citizens working in the UK will continue to ground their rights in the CTA and related legislation, rather than the Withdrawal Agreement, thereby further diminishing the value of their withdrawal rights as they relate to *EU* citizenship, at least as regards domestic law governing *access* to employment, although such rights may become relevant where disputes arise. The same was also true while the UK was a member of the EU, with Irish citizens not needing to rely on their EU worker status, albeit that the exemption from the need to acquire leave to enter or remain in the UK was more indirect than under the more recently amended immigration rules.

In the event that (pre-)settled or frontier worker status is lost, Irish citizens can also rely on the right to work protections offered by the CTA and associated legislation. Historically, however, there have been restrictions on the rights of Irish citizens from Ireland to work in (parts of) the UK.[64] While it is also not inconceivable that an employer might be mistaken as to the right of an Irish citizen to work, the amendment of the Immigration (Restrictions on Employment) Order 2007 and the recent introduction of new digital validation checks at least make clear that British and Irish citizens form a distinct group for the purpose of right to work verifications.[65] This is in part because the previous system of online checks was not practicable for British and Irish citizens as they do not appear in Home Office immigration records.[66] The new system allows the identity of British and Irish workers to be checked remotely by certified Identity Service Providers (ISP).[67] The Guidance makes clear that sponsor licences are not required for Irish citizens or for those with pre-settled or settled status and/or indefinite leave to remain in the UK.

Also of relevance to the right to work is the (mutual) recognition of professional qualifications and which is now addressed in the United Kingdom Internal Market Act (UKIMA) 2020. The UKIMA 2020 enshrines the principles of mutual recognition and non-discrimination (the market access principles) for goods and services. The Act makes no mention of Irish (or indeed British) citizens, despite the free movement of workers representing a core component of any internal market.[68] Of particular relevance for Irish citizens working in the UK are the Act's provisions on the mutual recognition of qualifications across the UK.[69] Evidently, a general right to work is not the same thing as having a right to practise a regulated profession. This much is accepted in the CTA MoU, which notes that the recognition of professional qualifications is merely an 'essential *facilitator*' of the right to work associated with the CTA, although it does highlight a potential avenue for restricting the right to work of Irish citizens in the UK despite their special immigration status.

The Act establishes that UK residents who are qualified to practise a profession in one of the four UK nations will—subject to certain exceptions—be recognised in respect of the equivalent profession in another part of the UK, without the need to requalify.[70] Irish nationals who obtained their qualification in the UK will be able to benefit from the Act's mutual recognition regime.[71] The legislation does not make any provision for the recognition of qualifications obtained in Ireland,

64. Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981 (SI 1981/839).
65. SI 2022/242 and SI 2021/689.
66. CJ McKinney, 'Changes to right to work checks from 6 April 2022', Free Movement Blog, 20 January 2022.
67. UK Government, 'Identity Document Validation Technology in the Right to Work and Right to Rent Schemes, and DBS Pre-Employment Checking' Policy Paper, 27 December 2021.
68. Thomas Faist, 'Social Citizenship in the European Union: Nested Membership' (2001) 39 Journal of Common Market Studies 37.
69. Part 3 UKIMA 2020.
70. ibid.
71. Ss 24 and 25 UKIMA 2020.

and therefore represents a divergence from the mutual recognition system found within EU law.[72] The Withdrawal Agreement does, however, ensure that Irish (and other EU) citizens who have acquired settled status and who had their Irish qualifications recognised in the UK prior to the end of the transition period will continue to have their professional qualifications, and thereby their right to work in that profession, recognised.[73]

The TCA, which governs the new relationship between the EU and the UK does not provide for mutual recognition of qualifications, but does accept that both parties may in future seek more detailed reciprocal arrangements.[74] Specific arrangements may also be reached between the British and Irish Governments to recognise Irish qualifications in the UK. Without such arrangements, Irish qualified professionals (and Irish citizens qualified in another country without a mutual recognition agreement), who arrive in the UK to work, will need to apply to the relevant authorities to have their qualifications recognised in accordance with the new system.[75] Absent specific arrangements, Irish citizens will be treated in the same way as all other EEA citizens for the purposes of the mutual recognition of qualifications under the UK legislation. The new (temporary) system is nevertheless consistent with the UK's commitments under the CTA MoU, which simply provides that both governments 'are committed to ensuring that within their respective jurisdictions, comprehensive measures continue to be in place to allow for the recognition of such qualifications, covering all relevant professions, in accordance with their national laws', but which for now essentially takes place on a sectoral basis.

The above discussion makes it clear that Irish citizens in the UK enjoy a relatively high level of protection of the right to work in that this right is largely protected in the same way as for British citizens, albeit that the latter derive their right to work from the right of 'abode' under the 1971 Act. These protections also go against the grain of post-Brexit immigration law, which has ended freedom of movement and thereby the EU law derived right to work for all EEA citizens without settled status. Nevertheless, the right to work under domestic UK law continues to be dependent on a patchwork of indirect legislative interventions. This can be contrasted with the rights enjoyed by Irish citizens under EU (withdrawal) law, where the right to work is also reinforced by Treaty commitments and the recognition of that right as a fundamental right in the EU Charter of Fundamental Rights (CFR).[76] The EU right to work is also supported by clear enforcement mechanisms as well as constitutional concepts such as direct effect and primacy, which strengthen the place of the right to work within the hierarchy of norms. The indirect protection of the right to work of Irish citizens can also be contrasted with the more explicit protections that have been granted for other substantive rights deriving from the CTA, notably access to social security, which is buttressed by a new treaty-based framework.[77] Similarly, the right to access education and healthcare are—albeit also indirectly—provided for Irish citizens under

72. Directive 2005/36/EC [2005] OJ L255/22.
73. Art 27 WA; Qualifications and Services (Amendments and Miscellaneous Provisions) (EU Exit) Regulations 2020 (SI 2020/1038).
74. Stefano Fella and others, 'The UK-EU Trade and Cooperation Agreement: Summary and Implementation' House of Commons Briefing Paper No 09106, 30 December 2020 21.
75. European Union (Recognition of Professional Qualifications) Regulations 2015 (SI 2015/2059) as amended.
76. Art 45 TFEU; art 15 CFR.
77. Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and The Government of Ireland, 1 February 2019; The Social Security (Ireland) Order 2019 (SI 2019/622) (UK).

domestic legislation i.e., the content of the rights is made explicit (in contrast to the right to work), but these rights are not explicitly addressed to Irish citizens (in the same way as the right to work is not).[78]

It should now be clear that in addition to the fragmentations associated with the personal scope and source of protection of Irish citizens in the UK, there are also divergences in the legislative techniques chosen to enforce those rights. In some fields, such as the right of residence, the UK has *unilaterally* introduced legislative measures to ensure Irish citizens have access to that right. The right of residence is also a gateway right to other substantive rights, such as the right to work on the same terms and conditions as British nationals. In other fields, notably social security, domestic legislation is the vehicle through which *bilateral* agreements are enforced. The latter approach is evidently more effective in ensuring the transparency of rights, and which also has the additional effect of ensuring that substantive rights are based on negotiation and reciprocity, rather than being dependent on the unilateral action of one party, leading to potential future non-consensual changes.

Given the influence of EU law, as well as the emphasis on Brexit as an opportunity to reduce 'red tape', employment law is one of the substantive fields that is most vulnerable to change post-Brexit, with the potential therefore to create additional asymmetries within the CTA, by eroding the reciprocal protection of employment rights. The right to work deriving ultimately from the CTA is undermined if the level of protection granted to employment rights is reduced, with Ireland continuing to be bound by the protections offered by EU labour law, and which may further increase the fragmentation in employment rights protected on both sides of the Irish border, despite the existence of the Windsor Framework's non-diminution commitments in relation to the rights and equality protections provided by the GFA.[79]

ii. Rights in work. It has already been noted that Irish citizens enjoy a right to reside in the UK, which in turn facilitates access to a right to work without the need to obtain permission. Having a right to work also opens up the possibility of access to certain substantive employment rights while working, provided that the individual meets the tests for employee or worker status, which can act as an additional barrier to the protection of substantive employment rights in the UK.[80] Whereas the right to work of Irish citizens has been grounded in domestic law post-Brexit, substantive employment rights remain vulnerable to deregulation in the wake of the UK's departure from the Union. The UK has long had one of the world's most flexible labour markets, based on the level of employment protection.[81] Despite this, one of the key motivators for Brexit was the perceived need to reduce the level of regulation emanating from Brussels, including within the employment context, therefore presaging a potential post-Brexit deregulatory agenda.[82] The UK has long demonstrated scepticism towards the encroachment of EU social law measures, for example in its initial opt-out from the Social Chapter to the Maastricht Treaty, and the—albeit much less effective—'opt-out' from the CFR, which was essentially an attempt to ensure that the Charter's fundamental economic and social rights did not undermine the UK's 'liberal' approach to the regulation

78. National Health Service Act 2006; Education Act 1996.
79. Sarah Craig and others, 'The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland' ECNI, NIHRC and IHREC, December 2022.
80. S 230 Employment Rights Act 1996.
81. Organisation of Economic Co-operation and Development, Indicators of Employment Protection 1990–2019.
82. Phil Syrpis, 'The Influence of the EU on UK Labour Law – Before and After Brexit' (2022) 51 ILJ 802, 817.

of the labour market.[83] The UK has also sought (unsuccessfully) to challenge the adoption of key aspects of EU employment legislation.[84]

EU law has certainly been influential in the development of labour standards in the UK, with the Union legislating in areas as diverse as discrimination law, collective rights, business transfers and the regulation of working time.[85] In the employment context, the EU largely adopts the technique of minimum harmonisation, whereby Union legislation sets the floor below which Member States are not permitted to deviate. While aspects of EU employment law evidence both a social (worker protection) and integrationist (market-building) rationale, EU employment rights are also accompanied by clear enforcement mechanisms, with the CJEU capable of assessing the compatibility of national law with EU legislation, and with certain employment rights also enjoying direct effect, allowing for their individual enforcement before national courts.[86]

The legislative protections granted by EU labour law also do not operate in a vacuum. Rather, they must be viewed against the normative backdrop provided by the Treaties, and which can be used as guides to the interpretation of EU legislation as well as national implementing legislation. For example, Article 3 of the Treaty on European Union (TEU) includes a commitment to 'work towards (…) a highly competitive social market economy, aiming at full employment and social progress', concepts which, although somewhat ill-defined, nevertheless emphasise the need for greater coherence between economic and social policies.[87] Perhaps more significant is the recognition in the CFR of the fundamental (social) rights underpinning of many of the employment rights found within EU legislation, for example the right to fair and just working conditions, which includes the directly effective right to paid annual leave.[88] These measures provide a clear indication of the normative value of at least some of the rights found in EU employment legislation, with the Charter also said in its preamble to espouse the 'universal' values of human dignity, freedom, equality and solidarity, as given more concrete expression in its individual provisions, and which are also echoed in Article 2 TEU, which sets out the Union's objectives. In other words, substantive EU legislative protections are reinforced through the interpretative and normative lens provided by fundamental constitutional concepts within the Union legal order.

None of this is to suggest that the aims of EU labour law remain uncontested, as perhaps evidenced by the distinction drawn in the Charter between 'rights' and 'principles', and which may impede the effectiveness of Charter provisions of relevance to the employment context.[89] Union law can also have a negative impact on Member State labour standards, particularly where the latter conflict with internal market freedoms, potentially leading to the framing of employment rights as 'barriers' to trade, which must therefore be justified by reference to a legitimate and proportionate aim.[90] Nevertheless, EU law has by-and-large been effective in ensuring a floor of basic rights for workers across the Union, thereby facilitating freedom of movement.

83. Michael Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) CMLRev 617, 666.
84. Case C-84/94 *UK v Council* ECLI:EU:C:1996:431.
85. Syrpis (n 82) 808.
86. ibid 804, 805.
87. Working Group XI on Social Europe (CONV 516/1/03 REV 1, para 17); Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972, para 76.
88. Case C-569/16 *Bauer* ECLI:EU:C:2018:871.
89. Case C-176/12 *AMS* ECLI:EU:C:2014:2.
90. Case C-438/05 *Viking* ECLI:EU:C:2007:772; Case C-341/05 *Laval* ECLI:EU:C:2007:809.

Much of this legislative acquis (apart from the Charter) has now been converted into 'retained EU law', which enjoys primacy over any UK law measures enacted prior to the end of the transition period.[91] In accordance with the provisions of the Retained EU Law (Revocation and Reform) Act (REULA) 2023, retained EU law as a category ceases to exist from 1 January 2024, thereby ending its primacy over national law, as well as ending the direct effect of EU-derived rights, although the *effects* of these constitutional concepts may be restated i.e., preserved.[92] Draft Regulations have already been produced in order to codify EU-derived equality rules, such as the single source test for equal pay claims, which would otherwise lapse as a result of the 2023 Act.[93] The overall purpose of the REULA 2023 is to facilitate the timely removal or replacement of secondary legislation deriving from the EU, but the sunset clause that would have seen *all* retained EU law fall away unless explicitly preserved, has been abandoned.[94] The Act further provides for a new reference procedure, allowing lower courts, including employment tribunals, to refer questions relating to retained (now known as 'assimilated') EU case law (which remains binding on such courts) to higher courts with the power to overturn former EU case law, but only in cases of 'general public importance'.[95]

Regardless of the ongoing status of retained EU law as a category, domestic employment legislation—whether or not deriving from EU law—remains vulnerable to amendment or repeal post-Brexit. Significant aspects of the employment relationship have always been regulated by national law, notably unfair dismissal and the minimum wage, although even the latter is subject to increased coordination at Union level.[96] Some important changes have recently been announced to UK employment rules, and which do relate to aspects of retained EU law, including amendments to working time legislation governing paid annual leave in order to merge certain categories of holiday leave, as well as allowing for 'rolled-up' holiday pay, i.e., for holiday pay to be included in ordinary wages rather than being paid at the time the leave is taken, and which may thereby discourage workers from taking annual leave.[97] Additional proposals include removing consultation requirements under the law governing business transfers.[98] Finally, a number of (relatively minor) EU-derived statutory instruments relating to working time and posted workers, will also be repealed. More broadly, the 2023 Act grants Ministers the power to reform EU-derived laws until June 2026, so long as these reforms do not increase the 'regulatory burden'.[99]

Since its departure from the EU, the UK now also enjoys broader freedom to diverge from the protective framework offered by EU labour law, but remains somewhat constrained by the Level Playing Field (LPF) provisions of the TCA, in addition to the ongoing requirement to respect multilateral labour standards as specified in Article 399 TCA. The LPF is intended to ensure 'fair' competition between the parties and, as such, has a clear economic rather than social underpinning, with the 'non-regression' (Article 387 TCA) and 'rebalancing' (Article 411 TCA) provisions essentially ensuring that regulatory divergence, notably in the context of labour protections (defined in Article

91. Ss 2–7 EU(W)A 2018.
92. Ss 9 and 11–16 REULA 2023.
93. The Equality Act 2010 (Amendment) Regulations 2023.
94. S 1 REULA 2023.
95. ibid s 6.
96. Art 153 TFEU; Directive 2022/2041 [2022] OJ L275/33.
97. Working Time Regulations 1998 (SI 1998/1833).
98. Department for Business and Trade, 'Smarter Regulation to Grow the Economy', 10 May 2023; Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).
99. S 14 REULA 2023.

386 TCA), does not affect trade or investment. These provisions fall short of a 'dynamic alignment' requirement, with the non-regression clause applying to standards in force at the end of the transition period, albeit that the rebalancing mechanisms might provide for a form of indirect alignment by catching 'significant' differences between the parties beyond the minimum thresholds set at the end of the transition period.[100] This can be contrasted with the dynamic alignment provisions in the Windsor Framework, which guarantee the ongoing protection of certain EU equality rights in Northern Ireland, and which may potentially be of broader application beyond the equality context.[101] The TCA provisions are not accompanied by any individual enforcement mechanisms and therefore do not enjoy direct effect, which again can be contrasted with aspects of EU employment and fundamental rights law.

The instability that Brexit has created in the UK's employment law framework affects all workers, but also has particular implications for the CTA, by undermining the attractiveness of exercising CTA rights in order to obtain employment in the UK. Brexit also introduces further asymmetries in the substantive protections offered within the CTA, given that Ireland will continue to comply with the entirety of the EU's labour law acquis, including the economic and social rights contained within the Charter.[102] More fundamentally, these changes represent a deeper flaw within the CTA arrangements in that they illustrate the absence of any commitment to maintaining employment rights at any particular level, save to the extent to which the UK complies with its international obligations regarding workers' rights, including towards TCNs, for example under the provisions of the European Social Charter (ESC), which contains specific protections for migrant workers within Article 19. The absence of more rigorous binding commitments compounds the fact that access to the CTA's substantive protections remains vulnerable to unilateral repeal.

In order to overcome at least some of the post-Brexit fragmentations associated with the CTA, it is necessary to reimagine its underlying purpose, and to offer a clearer articulation of the role the CTA plays as a gateway to accessing fundamental social rights, including the rights of workers falling within its scope. It is worth noting that the CTA initially emerged from the context of divergence, rather than convergence, between the UK and Ireland, with Brexit therefore representing an opportunity to redefine the normative purpose of the CTA. Indeed, it was Brexit that ultimately led to the recognition of Irish citizens as a distinct group within UK immigration legislation, thereby (re-)securing their post-Brexit right to work. A reconceptualisation of the purpose of the CTA could constitute a response not only to Brexit itself, but could also ensure the CTA's sustainability in the face of further labour rights divergence between the EU (including Ireland), and the UK.

C. Reconceptualising employment rights under the Common Travel Area through the normative lens of social citizenship

It should now be clear that the CTA, and related arrangements, represent a rather weak employment law intervention in that they constitute no more than a facilitation of national measures to ensure (approximately) equivalent treatment between British and Irish citizens in matters of employment, among other economic, social and political fields. The current CTA arrangements are thereby

100. Syrpis (n 82) 822, 823.
101. Frantziou and Craig (n 60).
102. Aspects of the Charter have continued relevance within the context of the WA's citizenship provisions: *SSWP v AT* [2023] EWCA Civ 1307.

devoid of any underpinning (social) objectives or values, and lack explicit recognition of their role as a facilitator of access to employment rights. The grounding of the rights of Irish citizens in UK immigration law also poses challenges, given that 'citizenship' comes with its own set of exclusionary preconceptions that can serve to undermine the protection of substantive employment rights, particularly in the absence of a 'social' conception of citizenship rights.

Social citizenship theory therefore suggests a basic floor of rights that should be enjoyed by *all* citizens, and which thereby has clear implications for the protection of workers' rights. The MoU reached between the two governments, within the wider context of the unfolding Brexit process, appears to suggest that the CTA has always existed and should therefore continue to exist without any meaningful interrogation of its underlying purpose, or indeed of whether the CTA represents an effective underpinning for the protection of economic and social rights, particularly within the context of withdrawal from the protective framework offered by EU law. It is thus essentially unclear whether (1) the CTA exists to facilitate the granting of substantive rights to British and Irish citizens in each state, or whether (2) conversely (or concurrently), the granting of such substantive rights is necessary to facilitate the CTA.

The Memorandum is rather self-referential, with the Participants recognising 'their shared commitment to the protection of the CTA and associated reciprocal rights and privileges as a legitimate and fundamental public policy'. The Memorandum further stipulates the Participants' 'commitment to ongoing joint work to maintain and enhance the frameworks for cooperation on matters relating to the CTA and the associated reciprocal rights and privileges whilst protecting the longstanding principles on which this cooperation is based', without clarifying what these principles might be. The CTA is described as 'facilitating the ability of our citizens to move freely', with the MoU also stipulating that 'associated reciprocal rights and privileges have been enjoyed'. There are, however, *indirect* suggestions for justifications underpinning the CTA arrangements, with the MoU noting that '[t]hese arrangements reflect the historically close links and cooperation between Ireland and the UK, the many social and economic connections, as well as how the two countries have approached together the movement of people across national borders over time [and that they] hold a special significance in people's daily lives'.

Therefore, while the MoU evidences the joint commitment of the UK and Ireland to preserving the CTA post-Brexit, it remains unclear precisely what the Parties are seeking to preserve. What is clear is that the justifications for the existence of the CTA, and thereby the special status of Irish citizens in the UK, have always been practical and pragmatic rather than principled or normative. The primary rationale for the continued existence of these special arrangements remains essentially the impracticality of imposing border controls between Ireland and Northern Ireland, both given the logistics involved in policing a 500-kilometre border, but also given the cultural, social, economic, and political sensitivities associated with border controls on the island of Ireland.[103] Similar (unionist) sensitivities surrounding border arrangements preclude the imposition of controls between the island of Ireland and Great Britain. This, however, leads to the question as to whether the right to work within the CTA is essentially dependent on the continued existence of Northern Ireland as a constituent part of the UK, and which also raises fundamental questions as to how concepts of citizenship (and national identity) interact with employment rights derived from the CTA.

When taken together, the substantive rights offered to those entitled to benefit from the CTA span the full spectrum of categories of rights, namely civil rights, political rights and, crucially

103. John Coakley and Liam O'Dowd, 'The Transformation of the Irish Border' (2007) 26 Political Geography 877.

for present purposes, social rights.[104] The rights of Irish citizens in the UK essentially coincide with those of British citizens, save to the extent that the rights deriving from the CTA are not entirely reciprocal, and bearing in mind that some of these rights are also extended to other groups, for example Commonwealth citizens or those with settled status. Certainly, when it comes to the right to work and rights in work, Irish citizens are essentially treated substantively (even if not formally) as if they were British, with similar—although not identical—rights, privileges and procedures applying to both groups.

Although Irish citizens with settled status may benefit from the additional substantive and procedural protections offered by the Withdrawal Agreement, the CTA operates as a sort of default, ensuring that all Irish citizens can fall back on the protections offered by their privileged position within UK immigration and, therefore, employment law. Nevertheless, the justifications offered for the continued existence of the CTA essentially refer back to the original rationale for its foundation, namely, the practical need to avoid controls on persons entering either Northern Ireland or Great Britain from Ireland (the justification for the CTA as a free travel zone) and the related difficulties in distinguishing between classes of Irish citizen (justification for the substantive rights granted to Irish citizens), despite the fact that an absence of border controls is not necessarily a prerequisite for access to substantive social rights, while the granting of substantive rights is similarly not necessarily dependent on the removal of border controls, although it may encourage movement.

Given the elision of the rights granted to British and Irish citizens, the question can be asked whether a renewed conception of citizenship could form the normative foundation for a reformed CTA and one that recognises the value of the fundamental rights it supports, including the right to work. Citizenship and national identity can be antagonistic concepts, particularly in Northern Ireland. Post-Irish independence, there was also a complex relationship between Irish citizenship and British subject status.[105] Nevertheless, (social) 'citizenship' can be reconceptualised beyond its traditional confines within the nation state, as perhaps most clearly evidenced by the notion of EU citizenship, which grants standalone rights in addition to the freedom of movement and equal treatment rights provided for 'workers' under Article 45 of the Treaty on the Functioning of the European Union (TFEU), and related legislation.[106]

The EU's free movement regime was not, therefore, initially couched in terms of 'citizenship'. In fact, that regime has undergone several phases of transformation, beginning with the notion of the free movement of 'workers', i.e., the economically active; gradually extending to the non-economically active (free movement of 'people') before finally resting alongside the parallel, but interconnected EU citizenship regime, and which itself complements rather than supplants national citizenship.[107] The protections granted to EU citizens also depend on their length of residence, and there have been periods of retrenchment, for example in the recent more restrictive interpretation of the rights of non-economically active citizens.[108] Nevertheless, it can be said that the rationale for freedom of movement across the Union has transformed from an essentially economic

104. Marshall (n 12).
105. Ryan (n 3).
106. Regulation 492/2011 [2011] OJ L141/1.
107. Adrienne Yong, 'Free Movement or Fundamental Rights? EU Citizenship as a Legal Gateway to Fundamental Rights Protection' in Kostakopoulou and Thym (n 56) 149.
108. Case C-333/13 *Dano* ECLI:EU:C:2014:2358; Catherine Jacqueson, 'EU Social Citizenship: Between Individual Rights and National Concerns' in Frans Pennings and Martin Seeleib-Kaiser (eds), *EU Citizenship and Social Rights* (Edward Elgar 2018) 27.

and market-building rationale, to one more firmly located in the idea of transnational citizenship.[109] At the same time, the concept of the 'worker' within EU free movement law, although interpreted broadly by the CJEU, remains grounded in economic, rather than (social) citizenship concepts, notably 'subordination', 'remuneration', and 'genuine' and 'effective'—as opposed to 'marginal or 'ancillary'—economic activity.[110]

The CTA, by way of contrast, continues to be rather transactional in nature, with its purpose essentially being to avoid the economic, social and political costs associated with policing movement between Ireland and the UK. The CTA's underdevelopment as a 'rights instrument' can perhaps be explained by the fact that in certain respects, its function and purpose had been overtaken by the UK and Irelands' joint membership of the EU, with many of the rights granted under the CTA, including the right to work, also being found within EU law. Nevertheless, it is suggested here that the manner in which the CTA currently operates in practice through various legislative instruments, actually comes very close to a nascent form of quasi 'CTA citizenship', albeit crucially one that is neither political, nor subordinate to national citizenship.

The notion of 'citizenship' is not unidimensional, and indeed remains a contested, ambiguous and context-dependent concept.[111] Bosniak has offered a taxonomy of various forms of citizenship, namely: (1) citizenship as 'legal status', meaning formal membership in the nation state; (2) 'political' citizenship, which encompasses the ways in which people participate in the governance of their communities and which can take place across borders; (3) 'social' citizenship, which is also known as 'citizenship as rights', and which denotes the package of (social) entitlements that derive from membership and; (4) citizenship as 'identity', which evokes a sense of belonging to the group.[112] Elements of each of these aspects of citizenship can be found in the status of Irish citizens under the CTA and related legislative instruments, whose privileged position thereby goes well beyond the idea of granting 'partial' citizenship, i.e., the gradual and selective extension of civil, political and social rights to migrant workers.[113]

Of particular interest to the present consideration of the normative underpinning of the CTA as a medium for the protection of workers' rights, is Marshall's concept of 'social citizenship', which while being a facet of 'citizenship' itself, has also been said to point to the 'unified nature of citizenship and the need to consider civil, political and social rights in relation to, not in isolation from, each other', with 'equality of status' representing the unifying concept connecting each element of citizenship.[114] Social citizenship is further said to encompass two dimensions, namely, (1) the 'ties' between citizens and (2) the 'status' of citizens.[115] The former dimension refers to the connection between citizens, and between citizens and the relevant governing body. On this view, 'citizenship connotes the institutionalization of generalized reciprocity and diffuse solidarity of members in a political community', with 'generalized' and 'diffuse' being used to indicate that solidarity and

109. Catherine Barnard and Sarah Fraser Butlin, 'Ceding Control and Taking it Back: The Origins of Free Movement in EU Law' (2022) 51 ILJ 643, 671.
110. Case C-344/87 *Betray* ECLI:EU:C:1989:226; Case C-66/85 *Lawrie-Blum* ECLI:EU:C:1986:284.
111. Eric Gorham, 'Social Citizenship and its Fetters' (1995) 28 Polity 25, 40.
112. Linda Bosniak, 'Citizenship Denationalized' (2000) 7 Ind J Global Legal Stud 447.
113. Leah F Vosko, *Managing the Margins: Gender, Citizenship, and the International Rights of Precarious Employment* (OUP 2010) 9–12.
114. Michael Lister, '"Marshall-ing" Social and Political Citizenship: Towards a Unified Conception of Citizenship' (2005) 40 Government and Opposition 471, 473 and 481.
115. Faist (n 68) 40.

reciprocity operate at the level of the group, for example the community, the nation, or an organisation.[116] The second dimension holds that citizens are 'full and equal members of a political community with all attending rights and duties'.[117]

Faist, discussing the emergence of social citizenship within EU law, has emphasised the importance of a present and future-oriented common project, whose dynamics stem from the creation of common rights.[118] While the formal relationship between the UK and Ireland falls far short of the (albeit itself incomplete) political, economic and social union found within EU law, the cultural and symbolic ties between the former are much stronger, and reflect the long history of worker migration between the two islands. This in turn has the consequence that Irish citizens are essentially able to access the full panoply of citizens' rights on the same terms as UK nationals, and which therefore goes beyond the protections provided for at Union level, which fall well short of the full range of citizenship rights envisaged by Marshall.[119] EU law continues to distinguish between the 'worker' (market citizen) and wider citizenship rights applicable to the economically inactive, as well as those who have not exercised their free movement rights at all, thereby failing to meet Marshall's unifying conception of citizenship, as applicable to all persons, including the economically inactive.[120] In other words, all 'workers' as defined in accordance with Article 45 TFEU, are necessarily citizens for the purposes of EU law, but derive their right to work from their 'worker' rather than 'citizen' status. The right to work of TCN family members of EU citizens is similarly derived from the underlying (worker) status of their EU citizen family member, but without themselves enjoying EU 'citizenship' rights, which remain the preserve of nationals of Union Member States.[121]

As has already been seen, UK immigration law similarly provides for the right to work for various categories of leave-holder, but without extending other rights associated with British citizenship, and which demonstrates the significance of granting Irish citizens essentially the full range of rights enjoyed by UK nationals. Indeed, it has also been recognised that communities, which may form across national boundaries, can 'serve as sites of citizenship identity and solidarity', broadly conceived.[122] Moreover, it is the very malleability of social citizenship that makes it a valuable tool for reconceptualising the CTA around social rights concepts, and which can bolster post-national claims that the fundamental rights—including all civil and social rights—of persons be respected, regardless of citizenship status.[123] Despite their differing perspectives, fundamental rights can also help to define the substantive content of citizenship, as well as form the basis for the extension of such rights to non-citizens.[124]

Many of the substantive rights outlined in the CTA MoU can be found within international human rights instruments, but there is no recognition within the MoU of the normative value of

116. ibid.
117. ibid 41.
118. ibid 40.
119. Catherine Barnard, 'EU "Social" Policy: From Employment Law to Labour Market Reform' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, OUP 2021) 678; Catherine Barnard, *The Substantive Law of the European Union* (7th edn, OUP 2022) 322.
120. Nic Shuibhne (n 13); Stefanie Börner, 'Marshall Revisited: EU Social Policy from a Social-Rights Perspective' (2020) 30 Journal of European Social Policy 421, 425.
121. Directive 2003/109 [2004] OJ L16/44.
122. Bosniak (n 112) 488.
123. Faist (n 68) 45.
124. Mark Simpson, *Social Citizenship in an Age of Welfare Regionalism: The State of the Social Union* (Hart 2022); Bosniak (n 112) 462.

rights such as the right to work, which enjoys the status of a fundamental right in international (and EU) law.[125] A unified conception of the fundamental rights underpinning the CTA could also temper the increased divergence in the protection of social rights between the regions of the UK, but also between Ireland and the post-Brexit UK.[126] Indeed, it has been suggested that an early rationale for the status of Irish citizens as 'not foreign' in the UK was intended to protect their substantive rights, rather than to reflect the existence of the CTA, with the latter justification only emerging once Ireland had left the Commonwealth and its citizens ceased to be treated as British subjects.[127]

The idea that social citizenship or social rights might constitute an underpinning for the CTA does not suggest the uniform application of citizenship concepts across the UK and Ireland, which would be controversial within the context of two independent sovereign states, but particularly so given the fraught history between the two countries. Rather, it is argued that social citizenship can act as a normative concept, laying the ground for a floor of basic social rights, with Marshall defining this 'social minimum' as '[t]he whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society'.[128] It is suggested here that the right to work, and rights in work, are a crucial (albeit not exclusive) mechanism facilitating access to this social minimum, and with employment prospects representing a strong pull factor in exercising CTA rights. Worker mobility, which leads the worker to cross welfare-regime borders, has obvious implications for social citizenship, detaching that concept from its traditional locus in the nation state and thereby diverging from 'static' notions of sovereignty'.[129] Work itself can also serve a number of citizenship-building functions, with 'good work' representing an 'essential component of full citizenship, as well as an important site for the exercise of citizenship', particularly where, as here, broad conceptions of (social) citizenship as a sense of 'belonging' are deployed.[130]

Until the CTA's free movement rights are acted upon, these substantive social rights remain in abeyance, with the enjoyment of those rights essentially dependent on either physical presence, or residence in the other jurisdiction, in the same way that EU free movement rights only apply to workers in cross-border situations.[131] Within the EU context, it has been argued that social citizenship is shaped by the free movement of people, which creates a social environment or 'social milieu' at Union level.[132] It is also interesting to note changes to Irish nationality law during the early 21st century, which saw Ireland move away from an unconditional *ius soli* principle, whereby everyone born on the island of Ireland was entitled to Irish and thereby EU citizenship, with attendant implications for freedom of movement and the right to work across the Union.

The reformed citizenship rules provide that a child born on the island of Ireland will be entitled to Irish citizenship only where at least one of their parents is Irish, British, or otherwise meets the residence conditions provided for in Irish nationality law, and which includes a role for UK law in

125. Art 23(1) UDHR; art 6 ICESCR; art 1 ESC; art 15 CFR.
126. Simpson (n 124) 18.
127. Ryan (n 3) 860.
128. Marshall (n 12) 8.
129. Teresa Pullano, 'Free Movement, Social Citizenship, and the Production of the EU's Legal Territory as a "Social Milieu". Reading the *Laval* Case through Foucault' (2023) 23 La Revue des Droits de l'Homme 1, 3 and 13.
130. Gordon and Lenhardt (n 13) 1168.
131. Case C-175/78 *R v Saunders* ECLI:EU:C:1979:88; Cecilia Bruzelius, 'Freedom of Movement, Social Rights and Residence-Based Conditionality in the European Union' (2019) 29 Journal of European Social Policy 70.
132. Pullano (n 129) 1.

determining the right of residence in Northern Ireland.[133] Irish law thereby illustrates the possibility of extending certain citizenship rights to those residing within a particular (non-national) territory, as long as they enjoy an underlying (in this case, familial) connection with the relevant nations making up that territory. The existence of transnational social citizenship deriving from freedom of movement does not, however, imply a 'homogenous flawless and borderless space'.[134] Since the signing of the GFA, the various rights underpinning the CTA also operate within an overarching normative framework seeking to reconcile potentially conflicting British and Irish national identities by granting entitlement to citizenship of both countries.

Such a *variable* vision of social citizenship is not as far-reaching as it might at first appear. For example, Simpson notes the increased divergence in how social citizenship is defined and experienced across the UK as a consequence of devolution, but which has always had somewhat of a 'regional' character.[135] Regionalisation—and as argued here, transnationalisation—does not necessarily undermine social citizenship's unifying tendencies, in the sense of protecting a core of basic social rights, with its protections instead capable of being located or 'nested' at different levels.[136] In the EU context, for example, social citizenship has produced a differential space at Union level, with freedom of movement leading to the creation of a 'territory' through law (a juridico-political structure), and which in turn leads to a 'rescaling' of social citizenship, thereby extending that concept beyond the confines of the nation state, and which attenuates the risk of 'stratification' caused by the varying social entitlements guaranteed by the individual Member States.[137]

While EU-level visions of social citizenship are clearly influenced by the interrelationship of national and supranational rules, the CTA and associated rights, while largely the product of domestic legislation, also provide a clear indication that (social) citizenship rights, such as the right to work, are not always dependent on nationality of the relevant polity, nor are they confined within the framework of the nation state. 'Citizenship' as traditionally understood, also overlooks the sense of belonging that can exist at a more local or regional level, and which can transcend political allegiances or national identity, and which has particular resonance for the important cross-border social and economic connections that exist along the Irish border, with over 30,000 people crossing that border to work every day, some of whom, as non-British or Irish citizens, will not be entitled to benefit from substantive CTA rights.[138]

Scottish independence, or Irish unification (and thereby the reintegration of Northern Ireland into the EU) would pose further challenges for the protection of social citizenship across the CTA, and indeed for the continuation of the CTA itself. The GFA preserves the British citizenship of the people of Northern Ireland—for those seeking to maintain it in the event of Irish reunification, while Scottish independence would raise complex (British, Scottish and, in the event of reaccession, EU) citizenship issues.[139] Social citizenship, as a normative and legitimising 'signal' detached

133. S 6 Irish Nationality and Citizenship Act 1956 as amended; arts 2 and 9.2 Irish Constitution; Rieder (n 56) 374.
134. Pullano (n 129) 5.
135. Simpson (n 124) 3.
136. Faist (n 68).
137. Pullano (n 129) 1 and 9; Maurizio Ferrera, Francesco Corti and Maarten Keune, 'Social Citizenship as a Marble Cake: The Changing Pattern of Right Production and the Role of the EU' (2023) 33 Journal of European Social Policy 493, 494.
138. Luke Butterly, 'Immigration Rules Restrict Thousands from Crossing Border', The Detail, 14 October 2022.
139. Scottish Government Report, 'Building a New Scotland: Citizenship in an Independent Scotland', 27 July 2023 14 and 27; Jo Shaw, 'Citizenship in Scotland's Future', Centre for Constitutional Change, 5 December 2013.

from strictly political or legal citizenship may thereby form the basis for the ongoing continuation of the CTA and related rights, regardless of future changes to the rules governing citizenship across the islands of Great Britain and Ireland.[140]

Of course, social citizenship also has its limits as a rights-enhancing concept. Social citizenship has usually been framed around discussion of the welfare state, for example healthcare, social security or even education provision, rather than broader considerations such as employment rights, with the right to work only being addressed briefly by Marshall who conceived of that right as a civil right or economic freedom.[141] While the logic of social citizenship is inclusionary, in that it seeks to include more citizens within particular understandings of 'community', 'belonging' and 'membership', it can also be exclusionary in relation to migrant workers.[142] This is particularly the case when the ideals underpinning social citizenship come up against the 'logic' behind (restrictive) immigration policies.[143] Indeed, existing theories on the relationship between work and citizenship have often been criticised for their failure to consider the realities of immigration.[144] Work's capacity to create a sense of belonging can therefore be experienced in very different ways even among workers in similar employment, working under similar conditions, depending on various factors including formal citizenship or immigration status.[145]

There is no doubt that the CTA is an instrument of immigration law, and indeed the right to work of everyone resident in the UK ultimately derives from exceptions found within domestic immigration rules, which demonstrates the particularly close connection, in the UK context, between workers' rights and citizenship or immigration status. Nevertheless, the CTA is a rather unusual immigration law instrument in that it is (albeit selectively) permissive and facilitative of immigration and the right to work, in contrast to the restrictive approach adopted elsewhere in UK immigration law.[146] It is largely accepted that the right to work of non-citizens can legitimately be restricted.[147] The difficulty lies in carving out exceptions for particular classes of migrant, which can cause divisions, ultimately undermining worker solidarity.[148] While a case can be made for the restriction of the right to work of migrants, it is more difficult to support the extension of national citizenship rights, including rights at work, to a select category of non-citizens, and between two states which are no longer in any form of economic or political union. Those with 'legal' citizenship status can also be excluded from work, for example on the grounds of protected characteristics such as gender, race or disability, while certain forms of work, for example unpaid domestic labour, can go unrecognised.[149] Reconceiving the CTA and associated rights in 'social' as opposed to 'legal' or 'political' citizenship terms, may therefore go some way to overcoming these contradictions, while offering a more concrete normative foundation for the continued special status granted to British and Irish workers within the CTA in the absence of the overarching framework provided by the EU's free

140. Bosniak (n 112) 453.
141. Marshall (n 12) 15 and 22.
142. Gorham (n 111) 39.
143. ibid 41.
144. Gordon and Lenhardt (n 13) 1169.
145. ibid 1199.
146. Bernard Ryan, 'Employer Checks of Immigration Status and Employment Law' in Costello and Freedland (n 10) 239.
147. Virginia Mantouvalou, 'The Right to Non-Exploitative Work' in Virginia Mantouvalou (ed), *The Right to Work* (Hart 2017) 39.
148. Jennifer Gordon, 'Transnational Labour Citizenship' (2007) 80 So Cal L Rev 503, 563.
149. Diva Dhar, 'Women's Unpaid Care Work has been Unmeasured and Undervalued for too Long', Global Institute for Women's Leadership, 'Essays on Equality' 2019 30.

movement and labour law regime. Social conceptions of citizenship can also provide a potential avenue for further imbuing the (potentially exclusionary) Union 'worker' concept with social values, or indeed reducing the emphasis on the economic dimensions of EU citizenship more generally.

IV. Conclusion

It is now beyond doubt that Irish citizens as a class enjoy a privileged position in UK immigration law, which in turn facilitates access to a number of economic and social rights, including the right to work, and which is also crucial to unlocking access to other substantive employment rights. What is much less clear is the rationale and underpinning justification for this special position. The absence of a convincing normative vision for the post-Brexit CTA is compounded by, but also compounds, the increased fragmentation of the underlying substantive rights that derive from it, in both their personal scope and in the methods chosen to protect those rights. This is despite the fact that Irish citizens have now been recognised as a unified class within UK immigration law for the first time. While this discussion is relevant to all of the substantive rights that derive from the CTA, the right to work and associated employment rights are particularly illustrative of the fragilities associated with the CTA, including the fact that the right to work is only indirectly protected, and that substantive employment rights remain vulnerable to repeal as the UK begins to deviate from the Union labour law regime.

Given the more dramatic change in their immigration status provoked by Brexit, it is not surprising that attention, to date, has been focused on the status of other EEA citizens, but Irish citizens have de facto been excluded from the protections granted by the Withdrawal Agreement, thereby negating their rights as *EU* citizens in favour of the more nebulous—and easily eroded—quasi-citizenship afforded by the CTA. For now, the immigration status of Irish citizens in the UK has been secured within domestic law, but without a convincing articulation of the rationale for this continued—indeed renewed—protected status. Non-political visions of citizenship, notably social citizenship, have been suggested here as a potential underpinning for the CTA as it currently stands, but can also provide a starting point for the construction of a more robust CTA based on bilateral treaty arrangements, as reinforced by reference to fundamental social (citizenship) rights. The particular value of social citizenship lies in its ability to capture various facets of citizenship, namely civil, political and social rights, across which the substantive rights deriving from the CTA, and indeed EU free movement and labour law, also intersect.

EU membership allowed for the gaps in protection of the rights of Irish citizens in the UK to be largely overlooked, but more fundamentally, the free movement of persons and Union citizenship provided a clear normative justification for the right to work of all EU (including Irish) citizens within the UK, and one which was reinforced by reference to fundamental social rights concepts found within the CFR. Social rights conceptions of citizenship, within the context of the CTA, can also provide broader lessons for the reconceptualisation of (EU) citizenship as a labour law concept, given its role in governing access to substantive employment protections. The recent retrenchment in the CJEU's case law concerning EU citizenship demonstrates the continued gaps in protection that can exist within the context of non-social conceptions of citizenship, and which continue to emphasise economic activity as a gateway to the rights deriving from 'worker' status, essentially to the exclusion of other citizens. The relationship between the UK and EU labour law regimes is now governed by the rather unstable protections offered by: (1) the Withdrawal Agreement; (2) the Trade and Cooperation Agreement; (3) domestic legislative

protections, including retained/assimilated EU law; and as argued here; (4) the CTA arrangements governing labour rights between a current and a former EU Member State. The relationship between the UK and Ireland will thereby continue to constitute a site for the exploration of ongoing protections granted to EU-derived labour rights concepts within the UK after Brexit.

Declaration of conflicting interests

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author received no financial support for the research, authorship, and/or publication of this article.

ORCID iD

Niall O'Connor https://orcid.org/0000-0002-6553-9184