NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Frontier Workers and their Families: Rights after Brexit

Sylvia de Mars and Charlotte O'Brien

October 2023

> **Frontier work**
> meaning work in which a person lives in one country and works in a different country, is commonplace across the EU, and also occurs with regularity on the island of Ireland

Frontier Workers and their Families: Rights after Brexit

This paper was written by Sylvia de Mars and Charlotte O'Brien for the Northern Ireland Human Rights Commission. Dr Sylvia de Mars is a Reader at Newcastle Law School, Newcastle University; Professor Charlotte O'Brien is a Professor at York Law School. The views expressed within this paper do not necessarily represent the views of the Northern Ireland Human Rights Commission, nor the employers of the authors. This paper is not intended to be relied upon as legal advice applicable to any individual case.

Paper finalised on 20 July 2023.

© 2023. Copyright is held by the Northern Ireland Human Rights Commission.

Northern Ireland Human Rights Commission,
4th Floor Alfred House, 19-21 Alfred Street, Belfast BT2 8ED.

Table of Contents

About the Authors

Sylvia de Mars, Reader
(Newcastle Law School, Newcastle University)

Dr de Mars joined Newcastle University's Law School in 2010, following the completion of a PhD in EU public procurement law at the University of Nottingham. Her research interests cover a variety of aspects of EU internal market law, with recent focuses on social security coordination and healthcare, and on comparative public law, with recent focuses on Brexit and its impact on Northern Ireland and trade between the UK and the EU. She has given evidence to numerous Parliamentary select committees on topics related to Brexit and between 2018 and 2020 she was also employed as a Senior Researcher in EU and International Law and Policy in the House of Commons Library.

Charlotte O'Brien, Professor
(York Law School, University of York)

Professor O'Brien leads the ESRC-funded EU Rights & Brexit Hub, conducting legal action research into the rights of EEA nationals in the UK post-Brexit. She also led the EU Rights Project from 2012-2017, pioneering the practice of advice-led ethnography to research EU citizens' rights. She has been researching and writing about the free movement of workers and citizens, including frontier workers, since 2008. She is an analytical expert in the EU Commission's Free Movement and Social Security Coordination network and recently was named Legal Academic of the Year at the Inspirational Women in Law 2022 Awards.

Frontier Workers and their Families: Rights after Brexit

Executive Summary

Frontier work, meaning work in which a person lives in one country and works in a different country, is commonplace across the EU, and also occurs with regularity on the island of Ireland. An increasingly complex web of domestic, EU and international law has regulated the rights of these frontier works since the UK and Ireland joined the EU, and Brexit has risked destabilising that web to the detriment of frontier workers and their families.

The Northern Irish Human Rights Commission commissioned this research paper to explore the effects of Brexit on the rights held by frontier workers on the island of Ireland, with a particular focus on those frontier workers who hold rights within the United Kingdom (by either working or residing there) that should be protected by the Windsor Framework (and its Article 2 non-diminution of rights commitment).[1] The work in the report is the result of extensive legal research into UK, EU and international law that affects the rights of frontier workers, as well as a close investigation of UK policy applicable to frontier workers in the aftermath of Brexit. The research itself was conducted over the course of 2021 and 2022, with contents up to date as of 31 March 2023.

The paper commences in Chapter 1 with a detailed overview of the EU law rights held by frontier workers and their families, so as to clearly establish a pre-Brexit baseline that the post-Brexit picture can be compared to. It evaluates in detail the three pieces of secondary legislation in EU law that grant residence, employment and social security rights to frontier workers, and pays specific attention to the 'margins' of frontier work: for example, the absence of clear definitions of frontier work in EU law means that certain types of frontier work may not be treated as such, which may have consequences on the ability of frontier workers to exercise their EU law rights.

Chapter 2 explores how the UK implemented the EU law considered in Chapter 1 prior to Brexit, again as part of the 'baseline' analysis of pre-Brexit frontier worker rights. The chapter demonstrates that UK compliance with the EU law that affects frontier workers was broadly faithful, but there were shortcomings in the UK approach to addressing EU-originating social security entitlements that may make these less clear or accessible to relevant beneficiaries.

Following this establishment of the 'pre-Brexit' picture, Chapter 3 explores the UK-EU Withdrawal Agreement and its UK implementation. The EU law itself is considered, and the shortcomings in defining frontier work are discovered in Part 2 of the Withdrawal Agreement much as they were in EU law more generally. The UK implementation of Part 2 of the Withdrawal Agreement in places supplements what EU law clearly sets out, but comes with its own shortcomings in defining what frontier work is and how, specifically, frontier workers and their families are protected in UK law after Brexit.

[1] The Protocol on Ireland/Northern Ireland was formally renamed to the Windsor Framework by a Joint Declaration of the Withdrawal Agreement's Joint Committee on 24 March 2023; see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1145699/Joint_Declaration_by_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_and_the_European_Union_in_the_Withdrawal_Agreement_Joint_Committee_on_the_Windsor_Framework.pdf

Chapter 4 assesses possible alternative sources of rights for those engaging in frontier work on the island of Ireland for those who fall outside of the coverage of the Withdrawal Agreement, or otherwise find the Withdrawal Agreement does not preserve their pre-Brexit rights. The Common Travel Area, frequently referred to as ensuring that British and Irish nationals would not be negatively affected by Brexit, comes with limited protection, and its Social Security Convention offers what looks to be less protection, particularly for family members of frontier workers, than the Withdrawal Agreement does. The UK and EU's 'Trade and Cooperation Agreement' (TCA) has its own Protocol on Social Security, which by and large copies over existing EU rules on social security coordination – and so provides similar levels of protection to the Withdrawal Agreement – but which has an expiration date attached is also not a 'full' replacement for what the Withdrawal Agreement achieves. Frontier work is also not specifically considered by the European Convention on Human Rights, and claims made under its Article 14 prohibition of discrimination by frontier workers who cannot access certain benefits or residency rights would face an uphill battle.

A final potential source of rights for frontier workers who commenced their work before Brexit is Article 2 of the Windsor Framework, which prohibits a diminution of rights for those in Northern Ireland as a consequence of Brexit; as Chapter 4 shows, there are a number of ways in which the Brexit settlement as well as all international law alternatives simply do not offer the same level of rights to frontier workers and their families on the island of Ireland that EU membership did, and so a claim that 'diminution' in contravention of Article 2 of the Windsor Framework has taken place may be the most effective course of action for ensuring that rights are not lost to Brexit.

The report concludes in Chapter 5 with a summary of the findings of all previous chapters and a series of recommendations, which focus on further codification and specification of rights held under the Withdrawal Agreement as a matter of UK implementing law, and a bolstering of the CTA's rights contents as a matter of law as 'best practice'. Amendments of the Withdrawal Agreement and/or the TCA's Protocol on Social Security are further means of ensuring frontier workers and their families do not fall between legislation, but may be less achievable. If a fortification of UK domestic law proves impossible, a second-best alternative is to set out clearer and heavily advertised user guidance (as opposed to caseworker guidance) to frontier workers and their families on what their rights are and how they can access them.

"Claims made under Article 14 prohibition of discrimination, by frontier workers who cannot access certain benefits or residency rights would face an uphill battle."

Glossary of Terms

Abbreviations

BGFA:	Belfast (Good Friday) Agreement 1998
CD:	Citizenship Directive, Directive 2004/38/EC
CJEU:	Court of Justice of the EU
CTA:	Common Travel Area
ECNI:	Equality Commission for Northern Ireland
EUSS:	EU Settlement Scheme
FWP:	Frontier Worker Permit
NIHRC:	Northern Ireland Human Rights Commission
PcSS:	Protocol on Social Security (in the TCA)
SSCR:	Social Security Coordination Regulation, Regulation 883/2004
TCA:	UK-EU Trade and Cooperation Agreement, 2021
TFEU:	Treaty on the Functioning of the European Union
UC:	Universal Credit
WA:	UK-EU Withdrawal Agreement, 2020
WF:	Windsor Framework
WR:	Workers' Regulation, Regulation 492/2011

Key Concepts

Comprehensive sickness insurance: an EU law requirement in the Citizenship Directive for economically inactive EU nationals to retain residency rights in their host States after 3 months; the CJEU has recently confirmed (in VI) that NHS cover counts as comprehensive sickness insurance.

'Dual' frontier work: the term the report uses to describe frontier work where the worker lives in a Member State they are not a national of, and works in a different Member State they are not a national of. (The term Member State here encompasses the UK.)

Frontier work: an EU law concept describing an EU national who works in one Member State and lives in a different Member State. (The term Member State here encompasses the UK.)

'Genuine and effective': an EU law concept that describes when economic activity counts as 'work' under EU Law. It is used as a description in contrast to 'marginal and ancillary' activity, which does not count as 'work' for EU law purposes.

Minimum Earnings Threshold (MET): a UK immigration law concept that the UK uses as a proxy for testing if work is 'genuine and effective'.

'Reverse' frontier work: the term the report uses to describe frontier work where the worker has moved to a Member State they are not a national of, and works in their home Member State. (The term Member State here encompasses the UK.)

Self-sufficiency: an EU law requirement in the Citizenship Directive for economically inactive EU nationals to retain residency rights in their host states after 3 months; it is also described as holding 'sufficient resources' so as to not be an 'unreasonable burden' on the host State.

Chapter 1: EU Rights of Frontier Workers and their Families

An assessment of how Brexit has impacted the rights of frontier workers resident in Ireland and employed in Northern Ireland has to start with an overview of the rights frontier workers held when both Ireland and the UK were Member States.

Chapter 1 provides an overview of the foundational right of frontier workers—the free movement of all EU workers in Article 45 TFEU—as well as an analysis of specific rights that have been set out in relevant secondary EU legislation. Throughout, the Chapter considers the CJEU's interpretation of the relevant provisions, and it concludes by drawing attention to the limited ways in which frontier worker rights have been treated as distinct from the more general Article 45 TFEU rights of workers who live and work in a host Member State (where host Member State means a Member States other than the state of nationality). The summary at the end of the chapter sets out in short the rights frontier workers held (at least in theory) in the UK before Brexit, which enables an analysis of how those rights operated in practice in the UK before Brexit (Chapter 2) and to what extent those rights remain after Brexit (Chapters 3 and 4).

1.1 Article 45 TFEU

The phrase 'frontier worker' does not appear in the EU Treaties and never has, but as early as 1968, EU secondary legislation has made it clear that the EU concept of 'worker' encompasses 'permanent, seasonal and frontier workers'.[2] CJEU case law has confirmed that frontier workers can operate in two different ways: they can stay living in their home Member State while taking up employment in a host Member State,[3] which is the 'traditional' way of doing frontier work, but they can also stay working in their home Member State and move their residence to a host Member State as 'reverse' frontier workers.[4]

Such 'reverse' frontier workers have, in principle, identical rights under EU law as regular frontier workers do – but the state responsible for granting those rights will be inverse. As such, under EU law, a Belgian national living in Belgium and working in Germany will have identical rights to a Belgian national living in Germany and working in Belgium, but the former would generally be covered by the German social security system, whereas the latter would be generally covered by the Belgian social security system. As EU law does not dictate the level of social security cover available in the Member States, this can result in practical differences – but this is not unique to frontier work, as any exercise of the right of freedom of movement can result in changes to social security cover.

The rights of frontier workers are thus found where the rights of all EU workers are: in Article 45 TFEU.

> 1. Freedom of movement for workers shall be secured within the Union.
>
> 2. Such freedom of movement shall entail **the abolition of any discrimination based on nationality** between workers of the Member States as regards **employment, remuneration and other conditions of work and employment.**
>
> 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
>
> (a) to accept offers of employment actually made;
>
> (b) to move freely within the territory of Member States for this purpose;
>
> (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
>
> (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
>
> **4. The provisions of this Article shall not apply to employment in the public service.**
>
> Article 45 TFEU (emphasis added)

The basic rights are of (i) movement for the sake of employment, which includes for an initial 'offer of employment' in a different Member State, but accepting additional offers of employment in that same Member State, and (ii) non-discrimination when engaging in that employment—whether it be during the job application process, or in terms of 'conditions of work and employment'. The CJEU has confirmed that Article 45(1) is both horizontally and vertically directly effective.[5]

Given the context of Brexit, the frontier workers who are the focus of this report will not be engaging with several of these rights: as will be discussed in Chapter 3, the only 'frontier workers' addressed by the Withdrawal Agreement are those EU or UK nationals who were, at the end of the transition period, employed in an EU Member State and resident in a different Member State or in the UK, or else employed in the UK and resident in a Member State.[6] They had to hold the status of 'frontier worker' before the Withdrawal Agreement entered into force—and as such will have consequently already accepted an offer for employment in another Member State. The right to subsequently move for employment, as set out in Article 45(3) TFEU, is therefore not one that is relevant to their situation.[7] However, they might wish to change employment within the Member State they are employed in – which Article 45(3) TFEU implies they should be able to do.

The other rights set out in Article 45(3) TFEU are not relevant to the situation of frontier workers, however: they do not reside where they are employed, and as such are not specifically covered by the 'rights' there.

2 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (1968) OJ L257/2, preamble. This is reinforced by Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (1971) OJ L149/2, which declares itself to be addressing 'all the basic provisions for implementing [Article 45 TFEU] for the benefit of workers, including frontier workers…' in the preamble and defines 'frontier worker' in Article 1(iii)(b). The first mention of 'frontier work' in CJEU case law is Case 13/64 Van Dijk EU:C:1965:19.

3 See, as an early example, Case C-57/96 Meints EU:C:1997:564.

4 Case C-212/05 Hartmann EU:C:2007:437; Case C-286/05 Hendrix EU:C:2007:494.

5 Case 167/73 Commission v France EU:C:1974:35 established vertical direct effect; Case C-281/98 Angonese EU:C:2000:296 made clear that horizontal direct effect also applies to the non-discrimination condition in Article 45 TFEU. See Chapter 8 for more on direct effect.

6 We use the term 'Withdrawal Agreement' to discuss its general content, and in particular the rights for EU and UK nationals set out in Part 2; the Windsor Framework is discussed separately, with a particular focus on its Article 2 obligation for non-diminution of rights, in Chapter 4.4

7 If the WA-covered frontier workers end their employment and take up different employment, they fall outside of the scope of the Withdrawal Agreement as written. See Chapter 3 for analysis.

What will be most relevant for most of the frontier workers who are the focus of this report is Article 45(2) TFEU, which sets out a non-discrimination obligation when it comes to employment and all working conditions. The CJEU has developed an extensive body of case law both on what counts as 'discrimination' for the purposes of Article 45 TFEU, and what the requirement of equal 'working conditions' involves, which will be considered below.

One final point worth making is that frontier workers can be either employed or self-employed. In the event they are self-employed, they are carrying out an activity under Article 49 TFEU instead of Article 45 TFEU. This has consequences in terms of which provisions of secondary legislation apply, but the CJEU's case law on the non-discrimination rights of the self-employed and of workers follows extremely similar patterns. The relevant 'comparator' for equal treatment is what a self-employed national of the State where they are self-employed would receive in terms of benefits or working conditions—but the requirement for equal treatment operates in much the same way.

What is 'work'?

To qualify for protection of Article 45 TFEU, the CJEU's case law on the meaning of 'work' is relevant—and will continue to be relevant for anyone in the UK who relies on the Withdrawal Agreement to protect their rights.

The CJEU has deliberately cast the definition of 'worker' widely; the term must have a 'Community meaning' as otherwise the relevant Treaty provisions would 'be deprived of all effect and the… objectives of the Treaty would be frustrated if the meaning of such a term could be unilaterally fixed and modified by national law'.[8] As it 'defines the scope of one of the fundamental freedoms of the Community' the term worker 'must be interpreted broadly'.[9] The Court's case law describes a 'work' relationship as having certain qualities which could apply in all Member States, regardless of whether they operate common or civil law legal systems. The first of these is subordination, and the second is remuneration.

The third quality that 'workers' possess requires them to satisfy a test of the degree of work activity engaged in - that is, that while the number of hours worked, degree of productivity, or amount of pay received cannot determine whether or not someone is a worker,[10] work must be 'genuine and effective' as opposed to 'marginal and ancillary'.[11] In terms of clarifying these terms, when domestic courts sent regular preliminary references requesting more specifics on how much work was 'enough' work, the CJEU insisted that individual circumstances had to be taken into account in making such an assessment, because free movement of workers is a fundamental EU right, and must be interpreted as widely as possible.[12] It has refused to give a definitive number of hours that is the minimum needed for work to be 'genuine and effective'—but it has suggested that 10 hours of employment per week could suffice,[13] or even less. In Genc, the Court stated that while the person had a contract of employment for 5.5 hours per week, when assessing whether work was genuine and effective, it was:

> … necessary to take into account factors relating not only to the number of working hours and the level of remuneration but also to the right to 28 days of paid leave, to the continued payment of wages in the event of sickness, and to a contract of employment which is subject to the relevant collective agreement, in conjunction with the fact that her contractual relationship with the same undertaking has lasted for almost four years.
>
> Those factors are capable of constituting an indication that the professional activity in question is real and genuine.
>
> Case C-14/09 Genc ECLI:EU:C:2010:57, paras. 27-28.

The nature of the work engaged in is irrelevant to whether it is 'genuine and effective', provided it is voluntarily engaged in and involves subordination and remuneration. In a rare departure from the Court's expansive approach to defining work, the CJEU found in Bettray[14] that compulsory enrolment in a drug rehabilitation programme was not a form of genuine and effective work.

The broad approach required in EU law has not always been respected in national implementation measures. In particular, in 2014, the UK adopted a 'Minimum Earnings Threshold' (MET) for decision-makers to determine whether or not someone purporting to exercise Article 45 TFEU rights was a worker. This still appears in the advice for decision-makers where EU nationals with pre-settled status under the EUSS wish to claim benefits for which a 'right to reside' is necessary.

The MET is, in theory, a two-stage test. The first stage asks whether the applicant has consistently earned above the threshold for making national insurance payments (which from July 2022 is £242 per week) for 3 months. If they meet the threshold, they will typically be automatically considered to be in genuine and effective work. If they do not, then they move the second tier of the test, which is to ask whether work is genuine and effective. When considering if work is genuine and effective, decision makers are instructed to have regard to the following: [15]

> 1. whether work was regular or intermittent
>
> 2. the period of employment
>
> 3. whether the work was intended to be short-term or long-term at the outset
>
> 4. the number of hours worked
>
> 5. the level of earnings.
>
> ADM Chapter C1: Universal Credit - International Issues

These criteria largely reproduce the first tier, as they focus on hours and remuneration. They make it harder for people in intermittent, or short-term employment to be defined as workers (notwithstanding guidance from the CJEU that fixed-term work is capable of being work).[16] This could have a disproportionate effect upon frontier workers, if for instance, they are engaged in seasonal employment, or are pursuing multiple jobs either side of a border. In practice, the MET creates a 'presumption of marginality' for those who fail the first tier, switching the burden of proof and making it harder for those earning below the threshold to demonstrate genuine and effective work.[17]

8 Case 75/63 Hoekstra EU:C:1964:19, 1.
9 Case 344/87 Bettray EU:C:1989:226, 11.
10 Ibid, 15.
11 Case 53/81 Levin v Staatssecretaris van Justitie EU:C:1982:105.
12 Ibid.
13 Case C-444/93 Megner & Scheffel EU:C:1995:442, para 18.
14 Case 344/87 Bettray v Staatssecretaris van Justitie EU:C:1989:226.
15 ADM Chapter C1: Universal Credit - International Issues https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1116621/admc1.pdf C1499.
16 Case C-483/17 Tarola EU:C:2019:309.
17 Charlotte O'Brien, Unity in Adversity: EU citizenship, social justice and the cautionary tale of the UK, (Hart: Oxford, 2017).

Self-employed frontier workers are also subject to the MET; their average profits before tax and NI should be above the level at which they become liable for Class 2 NI contributions (which is the same level at which employees become liable for Class 1 contributions) to pass the first tier. If they fall below this, decision makers then consider whether their self-employment was 'genuine and effective'.

The UK Advice for Decision Makers also includes some problematic criteria unrelated to EU law; they should consider whether the person is exercising their rights as a worker, looking at, inter alia, 'the person's primary motivation in taking up employment'. Decision makers are also instructed to take account of whether the claimant was physically incapable of doing the work and the work lasted for a short time – which poses a considerable risk of disability discrimination.[18]

Applying both the EU rules and the UK approach to frontier workers working in Northern Ireland, there are various instances where frontier work may be on the borderline of the definition, and is at risk of being deemed 'not work'. Examples include:

- Frontier workers on short term (e.g. seasonal) contracts, who do not meet the first tier of the MET;
- Frontier workers on zero-hours contracts whose hours and remuneration are unpredictable;
- Disabled frontier workers who move between jobs for reasons related to disability.

Non-Discrimination Rights of Workers

As discussed, the most pertinent rights stemming from Article 45 TFEU for frontier workers resident in Ireland and working in Northern Ireland are the non-discrimination rights implied by Article 45(2) TFEU. They require that any EU national exercising the freedom to work in another Member State must be treated equally to a citizen of that Member State in a comparable position. Non-discrimination applies to all employment conditions/benefits, but also applies to access to social security benefits and public services.

The Workers' Regulation (Regulation 492/2011), discussed below, contains various examples of employment conditions and benefits that are covered by the equal treatment clause in Article 45(2) TFEU. However, the CJEU has expanded on what is meant by 'equal treatment' when it comes to employment conditions and benefits.

First, the CJEU has made clear that all direct discrimination is caught by Article 45(2) TFEU. Direct discrimination here means clearly separate rules for EU nationals as opposed to home nationals. Direct discrimination in employment conditions was observed in Marsman v Rosskamp, where only home nationals were covered by the laws protecting disabled workers from dismissals.[19]

Indirect discrimination arises where provisions, criteria or practices significantly disadvantage EU nationals as compared to home nationals. As an example of an indirectly discriminatory policy affecting employment conditions, in Schöning, work in other Member States was not taken into account when considering promotions.[20]

[18] ADM Chapter C1: Universal Credit - International Issues https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1116621/admc1.pdf C1501, Example 3.
[19] Case 44/72 Marsman v Rosskamp EU:C:1972:120.
[20] Case C-15/96 Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg EU:C:1998:3.

The CJEU ruled that such conditions violated Article 45(2) TFEU, for the reason that ignoring activity abroad was significantly more likely to harm EU nationals than home nationals. A particularly striking example of indirect discrimination in employment conditions is the 1994 O'Flynn case, where a UK company's funeral payment plan was conditional on the funeral taking place in the UK; this again was found to be significantly more likely if the person being buried is a UK national, as opposed to Irish, as Mr O'Flynn was.[21]

The CJEU has gone further than simply looking at direct and indirect discrimination when considering the equal treatment obligations in Article 45(2) TFEU. It has interpreted Article 45(2) TFEU as also covering restrictions on free movement of workers that do not amount of discrimination. Kraus, for example, resulted in the CJEU finding that any measure that was liable to hamper or to render less attractive the exercise by EU nationals of fundamental freedoms guaranteed by the Treaty, would be found contrary to Article 45(2) TFEU.[22]

Justifying Discriminatory Treatment of Workers

The CJEU has made clear in its case law that Member States can justify indirectly discriminatory measures, or measures that make movement less attractive. Defensible restrictive measures thus have to meet the following test:[23]

- The measure must be aimed at achieving a legitimate objective;
- The measure must be applied in a non-discriminatory manner;
- The measure in place must be suitable for securing the attainment of the objective which they pursue;
- And the measure in place must be proportionate – that is, it must not go beyond what is necessary to attain the objective.

Examples of justified restrictions of the right to equal treatment in employment conditions include measures adopted to achieve the legitimate objectives of 'protecting the public from the abuse of academic titles granted by different rules' and 'maintaining a competitive balance between football clubs'. One other legitimate objective, originating from the CJEU's case law on movement rights of those who are economically inactive, but now also occasionally applied to case law surrounding frontier workers, is preventing EU nationals from becoming an unreasonable burden on their host State—in which case the measure adopted will normally take the form of requiring the EU national to demonstrate a 'real link' as a show of integration into that host State.[24] This case law will be discussed in detail in Chapter 1.5 below.

The majority of CJEU case law on legitimate objectives to justify restrictions on the movement rights of workers fails not on the nature of the justification, but rather on the measure adopted to achieve a certain policy goal as being inappropriate for those purposes or disproportionately impactful on EU

[21] Case C-237/94 O'Flynn v Adjudication Officer EU:C:1996:206.
[22] Case C-19/92 Kraus v Land Baden-Württemberg EU:C:1993:125, para 32; see also Case C-415/93 Bosman EU:C:1995:463.
[23] As clearly articulated in Case C-55/94 Gebhard EU:C:1995:411; note that Gebhard is a case on freedom of establishment but the same four-part test applies to all freedoms involving the movement of persons.
[24] First apparent in a series of rulings by the CJEU in 2007; see the commentary by Charlotte O'Brien, 'Case C-212/05, Gertraud Hartmann v. Freistaat Bayern, Judgment of the Grand Chamber of 18 July 2007, nyr; Case C-213/05, Wendy Geven v. Land Nordrhein-Westfalen, Judgment of the Grand Chamber of 18 July 2007, nyr; Case C-287/05, D.P.W. Hendrix v. Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen, Judgment of the Grand Chamber of 11 September 2007, nyr. Common Market Law Review 45 (2), pp. 499–514.

national workers, with less restrictive measures being an option. Such determinations of whether measures are justifiable, suitable and proportionate are usually made by domestic courts—and, in the case of frontier workers who reside in Ireland but work in Northern Ireland, will continue to be made by the UK courts despite the UK no longer being a Member State. Where the CJEU has made determinations on the question of proportionality, the guidance it has given on the evidential burden a Member State must discharge, (to demonstrate, for instance, that there is a genuine threat to financial equilibrium of a national system) has been somewhat inconsistent.[25]

1.2 The Workers' Regulation[26]

The key rights contained in the Workers' Regulation are:

i. the right to take up employment within the territory of other Member States (Arts. 1-4);

ii equal access to job-seeking assistance services (Art. 5)

iii. equality of treatment with regard to employment conditions (in particular, as regards remuneration and dismissal) (Art. 7(1));

iv. equality of treatment with regard to tax and social advantages (Art. 7(2));

v. equal access to trade union membership (Art. 8);

vi. equal access to housing (Art. 9); and

vii. the rights of the children of migrant workers to attend educational courses 'under the best possible conditions' – which includes a derivative right to reside for their primary carer, and entitlement to social assistance under equal conditions with home state nationals (Art 10).

The fourth and fifth recitals of the Workers' Regulation make clear that frontier workers are within its scope (in the territory of the Member State of work):

> (4)... The right of all workers in the Member States to pursue the activity of their choice within the Union should be affirmed.
>
> (5) Such right should be enjoyed without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services.
>
> Workers' Regulation, Recitals.

Article 3 sets out several examples of discrimination in hiring processes. These include separate recruitment procedures for foreign nationals; limitations or restrictions on the advertising of vacancies; and eligibility for employment being restricted somehow (ie, by a residency requirement, such as 'you must have lived in Austria for five years', or a requirement to register with specific employment offices, like the UK's Jobcentre). Likewise, Article 7 offers examples of employment conditions and benefits that are covered by the equal treatment clause in Article 45(2) TFEU. These include conditions on pay, conditions for dismissal and reinstatement, all social and tax advantages that are linked to the employment, and access to training and re-training.[27]

[25] Contrast, for instance, Case C-147/03 Commission v Austria EU:C:2005:427 with Case C-308/14 Commission v UK EU:C:2016:436: Charlotte O'Brien 'The ECJ sacrifices EU citizenship in vain: Commission v UK', 54(1) CML Rev (2017) 209-244.

[26] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1 ('Workers' Regulation' or WR.)

[27] This has been further codified in Article 24(1) of the Citizenship Directive, which expresses that workers are entitled to equal treatment in accessing all social security and social assistance in their host Member State.

At first glance, reverse frontier workers (who move their place of residence, while continuing to work in the state of nationality) do not appear to benefit from the provision on equal access to social advantages within the Workers' Regulation. Article 7(1) states that "A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality,' with Article 7(2) adding that 'He shall enjoy the same social and tax advantages as national workers.' All of which suggests that the provisions are addressed to those working in a state of which they are not a national – which would include standard frontier workers (who live in the state of nationality and work elsewhere), or dual frontier workers (who are nationals of one Member State, live in another, and work in a third). However, the CJEU was content to gloss over the precise wording of the Workers' Regulation's predecessor[28] in simply finding that reverse frontier workers were migrant workers and so entitled to benefit from that Regulation's provisions in Hartmann.[29]

There is some overlap between rights that fall within the scope of 'social advantage' for the purposes of the Workers' Regulation, and those which constitute 'social assistance' (or are classified as 'special non-contributory benefits' that have some of the characteristics of, and so are treated as, 'social assistance'),[30] for the purposes of the Citizenship Directive (Directive 2004/38).[31] However, several cases have confirmed that rights to benefits that arise under the Regulation should not be subject to the conditions attached to the Citizenship Directive.[32] In particular, the Directive is not to be treated as exhaustive when it comes to residence rights; the derivative residence rights that stem from Article 10 of the Workers' Regulation, for the primary carer of a child who is both in school, and has an EU national worker/former worker parent, exist outside of the Directive, and so cannot be subjected to the Directive's conditions with regard to e.g. self-sufficiency.[33] The flipside of this, is that such periods of residence then cannot count towards the clocking up of the five years required for 'permanent residence'[34] which is a concept created by, and contained within, the Directive.

A disadvantage created as a result of being a frontier worker can be treated as a proxy for nationality discrimination. The CJEU has found that measures which disproportionately affect frontier workers as opposed to resident workers, are by virtue of that fact, indirectly discriminatory on the grounds of nationality, because frontier workers are more likely to be non-nationals. It 'is immaterial for the purposes of categorisation as indirect discrimination, whether the national measure affects, as well as frontier workers, nationals of the Member State in question who are unable to meet such a criterion'.[35]

[28] Regulation 1612/68, Article 7, which has identical wording to that quoted here.

[29] See Hartmann, para. 17, where the CJEU emphasises that any EU national who has exercised freedom of movement for workers, regardless of where they live and what their nationality is, and who has been employed in a Member State other than that of residence (as opposed to other than that of nationality) is encompassed in what is now Article 45.

[30] Case C-67/14 Alimanovic EU:C:2015:597.

[31] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (2004) OJ L 158/77 ('Citizenship Directive' or CD.)

[32] Case C-480/08 Teixeira EU:C:2010:83; see also Case C-310/08 Ibrahim EU:C:2010:80.

[33] Krefeld.

[34] Case C-529/11 Alarape EU:C:2013:290.

[35] Case C-830/18 Landkreis Südliche Weinstraße EU:C:2020:275, para 34.

So, discrimination on the grounds of frontier work is treated as discrimination on the grounds of nationality. In Landkreis Südliche Weinstraße, a requirement that applicants for school transport costs reside in a specific Land could affect the children of national workers who resided in other regions of the same State. But the Court noted that it was 'intrinsically liable to affect frontier workers more than national workers'.[36]

However, while the CJEU may be quick to identify indirect nationality discrimination against frontier workers, such discrimination can, it seems, be more readily justified than in the context of resident migrant workers. Spaventa, Rennuy and Minderhoud note that:[37]

> While the CJEU maintains that 'frontier workers have [...] in principle, a sufficient link of integration with the society of their host State', [quoting Case C-410/18 Aubriet EU:C:2019:582, para. 32] in practice they are much more vulnerable to a real link justification than workers who reside in their State of activity. A 'frontier worker is not always integrated in the Member State of employment in the same way as a worker who is resident in that State' [quoting Case C-20/12 Giersch EU:C:2013:411, para. 65].
>
> Eleanor Spaventa, Nicolas Rennuy and Paul Minderhoud, 'The legal status and rights of the family members of EU mobile workers', Free Movement of Workers and Social Security Coordination network report, EU Commission (Brussels, November 2021)

For example, in Geven, the CJEU found that it was lawful for Member States to impose extra conditions upon non-resident workers in order to claim child-raising allowance; frontier workers had to meet a minimum hours of work threshold, which resident workers did not. Germany was entitled to look for an alternative 'connecting link' in the absence of residence on its territory, in the form of 'a substantial contribution to the national labour market' which was 'a valid factor of integration into the society of that Member State'.[38] Cases in which integration measures have been held unlawful nevertheless underscore the principle that such measures could be lawful, if they were not too restrictive, and in particular, did not disregard relevant economic contributions. Some degree of flexibility is required – in Aubriet, the focus on work in a specific reference period overlooked years of work in the Member State in question;[39] and in Verruga the constricted reference period and rigidity of the requirement of continuity again negated substantial work in the territory.[40] But in both cases the message is clear: Member States can impose extra conditions as to economic activity on frontier workers, but those conditions must not be so narrow as to exclude the (currently or formerly) substantially economically active.

1.3 The Social Security Coordination Regulation[41]

The key purposes of the Social Security Coordination Regulation (Regulation 883/2004) are:

i. to assign Member State competence on cross-border social security issues (Art. 10);

[36] Ibid, paras 34 and 37.
[37] Eleanor Spaventa, Nicolas Rennuy and Paul Minderhoud, 'The legal status and rights of the family members of EU mobile workers', Free Movement of Workers and Social Security Coordination network report, EU Commission (Brussels, November 2021), 19 (available at: https://pure.york.ac.uk/portal/services/downloadRegister/73998770/KE_09_21_467_EN_N.pdf)
[38] Case C-213/05 Geven EU:C:2007:438, para 25.
[39] Case C-410/18 Aubriet EU:C:2019:582.
[40] Case C-235/12 Bragança Linares Verruga EU:C:2016:949.
[41] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (2004) OJ L166/1 ('Social Security Coordination Regulation' or SSCR).

ii. to provide for equality of treatment with home state nationals (Art. 4);

iii. to require Member States to consider facts/events/benefits received/income acquired within other Member States as having equivalent effects to those facts/events/benefits/income within their territories (Art. 5);

iv. to require Member States to take into account periods of insurance, employment, self-employment or residence in other Member States, as though they were periods completed under their legislation (the principle of aggregation) (Art. 6);

v. to allow certain benefits to be exported to other Member States (Art. 7);

vi. to provide a system for reimbursement between Member States (Art. 35);

vii. to regulate the conditions under which Member States can attach residence conditions to special non-contributory benefits (Art. 70).

Recital 8 makes clear how important the provisions on equal treatment and residence conditions are for frontier workers:

> The general principle of equal treatment is of particular importance for workers who do not reside in the Member State of their employment, including frontier workers.
>
> The Social Security Coordination Regulation, Recital 8.

The regulation defines a frontier worker, in Article 1(f), as 'any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he/she returns as a rule daily or at least once a week'. This risks excluding a large amount of frontier workers who are less regularly mobile, who would be treated as effectively resident in the state of employment as a consequence – which could make their access to social security benefits in their actual place of residence, or the coordination of social security between their Member State of actual residence and their Member State of legal residence, significantly more complex and contentious, especially where some of the rights-holders for social security purposes are non-EEA family members. One example of a benefit this would affect, discussed in detail in Chapter 2, is Child Benefit. Frontier workers are entitled to child benefit in their state of employment, but where the state of residence provides a higher rate of benefit, the state of residence has to provide a top-up of benefit to make up the difference.[42] If, however, a frontier worker is not deemed as a matter of EU law to actually reside and work in different states, that coordination would not apply and, where the Member State of (actual, if not legal) residence has a higher cost of living and thus higher benefits, this would work to the frontier worker's disadvantage. Moreover, a determination that a frontier worker was not resident in their state of actual residence could jeopardise the residence rights in that state of any third country national family members. The specific term of 'frontier worker' is only invoked in the main text of the Regulation to address sickness and maternity/paternity benefits of the frontier worker and their family members, but it is not clear whether or to what extent this restrictive definition influences other areas of social security.[43]

[42] SSCR Article 68(2).
[43] SSCR Articles 17 and 28.

The regulation also includes several specific provisions for the special circumstances of frontier workers – mainly on: benefits in kind (Art. 18); benefits for retired frontier workers (Art. 28); and unemployment benefits and work search conditions (Art. 65).

Briefly, frontier workers and their families are entitled to benefits in kind from the state of residence, but are also entitled to benefits in kind when they stay in the state of work. However, as both the UK and Ireland are listed in Annex III to the Regulation, under Article 18(2), the in kind entitlements of the family members of frontier workers are restricted, by Article 19, to 'the benefits in kind which become necessary on medical grounds during their stay, taking into account the nature of the benefits and the expected length of the stay' if the state of work is Ireland or the UK.

Article 28 lays down the rules as to when a retired frontier worker, and their family members, can continue to, or start to, receive treatment/benefits in kind from the last state of work. Article 65 distinguishes between partially/intermittently unemployed frontier workers and wholly unemployed frontier workers. The former should, typically, make themselves available to the employment services in the state of most recent employment, while the latter should generally make themselves available to the employment services in the state of residence; they may, as a supplementary step, also seek work in the state of former employment (Article 65(2)), but this does not entitle them to unemployment benefits from that state.[44]

Many of these provisions are quite complex when it comes to applying them in practice. For example, a recent case, K, concerned a worker who moved state of residence while he was on sick leave. When he subsequently became unemployed, this posed the question of whether he had become a frontier worker during the period of residing in one Member State while receiving sickness benefits from another. The CJEU concluded that someone could have become a frontier worker in such circumstances, if in the State of former employment, entitlement to sickness benefits was 'treated in the same way as the pursuit of an activity as an employed person';[45] this rather suggests that frontier worker status can be dependent on, and so change according to different, domestic treatment of the receipt of sickness benefit. In EU v Caisse pour l'avenir des enfants, another case that highlights just how complex the configuration of fact of frontier worker cases can be, the CJEU was asked whether frontier workers should benefit from a bilateral international convention allowing the exportation of benefits to a non-Member State (Brazil), when the Member State's own nationals and residents could do so.[46] The Court concluded that they should, unless the State could put forward an objective justification for the discriminatory treatment; in this case, Luxembourg had not done so. The case also includes a note about what cannot count as objective justification:

> 47 Furthermore, the argument relating to the heavy financial and administrative burdens which the relevant authority would face if it had to extend to nationals of other Member States the advantages granted to its own nationals cannot, as such, provide objective justification for that authority's refusal to extend those advantages.
>
> 48 In that regard, the Court has repeatedly held that reasoning based on an increase in financial burdens and possible administrative difficulties cannot, in any event, justify a failure to comply with obligations arising out of the prohibition of discrimination based on nationality, set out in Article 45 TFEU.
>
> Case C-801/18 EU v Caisse pour l'avenir des enfants EU:C:2019:684

The Regulation had to be read in conjunction with the equal treatment provisions in the Workers' Regulation, in the sightly later case of C-802/18 Caisse pour l'avenir des enfants[47]. Then, the Court was asked whether a rule restricting family allowances only to the children of frontier workers (working in the State in question), whereas resident workers were entitled to family allowances for any child they supported who was resident in that State. This rule, the Court found, was contrary to EU law and although Member States were entitled to set the criteria for benefits, those criteria had to comply with the principles of EU law, including that of equal treatment. In reaching this conclusion, the Court also drew upon the definition of family member in the Citizenship Directive.

1.4 The Citizenship Directive[48]

The majority of the contents of the Citizenship Directive is not of relevance to frontier workers or their families who are resident in Ireland and working in Northern Ireland following Brexit. There are two distinct reasons for this:

a. Frontier workers are likely to have more specific rights in the Workers' Regulation discussed above. The 2020 Krefeld judgment confirmed that where an EU national has residency rights on the basis of the Regulation, they cannot be subjected to the conditions that apply for residency under the Citizenship Directive, such as a restrictive right to 'equal treatment' for those not economically active (as set out in Article 24(2) of the Directive).[49]

b. Much of the content of the Citizenship Directive is concerned with rights of EU citizens that no longer operate given Brexit.[50] For example, the conditions for general entry into a Member State as an EU citizen are no longer applicable to the UK.

The below therefore addresses only those provisions that still have a relevance after Brexit, and what rights they set out.

Worker Status

The categories of migrant entitled to equal access to benefits, as outlined in the Directive, continue to be relevant for EU citizens in the UK, because many of the provisions of the Directive's implementing legislation - the Immigration (EEA) Regulations 2016 – remain applicable to people with pre-settled status.[51]

44 Case C-443/11 F.P. Jeltes & Others EU:C:2013:224.
45 Case C-285/20 K v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen EU:C:2021:785.
46 Case C-801/18 EU v Caisse pour l'avenir des enfants EU:C:2019:684.
47 Case C-802/18 Caisse pour l'avenir des enfants EU:C:2020:269
48 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (2004) OJ L 158/77 ('Citizenship Directive' or CD).
49 Case C-181/19 Krefeld EU:C:2020:794, para 64: 'When Directive 2004/38 was adopted, Article 12 of Regulation No 1612/68, reproduced in the same wording in Article 10 of Regulation No 492/2011, was neither repealed nor amended. On the contrary, that directive was designed so as to be compatible with Article 12 of Regulation No 1612/68 and with the case-law interpreting that provision. Consequently, that directive cannot, as such, either call into question the independence of the rights based on Article 10 of Regulation No 492/2011 or alter their scope (see, to that effect, judgment of 23 February 2010, Teixeira, C-480/08, EU:C:2010:83, paragraphs 54 and 56 to 58).'
50 These rights might, however, interact with Article 2 of the Windsor Framework, in which case they will be considered in Chapter 4.4.
51 By virtue of Schedule 4 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 No. 1309.

'Worker' status, including 'frontier worker' status, assumes current employment activity that is 'genuine and effective'; but the EU legislature acknowledges that there are circumstances where employees cease being able to 'work' on a temporary basis. EU 'workers', under what is now Article 7(3) of the Citizens' Directive, retain their 'worker' status in the following situations:

- Temporary incapacity because of illness or accident (whether work-related or not);
- Involuntary unemployment after working for over a year, provided the 'worker' is registered as a job-seeker in the host Member State;52
- Involuntary unemployment after working for less than a year, provided the 'worker' is registered as a job-seeker in the host Member State—'worker' status here is retained for a minimum of six months;
- Entry into vocational training, provided that training is related to the previous 'work'.

These situations are not exhaustive. In the 2012 Saint Prix case a pregnant French woman voluntarily quit her UK job in a nursery when she was six months pregnant, because the work became too strenuous for her.[53] She then applied for income support 11 weeks before her due date, and was denied this, because she did not meet any of the Article 7(3) criteria. The CJEU unequivocally confirmed that Article 7(3) of the Directive does not 'exhaustively' set out the circumstances where worker status is maintained, and that an interruption of work because of pregnancy does not deprive someone from 'worker' status.[54] The UK Upper Tribunal has confirmed that a 'reasonable period' for the retention of worker status in such circumstances as St Prix is, in the absence of fact-specific circumstances, a year.[55]

Rights to Reside

The right to reside in a host Member State, as set out in Articles 6 and 7, will not be relevant to the majority of 'standard' frontier workers—but it will be to 'reverse' frontier workers in respect of their residency (rather than their work). Articles 6 makes it clear that residency for the first 3 months is semi-automatic: EU nationals are only required to hold a passport or identity card. Following those three months, however, some frontier workers will in different Member States simultaneously be 'workers' and 'economically inactive' under EU law.[56] Article 7 sets out the general rule which is that EU nationals are entitled to reside in a host Member State for more than 3 months if they work there. That is not the situation that frontier workers are in, however: they either stay living in their Member State of nationality (where their residence rights would be outside of the scope of EU law, as a purely internal situation)[57] or while they are living in a state different to that of their nationality, the state of residence is not the Member State where they work. In the latter case, the Directive suggests that for residency purposes, they would qualify as self-sufficient EU citizens who have simply moved to another Member State.

52 See here SSCR Articles 17-19 which, in a change from Regulation 1612/68, permits frontier workers to register with both their state of residence as well as their state of former employment as a job-seeker.
53 Case C-507/12 Saint Prix EU:C:2014:2007.
54 Ibid, para 38-40.
55 SSWP v SFF [2015] UKUT 0502
56 For example, a Belgian national who lives in France but works in Germany is, as a matter of EU law, economically inactive in their state of residence (in that they are not living in France because they are employed there – hence, they will have to be self-sufficient), and employed in their state of employment.
57 See, eg, Case C-212/06 Walloon Government EU:C:2008:178.

The Commission confirms this is a correct reading of the Directive,[58] and so frontier workers and their families, if not resident in their state of nationality, are subject to the conditions in Article 7(1)(b) of the Directive, which requires them to be self-sufficient and to have comprehensive sickness insurance. These conditions would not be complicated to satisfy for many frontier workers, who will be 'working' and (as discussed in Chapter 1.2 above) are entitled to social security coverage in their Member State of employment, including healthcare coverage. However, it is not impossible to imagine a frontier worker in need of a benefit who falls between two healthcare systems because they are a 'worker' in one Member State but 'economically inactive' where they live.

It is worth noting, that following a case referred from Northern Ireland,[59] the CJEU has recently confirmed that, contrary to the wrong position adopted in the UK for well over a decade,[60] affiliation with the NHS does discharge the comprehensive sickness insurance requirement,[61] which makes establishing CSI in the UK more straightforward.

Finally, Article 16 sets out the rules for attaining 'permanent residency' after 5 years of residency in compliance with the Directive, which would also apply to 'reverse' frontier workers. Once they attain permanent residence, EU nationals are no longer subject to any of the conditions applicable to economically inactive EU nationals when it comes to residence rights.

Rights of Family Members

Prior to the Citizenship Directive's adoption, the rights of the family members of workers were set out in Articles 10 and 11 of Regulation 1612/68, the predecessor to the Workers' Regulation. The Directive, however, repealed those two Articles—and so the rights of workers' families are now found in the Directive itself.

'Family members' are defined in Article 2 of the Directive as, regardless of their nationality:

- Spouses and civil/registered partners;[62]
- Direct descendants under the age of 21 or dependents of either the EU national or their spouse;
- Dependent relatives in the ascending line of either the EU national or their spouse (so, grandparents).

Article 3 of the Directive then makes clear that the Directive applies to all family members who 'accompany or join' their EU national family member—and they must be admitted for those purposes. As a starting point, this means that the majority of frontier worker families will not be affected by the rights in the Citizenship Directive: if they remain resident in their country of nationality, they are not accompanying or joining their EU national family member, and they will fall outside of the scope of EU law on residency rights.[63] However, 'reverse' frontier workers (who move their home, rather than work)

58 COM(2009)313, p.4.
59 Case C-247/20 VI EU:C:2022:177.
60 Sylvia de Mars, 'Economically Inactive EU Migrants and the NHS: Unreasonable Burdens Without Real Links?' (2014) 39(6) European Law Review 770.
61 Sylvia de Mars, 'VI v The Commissioners for HMRC [Case Note]' (2022) 36(4) Journal of Immigration, Asylum and Nationality Law 358.
62 Key here is Case C-673/16 Coman EU:C:2018:385, where the CJEU confirmed that 'spouse' encompasses same-sex spouses who register their relationship in a country where that registration is legally recognised – even when they move to a Member State where gay marriage is not legal.
63 A possible but untested argument that they do fall within EU law can be made by analogy to the CJEU's Carpenter case, where a man who provided services to other Member States from the UK succeeded in getting EU residency rights for his non-EU national wife by arguing that his wife failing to get residency rights would form a restriction on his right to provide services under Article 49 TFEU, read in light of the fundamental right to respect for family life. See Case C-60/00 Carpenter ELCI:EU:C:2002:434.

and 'dual' frontier workers (who live and work in two distinct Member States, neither of which are their Member States of nationality) may be affected by family members' rights of residence as set out in the Directive. As above, the family would be permitted to reside in the 'host State' on a self-sufficiency basis in both of those cases. The EU national frontier worker would serve as the primary rights-holder, and their family members (regardless of nationality) would hold rights because of the EU national frontier worker's status; unless they are EU nationals who can qualify for residency rights under EU law by being either economically active or self-sufficient, their rights are entirely parasitic of the frontier worker's rights.

On the subject of family reunification, the CJEU's case law here has been generous, and in Metock made it clear that non-EU national family members can join their EU national family members in the host State from outside of the EU[64]—without requiring prior residence in any of the Member States.[65] As such, dual or reverse EU national frontier workers can circumvent national immigration law where they live in order to be united with their families.

An innovation in the Directive is in Article 3(2), where the Directive also requires Member States to facilitate the entry for people who are not 'direct family members' as set out in Article 2, but nonetheless may be part of an EU national's household. These 'extended' family members include long-term partners (in a so-called 'durable relationship') and any other dependent relatives. The Member State 'duty to facilitate' their entry means that it must be possible for them to join an EU national family member, but that it cannot be presumed to be automatic. In Rahman, the CJEU made clear that Article 3(2) 'imposes an obligation on the Member States to confer a certain advantage' on extended family member applications when compared to persons subject to the State's general immigration policy.[66]

Once granted entry, family members have residency rights on the same terms as their EU family member—but those rights are parasitic on the family member's rights. Articles 9 and 10 of the Directive make clear that where the family members are not EU nationals, they will be issued with a residence card that works as proof of the residence status they hold under the Directive as long as they can prove their relationship to the EU national family member, and can prove that the EU national family member has a right of residence themselves (eg, by being a worker).

Article 12 gives family members 'retained' residency rights in the event of the death or departure of their EU family member, which, again, will be of relevance to reverse frontier workers. The retained residence rights apply to both EU national family members and non-EU family members, provided they have been resident in the host Member State for at least one year; and Article 12 also stresses that family members, to attain a right of permanent residence, must demonstrate that they themselves are exercising so-called 'Treaty rights' and so are satisfying the residency conditions in Article 7 (eg, by either being economically active or by being self-sufficient and holding comprehensive sickness insurance).

Article 13 sets out similar 'retained' rights for family members in the event of divorce, provided that the marriage or relationship in question lasted for at least 3 years, with one year spent together in the host Member State—or the end of relationship is a consequence of 'particularly difficult circumstances' such as domestic violence. Here, too, the family members must exercise so-called 'Treaty rights' themselves in order to attain permanent residence.

Rights of permanent residence, as described in Article 16, are also of interest to 'reverse' and 'dual' frontier workers for the sake of their family—particularly if their family comprises non-EU nationals, who otherwise have to continue to apply for regular EU residence cards. The right is attained after 5 years, with one exception for frontier workers set out in Article 17, which is discussed in Chapter 1.5 below.

Finally, and copying Article 11 of Regulation 1612/68, Article 23 of the Directive gives 'the family members of a Union citizen who have the right of residence or the right of permanent residence' in a Member State the right to 'take up employment or self-employment there'.

Restrictions on the Rights to Enter and to Reside?

The Citizenship Directive consolidates decades of CJEU case law on the conditions under which EU nationals and their family members can be denied entry into, or deported from, a host Member State. Applying this case law to frontier workers is not straight-forward: if they live in a country of which they are also a national, they cannot be deported from their country of residence. So-called 'reverse' frontier workers, however, who remain working in their state of nationality but move to a different Member State could be deported from there.[67] However, the rights to enter a host Member State, even if it is not for the purpose of residing there, remains relevant to all frontier workers.

Article 27(2) of the Directive sets out in clear terms that measures taken to restrict entry or residence on the basis of public policy or public security must be:

- Proportionate;
- Based exclusively on the behaviour of an individual: they must 'represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society';
- Previous convictions therefore cannot in themselves result in restrictions; and
- Restrictions cannot be taken as general preventative measures.

In the context of frontier workers, a restrictive measure could be put in place at any time the frontier worker crosses the border, but at that time they must then pose a current and sufficiently serious threat—and rejecting their right to enter must be a proportionate measure taken.

Article 28 of the Directive then sets out further protections against deportation, making it harder to remove or deport EU nationals the longer they have been resident and the more integrated they are. Specifically, very integrated EU nationals and those with permanent residence can only be deported on 'serious grounds' of public policy or public security, and those with more than 10 years of residence or minors can only be deported on 'imperative grounds' of public policy or public security. CJEU case law has made clear that such 'imperative grounds' can be the prevention of organised crime[68], the prevention of terrorism[69], and the prevention of sexual exploitation of children[70] - but the majority of criminal activity would not result in that threshold being met. 'Reverse' frontier workers with long-term residence in their host Member State are thus very unlikely to

64 Case C-127/08 Metock EU:C:2008:449
65 This overrides earlier case law; see Case C-109/01 Akrich EU:C:2003:491.
66 Case C-83/11 Rahman and Others EU:C:2012:519, para 21.
67 On 'reverse' frontier workers, see Chapter 1.5.
68 Case C-145/09 Tsakouridis EU:C:2010:70
69 Case C-300/11 ZZ EU:C:2013:363
70 Case C-348/09 PI EU:C:2012:300

be removable from that state; moreover, the Court has emphasised that the 'decisive criterion' for triggering the heightened protection is having 'lived in that Member State for the ten years preceding the expulsion decision'[71] – there is no suggestion that such residence need be 'in accordance with the Directive', so there is no need to demonstrate the exercise of a right to reside under, e.g. Article 7 or 16 for that period.

Article 29 of the Directive permits the restriction of entry and, within three months of arrival, the restriction of residency rights for public health purposes—but this provision has never been relied on by any Member States in a way that the CJEU has had to consider it. For the purposes of frontier workers, especially in the post-Brexit context, this provision is unlikely to be relevant to 'reverse' frontier workers resident in the UK because they will by now have been resident there for longer than three months.

Articles 30 and 31 of the Directive set out requirements for notifying any EU national of a deportation or refusal of entry decision, and will make it possible for them to appeal the decision taken against them. Importantly, in the case of frontier workers, Article 31(4) makes it possible for Member States to exclude EU nationals from their territory while an appeal to a deportation decision is underway—but it cannot preclude them from submitting their defence in person, unless that also causes serious public policy or health concerns.

Article 32, finally, makes clear that those excluded on public policy or public security grounds can apply to have their exclusion order lifted after a 'reasonable period' – which is defined as 'in any event after three years from enforcement of the final exclusion order'. If they can argue successfully that there has been a material change in the circumstances that justified their exclusion, the Member State must consider those and reach a decision on such an application within 6 months of its submission.

More Favourable National Provisions

One final provision of the Directive that will apply to frontier workers as well as to their family members is Article 37, which makes clear that the Directive is a minimum requirement—but not a maximum one in terms of rights granted to EU nationals by Member States. As such, the Directive does not preclude the application of 'any laws, regulations or administrative provisions' that will be more favourable to anyone in its scope.

'Onward' Frontier Work and Permanent Residency

One specific exemption to the general rules on attaining permanent residence under the Citizenship Directive is set out in Article 17(1)(c) of the Directive. Ordinarily, migrant workers attain permanent residency after 5 years of working and residing in their host Member State under Article 16 of the Directive; but Article 17(1)(c) makes clear that migrant workers who become frontier workers can actually attain permanent residency sooner. This is a group we will call 'onward' frontier workers: EU nationals who have lived and worked in a host Member State, but then after that go and work in another Member State while maintaining their residence in their first host State.

As long as they have worked and resided in a host Member State for 3 years, then when they become frontier workers and start work in another Member State, they attain permanent residence status in the state of residence (which is also the state of former migrant work). Article 17(3) of the Directive makes clear that their family members (regardless of nationality) who live with them also acquire permanent residence. Because they do not reside in the new State of work, they can never attain permanent residence there. Given that 'settled status' in the UK is granted to those who can evidence holding permanent residence under Article 16 of the Citizenship Directive, we will consider if this type of 'onward' frontier work (with its subsequent permanent residency rights) remains possible after Brexit.

1.5 CJEU Case Law Trends

Early CJEU case law on frontier workers was concerned with their rights to equal treatment. Cases such as Meints and Meeussen made it clear that as far as the CJEU is concerned, frontier workers are entitled to equal treatment as regards social advantages in the Member State they work in under what was then Article 7(2) of Regulation 1612/68; and found that restricting equal treatment to resident workers was contrary to Article 45 TFEU.[72]

Over the last 40 or so years, the vast majority of CJEU case law surrounding frontier workers considers specific aspects of Regulation 883/2004 and the Workers' Regulation, and how they apply to frontier workers. Questions have been raised about the location and role of the competent state in different 'frontier' scenarios;[73] the application of residency conditions to specific benefits;[74] and the general operation of cross-border benefit situations.[75] Significant numbers of these cases concern unemployed frontier workers—those without work, but maintaining the 'frontier worker' status, as described in Chapter 1.4 above—and both where they are entitled to unemployment benefits and how those benefits are to be calculated.[76]

Other cases will have been discussed in Chapters 1.2 and 1.3 above, as they clarify entitlement to specific rights set out there; notable in particular is the recent

[71] Case C-145/09 Tsakouridis EU:C:2010:70, 31.

[72] Meints and Meeussen; Case C-35/97 Commission v France EU:C:1998:431

[73] See, eg, Case 67/79 Fellinger EU: - regarding a requirement to calculate wages at 'last employment' when that was in a different Member State; Case 227/81 Aubin - on where a former frontier worker should obtain unemployment benefits; Case 276/81 Kuijpers – precluding national legislation that resulted in a frontier worker not being eligible for enrollment in a pension scheme because they were also employed in a second Member State

[74] See, eg, Meints and Meeussen; Case C-35/97 Commission v France EU:C:1998:431 – declaring a French law that precluded frontier workers who resided in Belgium from qualifying for 'supplementary pension points' in early retirement as contrary to what is now Article 45 TFEU and the Workers' Regulation; Case C-212/05 Hartmann EU:C:2007:437 – granting equal treatment to 'reverse' frontier workers applying for child benefits in their state of employment; and very recently, Case C-830/18 Landkreis Südliche Weinstraße EU:C:2020:275 – where German legislation restricting the payment of school transport costs to families resident in a specific German territory was found contrary to the Workers' Regulation's Article 7(2).

[75] See, eg, Case 104/80 Beeck EU – regarding a frontier worker entitlement to family allowance in their state of residence, when employment is in a different Member State, under Regulation 1408/71; Case 451/93 Delavant – where the CJEU confirmed that frontier worker family members are also covered by sickness benefit in the frontier worker's state of employment, provided they are not covered by those in their state of residence; Case C-34/98 Commission v France – where a French law that applied social taxation to income of those resident in France but working in another Member State was found to be contrary to what is now Article 45 TFEU, as those frontier workers were not covered by French social security; Case C-311/01 Commission v the Netherlands – where the CJEU declared it contrary to Regulation 1408/71 that the Netherlands refused to allow wholly unemployed frontier workers to retain their unemployment benefits if they were to other Member States to seek employment; Case C-286/03 Hosse – on claiming a care allowance for a frontier worker's family member in the Member State of employment, which the CJEU concluded was correct unless that family member was entitled to such a care allowance in their state of residence; Case C-548/11 Mulders EU:C:2013:249 – on precluding certain national measures that resulted in a period of incapacity benefit being paid in a different Member State not counting for a period of insurance within another Member State.

[76] See, eg, Case 201/91 Grisvard – precluding the Member State of residence from applying a benefit cap that applies in the state of former employment when calculating unemployment benefits; Case C-443/11 Jeltes EU:C:2013:224 – which clarifies SSCR Article 65 to make it clear that the former state of employment is not liable for unemployment benefits, as earlier CJEU case law had suggested under Regulation 1408/71; Case C-496/15 Eschenbrenner EU:C:2017:152 – indicating that Article 45 TFEU and the Workers' Regulation permit insolvency benefit award to a frontier worker not resident in that state from being determined by deducting income tax from the benefit in question.

CJEU case law on the 'integration' of the children of frontier workers discussed in Chapter 1.2.

1.6 Enforcement of EU Rights

One final dimension of rights held by frontier workers under EU law that must be addressed is how frontier workers can enforce those rights: as the UK has now left the EU architecture, it is important to consider what particular protections in terms of enforcement the EU legal system offered.

Key here are two observations:[77]

- **Public enforcement:** Where a Member State is felt to be in breach of EU law, the Commission is able to start so-called Infringement Proceedings under Article 258 TFEU against that Member State. Following an administrative exchange of letters, the Commission can escalate this dispute to the CJEU, which then rules on whether the Member State was in breach of EU law. If the CJEU rules against the Member State, which then does not heed this finding by amending its domestic law and bringing it into compliance with EU law, the Commission can bring a follow-up action in which it requests a financial penalty be applied to the Member State until it complies, under Article 260 TFEU. The Infringement Proceedings apply political, legal and financial pressure on Member States to comply with the obligations they hold under EU law.

- **Private enforcement:** Moreover, domestic courts are enlisted as 'enforcers' of EU law via several CJEU-developed doctrines. The combination of supremacy of EU law, which requires incompatible domestic law to be set aside by domestic courts, as well as direct effect of EU law, which enables certain provisions of EU law to be relied up on directly before domestic courts, means that individuals who believe their EU rights are not being granted by a Member State can challenge that Member State in the domestic courts – and domestic courts are obliged to set aside incompatible domestic law so as to grant those EU rights wherever possible. Where the court is not sure how to interpret a provision of EU law, they can (or if they are the final court of appeal, they should) make a preliminary reference to the CJEU to ask for an interpretation (Article 267 TFEU).

Both public and private enforcement have played a substantial role in ensuring that EU free movement rights of workers are respected by the Member States. Infringement Proceedings have been launched in light of failures to implement, or wrong implementations, of the Citizenship Directive, and private enforcement efforts have been the foundations for preliminary references to the CJEU, which have produced much of the clarification of what 'work' and 'workers' are, and what rights they hold. Private enforcement in particular is an effective means of granting workers the rights they hold under EU law without necessitating action before the CJEU, and as such the direct effect and supremacy of EU law is fundamental to ensuring its successful operation on the ground in the Member States.

[77] For more detailed material on enforcement of EU law, see Sylvia de Mars, EU Law in the UK (OUP 2020), Chapter 8.

1.7 Summary: Frontier Worker Rights under EU Law[78]

Specific Right Held	Responsible State (where appropriate)	Source
Right to enter a Member State		Article 45 TFEU; CD Article 6.
Right to reside in a Member State (reverse frontier workers and family)		CD Article 7 (see Chapter 1.4 above)
Right to work in another Member State		Article 45 TFEU, WR Section 1
Right for family members to accompany or join frontier worker, reside, and to work once in Member State		CD Articles 2-3, 6-7, 16, 23
Right to permanent residence (reverse frontier workers and family)		CD Article 16
Right to permanent residence ('onward' frontier workers and family)		CD Article 17
Protections against Entry Refusal and Deportation (reverse frontier workers and family)	State of Residence	CD Articles 27-31
Right to 'more generous national conditions' for frontier worker and family	State of Residence	CD Article 37
Right to equal treatment in employment conditions (remuneration, dismissal, reinstatement)	State of Employment	WR Article 7(1)
Right to equal social and tax advantages as national workers	State of Employment	WR Article 7(2)
Right to training on the same conditions as national workers	State of Employment	WR Article 7(3)
Right to equal treatment in trade union membership/activities	State of Employment	WR Article 8
Right to equal housing rights and benefits as national workers or where family has remained in the home State, equal treatment rights to national workers in the home State	State of Employment or State of Residence	WR Article 9
Rights to the coordination and aggregation of social and tax advantages between the state of residence and state of employment	State of Employment and State of Residence	SSCR, Articles 4, 5, 6 and 10
Right to the export of some social and tax advantages	State of Employment	SSCR, Article 7

[78] For context to the table in Chapter 1.7, while some of these rights are given to those 'resident' in a particular Member State, they in practice always originate from the fact that within a family unit, there will be an EU national holding the status of 'worker' or 'frontier worker' in compliance with Article 45 TFEU.

Chapter 2: Implementation of the Applicable EU Law in the UK (pre-Brexit)

Assessing the changes that frontier workers on the island of Ireland face are faced with as a consequence of Brexit requires an overview of how the UK (and Northern Ireland, where it has specific legislation in place) implemented the EU law described above. This is of particular importance given the 'no diminution' commitment in Article 2 of the Windsor Framework (WF), where the benchmark to be measured against for the purposes of 'diminution' is the law as it stood at the end of the transition period (so on 31 December 2021).

Chapter 2 commences with a short discussion on how the key EU Treaty provisions, regulations and directives that affect frontier workers were implemented in the UK, insofar as they were. After this, an overview of the law addressing the rights of EU national workers specified in the Workers' Regulation will be set out. A full discussion of the social security setup of Northern Ireland is beyond the scope of this paper; instead, the general approach taken by social security legislation to the rights of EU national workers before Brexit will be summarised by means of example, with specific attention to any situations where EU law gives EU national frontier workers rights, but where UK law pre-Brexit nevertheless did not fully reflect those rights.

2.1 General Implementation

As a starting point, the Treaty provisions governing free movement of workers are directly applicable, as are EU regulations (like the Workers' Regulation and 883/2004). What this means is that they do not have to be transposed into domestic law – but simply operate as 'the law' in the Member States. In the UK, this 'direct applicability' was guaranteed by s2 of the ECA 1972 when the UK was a Member State – and UK case law concerning EU nationals confirms that the UK courts consistently applied Treaty articles and regulations in domestic court cases as a part of relevant UK law.[79] Beyond that, the UK had the obligation to ensure that its domestic law did not conflict with EU Treaties or Regulations – and so the consequences of the Workers' Regulation and 883/2004 are likely to be found as amendments to a range of other legislation on topics such as housing, education, and benefits. Such legislation will be briefly summarised in Chapter 2.2.

The Citizenship Directive, on the other hand, did have to be implemented in order to have legal effects in UK domestic law. It was originally implemented in the Immigration (EEA) Regulations 2006 ('the 2006 Regulations'), which were later consolidated into the Immigration (EEA) Regulations 2016 ('the 2016 Regulations'). The 2016 Regulations were in force at the end of the transition period.

[79] UK cases that provide helpful summaries of the development of the law on workers include Barry v London Borough of Southwark [2008] EWCA Civ 1440 and Begum (EEA–worker–jobseeker) Pakistan [2011] UKUT 00275.

The 2016 Regulations

The Commission confirmed in 2008 that the UK had transposed the Citizenship Directive correctly and fully, in what were then the 2006 Regulations.[80] However, a 2018 research report funded by the EU's European Programme for Integration and Migration reveals that there are aspects of the Directive that were not transposed fully or at all.[81] Key for our purposes are the following two findings:[82]

- Article 7(3) of the Directive, which addresses retention of worker or self-employed status, is only partially reflected in the 2016 Regulations. While reg 6(2) reflects Article 7(3)(c) of the Directive in full in the case of workers, retention of 'self-employed' status is limited to situations of temporary inability to work because of illness or accident by reg 6(4). CJEU case law has made clear that the entirety of Article 7(3) applies to both workers and the self-employed, so this is an incomplete implementation of the relevant EU law.83
- Article 24 of the Directive has simply not been copied over in the 2016 Regulations. It is unclear to what extent this has caused problems for EU national workers generally or EU national frontier workers specifically in practice, however; Article 24(1) gives a general equal treatment right, which (as we will see below) is broadly reflected in UK social security legislation, by granting EU workers access to benefits where UK nationals have it. More interesting is Article 24(2), which excludes 'social assistance' from job-seekers, as well as maintenance grants for EU national students who do not hold worker or self-employed status. Again, this provision (as we will see below) bites when it comes to specific domestic legislation on benefits or, in the case of maintenance grants, student funding.

UK Case Law on EU Frontier Workers

Much as there is very little law specifically applicable to frontier workers as a matter of EU law, and case law from the CJEU on frontier workers is also the exception rather than the rule, the UK courts have only rarely decided cases involving frontier workers and so developed the law applicable to them specifically.

Focusing on cases relevant for Northern Ireland, a search revealed a total of 19 cases between 1989 and 2021 in which 'frontier workers' were mentioned. The vast majority of these cases referred to provisions in Regulation 1408/71 or 883/2004 that were found not to apply to the facts of the case.[84] In a few others, evidence of frontier worker status was not provided and so could not be considered.[85] None of this case law developed UK law as applicable to frontier workers or demonstrated any incompatibility with EU law as applicable to frontier workers, and so for the current purposes, it does not need to be considered further.

[80] Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 10th December 2008, COM(2008) 840 final.

[81] How such shortcomings in transposition might be challenged after Brexit is considered in Chapters 3.1 (on enforcement of the Withdrawal Agreement) and 4.4 (on Article 2 of the Windsor Framework).

[82] Matthew Evans, 'Fitness Check Report for the United Kingdom: A Review of the state of compliance of the United Kingdom's implementation of Directive 2004/38 on residence rights of EU citizens and their family members' (FEANTSA, May 2018) available at https://www.feantsa.org/download/prodec-legal-fitness-check_united-kingdom2627786278765622682.pdf (accessed on 8 September 2022)

[83] Case C-442/16 Florea Gusa EU:C:2017:1004.

[84] See, for example, Decision of the Social Security Commissioner [1989] NISSCSC C4-88(UB).

[85] See, for example, EA023262018 & Ors. [2019] UKAITUR EA023262018.

2.2 Entitlement to Social and Tax Advantages

The UK (and NI) welfare system is incredibly complex, and as the focus of this paper is specifically on rights for frontier workers on the island of Ireland after Brexit, it is not necessary to discuss in detail the entire range of benefits at work in the UK (or in Northern Ireland, where the benefits in question are administered by the devolved legislature). Instead, we will discuss certain benefits that the state of employment (the UK) was responsible for under the Social Security Coordination Regulation, and how access to them for EU nationals was regulated prior to Brexit.

As a starting point, the Immigration and Asylum Act 1999 in s115(9) makes clear that EEA nationals were not treated as generally unable to access benefits because of their immigration status in the UK – and instead were treated as not subject to immigration control. The specific entitlements of EEA nationals were consequently set out in individual pieces of social security legislation – or in the case of frontier workers, in guidance on that legislation.

Contributory Benefits in the State of Employment

Both Great Britain and Northern Ireland operate three kinds of benefits that workers (and so frontier workers) have rights to in light of the Workers' Regulation and their general entitlement to equal treatment under Article 45 TFEU. The first are contributory benefits, to which EU nationals become entitled once they have paid national insurance contributions. They correspond to the social advantages that the Workers' Regulation discusses in Article 7(2).

Historically, there have only been two types of contributory benefits that workers (so not yet of state retirement pension age) might apply for in the UK: the first is contributory job-seeker's allowance (JSA), for those involuntary unemployed; and the other is contributory Employment and Support Allowance (ESA), for those unable to work because of illness or disability. Both have been rebadged as 'New Style' JSA and ESA since the subsuming of income-based JSA and ESA into Universal Credit.

Non-Contributory Benefits in the State of Employment

The next category of broad benefits are non-contributory benefits. These can be either means-tested, meaning that those earning above a certain threshold do not qualify for them, or non-means-tested, where they are generally available to all those in a specific situation. The major means-tested benefits have been absorbed into Universal Credit, including income-based JSA and ESA, so that when a claimant's entitlement to contributory (or 'New Style') JSA or ESA runs out, (as they are both time-limited – JSA to 182 days, ESA to 365 days) they become subject to the Universal Credit regime. The Universal Credit Regulations (Northern Ireland) 2016, as in force prior to Brexit, make it clear that EU nationals in Northern Ireland as 'workers' or their family members meet the residency conditions for entitlement to Universal Credit – but do not specifically reference 'frontier workers':

> **Rule 9 – Persons Treated as not being in Northern Ireland**
> (1) For the purposes of determining whether a person meets the basic condition to be in Northern Ireland, except where a person falls within paragraph (4), a person is to be treated as not being in Northern Ireland if the person is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.
>
> (4) A person falls within this paragraph if the person is —
>
> (a) a qualified person for the purposes of regulation 6 of the EEA Regulations as a worker or a self-employed person,
>
> (b)a family member of a person referred to in sub-paragraph (a) within the meaning of regulation 7(1)(a), (b) or (c) of the EEA Regulations...
>
> The Universal Credit Regulations (Northern Ireland) 2016.

Reflecting an important understanding of movement on the island of Ireland, Rule 9(1) makes clear that residency in the Republic of Ireland also counted as residency in Northern Ireland. This is particularly important when we consider the rights of frontier workers on the island of Ireland: many will be resident in Ireland but employed in Northern Ireland. If access to benefits was determined on a residency basis with a strict definition of 'in Northern Ireland', some frontier workers resident in Ireland but working in Northern Ireland would not have been eligible for Universal Credit at all, as the UK authorities classify Universal Credit as social assistance, meaning that it cannot be exported to another country. Because of this broader definition of 'in Northern Ireland', however, those frontier workers were – as EU law requires in the Workers' Regulation – not excluded from Universal Credit.

However, EU nationals who lived in a non-Ireland Member State and worked in Northern Ireland were not captured by Rule 9, and so the legislation on Universal Credit in Northern Ireland utilises the classification of 'social assistance' to avoid the full scope of what the Social Security Coordination Regulation requires in terms of determining a 'competent state' for a social security benefit. This could have negatively affected, for example, seasonal agricultural workers from across the EU who worked in Northern Ireland but remained 'resident' in a different, non-Ireland Member State. It is here also worth noting that, even though UC replaces a bundle of legacy benefits, several of which (like child tax credits) were not social assistance, the UK government also relied on the overall classification as social assistance in order to explicitly discriminate on the grounds of nationality, by excluding EU national jobseekers from UC entitlement. So whereas UC is now the primary work-seeker benefit for UK nationals, for EU nationals, it can only ever be a benefit to supplement income from work. So far, this legislative approach has not been challenged, but the CJEU has in the past required benefits to be disaggregated into component parts where one element was deemed social security and another not.[86]

As we will see regarding other benefits as well, the broader effects of directly applicable EU law are set out only in guidance for decision-makers, and not referenced directly in either primary or secondary legislation. Whilst in the EU, this was problematic for UK rightsholders from the perspective of legal certainty and legitimate expectations for rights-holders – but the EU law granting the rights would have been enforceable in the UK (whether by the Commission or by private individuals reliant upon the rules before UK courts) all the same.

In the case of Northern Ireland's Department for Communities, as the competent public body that makes decisions on social security claims, a highly detailed Decision Makers Guide contains a Volume 2 that deals with 'European, International and Human Rights Issues'. Chapter 7 of this volume, in Part 1 (titled 'Common subjects') sets out how EU law applies to claimants, and while it captures the majority of issues well, it is significantly out of date – the Social Security Regulations referenced, for example, are 1408/71, not 883/2004, and the benefits listed are the 'legacy' benefits rather than Universal Credit.

[86] Case C-537/09 Bartlett EU:C:2011:278.

That said, it clarifies that under NI Social Security legislation, EU workers are treated as workers even if they do not earn enough to pay national insurance (provided their work is 'genuine and effective'), and that EU law requires that family benefits are available to workers who have family living in a different Member State. Importantly, it captures the provisions in the Social Security Coordination Regulation that are most beneficial to frontier workers: 'An employed or self-employed person is subject to the legislation in the country where that person is employed or self-employed. That person is subject to that country's legislation even if … that person resides in another European Economic Area country'. As the guidance makes clear that directly applicable EU legislation is 'part of United Kingdom law' and so 'adjudicating authorities must take into account all relevant [EU] provisions and case law when deciding claims and questions', this guidance appears to address adequately the situation where a frontier worker was resident elsewhere in the EU and worked in Northern Ireland.[87]

Non-means-tested benefits are not part of Universal Credit and are subject to distinct regimes. Child Benefit and Disability Living Allowance, now replaced by Personal Independence Payments, are the examples of non-means-tested benefits we will use here.

Child Benefit, a non-means tested benefit available for to those with parental responsibility for a minor, is regulated by the same statutory instrument across the UK, the Child Benefit Regulations 2006. General eligibility for child benefit once again depends on presence in 'in Northern Ireland' – and in this case, presence of the claimant for the benefit as well as for the child they are claiming for.

Regulation 27 discusses when claimants are deemed present in Northern Ireland, and there are a number of terms used here:

- First, anyone who is not 'ordinarily resident' in the UK is not deemed resident in Northern Ireland. Ordinary residence is a concept that is not defined in legislation, but effectively amounts to actually living in a given country.
- Part of the 'ordinary residence' test as set out in English case law is the requirement that that residence has to be legal; consequently, anyone without what the Child Benefit Regulations 2006 call a 'right to reside' will also not be deemed to be in Northern Ireland, and so eligible for Child Benefit there.

The Child Benefit Regulations do not further specify who has a 'right to reside' and instead focus on what types of residency rights do not entitle a claimant to Child Benefit. However, the concept of the 'right to reside' comes from the 2006 and 2016 Regulations – and it makes clear that all EU national workers have a right to reside in the UK as long as they stay working. The combined meaning of the Child Benefit Regulations and the 2016 Regulations is consequently that EU national workers have the right to reside in the UK – and where they are ordinarily resident in the UK, they are entitled to Child Benefit.

[87] Brexit has changed this – in that most of what used to be directly applicable EU legislation is now only part of UK law because Parliament agreed that it should be in the EU Withdrawal Act 2018. The Retained EU Law Bill, while at the time of writing seemingly 'on hold' (March 2023), intends to convert what used to be directly applicable EU law into regular domestic law (which would nonetheless be binding on UK authorities) – but for those EU nationals in the UK who are covered by the Withdrawal Agreement, the Social Security Coordination Regulation will nonetheless remain relevant as EU law because of its retention in Part 2 of the Withdrawal Agreement. This is discussed in Chapter 3.1.

This would appear to (erroneously) suggest the following applied to frontier workers on the island of Ireland before Brexit:

1. A frontier worker resident with their family in Northern Ireland, but working in Ireland, would have been able to get Child Benefit in Northern Ireland.
2. A frontier worker working in Northern Ireland, but resident and with family resident in Ireland, will not have been able to get Child Benefit in Northern Ireland.

However, this would have been contrary to the Social Security Coordination Regulation, and as we saw with regards to the benefits administered by the Department for Communities in Northern Ireland, it is guidance rather than law that stresses the application of the Social Security Coordination Regulation. In the case of Child Benefit, the relevant guidance is provided by HMRC in what is called the 'Child Benefit Technical Manual' (CBTM).[88] Like the Decision Makers Guidance discussed above, the CBTM has a bespoke volume dealing with 'Residence, Immigration and European Law'[89] – and its section on European Law sets out accurately and in detail how the Social Security Coordination Regulation applies to frontier workers when it concerns family benefits.[90] It thus stresses that anyone working in the UK is subject to the UK's social security legislation and that where in the EU they live is irrelevant for the purposes of the regulation.[91] It also very clearly discusses the 'priority' rules applicable in situations where, for example, one parent works in Northern Ireland and another parent works in a different Member State – where EU law makes clear that the 'competent State' is determined by employment first and residence of the children second, but any differences in the payment rate of Child Benefit would be coordinated between the two Member States.[92]

Considering the domestic legislation and the guidance on directly applicable EU law together, before Brexit, frontier workers with family resident in Ireland or elsewhere in the EU, but employed in Northern Ireland, were correctly treated as entitled to Child Benefit in Northern Ireland.

Personal Independence Payments (PIP), which have largely replaced Disability Living Allowance (except for children) is a non-means-tested benefit for people who need support in daily living and mobility activities. These benefits are not specific to workers, but are awarded on the basis of care and/or mobility needs. This does not preclude frontier workers or other workers from being eligible for them, however.

Eligibility for PIP in Northern Ireland is set out in the Personal Independence Payment Regulations (Northern Ireland) 2016, and rule 16 in principle restricts eligibility for PIP payments to those present in Northern Ireland and habitually resident in any of the UK, the Republic of Ireland, or the Isle of Man or the Channel Islands. This is a very similar formulation to that in the Universal Credit (Northern Ireland) Regulations 2016 – but unlike those regulations, the PIP Regulations include specific exemptions from this general rule for those to whom 'a relevant EU Regulation applies'.[93]

[88] HRMC, 'Child Benefit Technical Manual' (Updated 29 March 2022), CBTM10000, available at https://www.gov.uk/hmrc-internal-manuals/child-benefit-technical-manual
[89] Ibid, CBTM10000.
[90] Ibid, CBTM10200.
[91] Ibid, CBTM10203.
[92] Ibid, CBTM10207.
[93] Personal Independence Payments Regulations (Northern Ireland) 2016, rule 22 and 23.

Rule 23 thus addresses anyone living in an EEA state, and notes that where parts of PIP are exportable (as the 'daily living component' is, but the 'mobility' component is not),[94] a claimant can be habitually resident in any other EEA country and they will be eligible for PIP if they can demonstrate a 'genuine and sufficient link' to the UK social security system. However, the means by which the UK requires a claimant to demonstrate such a link are problematic; the guidance requires that a claimant actually and currently be working in the UK (or be paying National Insurance contributions because of work) or have paid enough NI contributions to be entitled to contribution-based benefits.[95] This runs the risk of penalising the very people likely to claim PIP – as disabled people are disproportionately represented among the lower paid members of the workforce. It is worth noting again that neither the legislation nor the guidance is specifically directed at frontier workers at all, but would encompass them.[96] In sum, therefore, an EU national frontier worker who worked in Northern Ireland and lived in Romania would have in principle been entitled to the 'daily living component' of PIP – but only if they were able to satisfy the 'genuine and sufficient link' criteria by actually working or having worked enough in the UK. For ill or seasonal frontier workers, this might represent a difficult hurdle to cross.

One final curiosity about UK legislation on social and tax advantages is worth commenting on briefly. In February 2019, the UK introduced a statutory instrument that precluded 'frontier workers' from claiming Universal Credit in Great Britain.[97] Instead, they remained eligible for the 'legacy' tax credits that Universal Credit is replacing. There is no information on why this measure was introduced, and it was repealed in March 2022, meaning that frontier workers covered by the Withdrawal Agreement are not, by virtue of that status, excluded from Universal Credit in Great Britain.[98]

"In February 2019, the UK introduced a statutory instrument that precluded 'frontier workers' from claiming Universal Credit in Great Britain."

94 Case C-537/09 Barlett EU:C:2011:278.

95 DWP, Advice for Decision Makers Chapter C2: Personal Independence Payment https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1090413/admc2.pdf, C-2122 defining an 'insured person' for the purpose of cash sickness benefits. However, note the guidance is inconsistent and appears to take a broader approach to a 'genuine and sufficient link' at c-2130.

96 See here also section 84 of the Welfare Reform Act 2012, which declares claimants entitled to these 'daily living' components of benefits where it is the competent state only.

97 See The Welfare Reform Act 2012 (Commencement No. 32 and Savings and Transitional Provisions) Order 2019, SI 2019/167 (C.6).

98 The Welfare Reform Act 2012 (Commencement No. 34 and Commencement No. 9, 21, 23, 31 and 32 and Transitional and Transitory Provisions (Amendment)) Order 2022, SI 2022/302.

Frontier Workers and their Families: Rights after Brexit

2.3 Summary

The majority of the relevant EU law for frontier workers has been – more or less – correctly transposed and applied by the United Kingdom. This is particularly the case because they are workers, and implementation of EU equal treatment principles has never been as controversial for workers in the UK as it proved to be for the economically inactive.[99]

Nonetheless, before Brexit, there were a few fronts on which UK implementation of the Treaty provisions, Regulations and Directives discussed in Chapter 1 had shortcomings. The table below summarises the instances where – even if practice, primarily driven by guidance, appears to have been in compliance with the requirements of the Regulations and the Directive – the law diverged from the EU's requirements.

Relevant Provision of EU Law	UK Implementation (in law)	Differences
Article 7(3) of the Citizenship Directive – on retained worker status for self-employed EU nationals	Regulation 6 of the 2016 Regulations	Does not extend retained 'self-employed' status beyond temporary inability to work because of injury or accident; missing the 3 other situations where EU law permits it.
Article 24 of the Citizenship Directive – on equal treatment rights	n/a	Not implemented as a 'general rule' – instead, workers' rights to equal treatment on benefits were addressed via social security legislation
The Social Security Coordination Regulation generally – coordination of social security	Not implemented or referenced in law – solely addressed in guidance on benefits	A reading of social security legislation alone looks as if benefits are only available to those resident in Northern Ireland

99 Charlotte O'Brien 'The pillory, the precipice and the slippery slope: the profound effects of the UK's legal reform programme targeting EU migrants' (2015) 37(1) Journal of Social Welfare and Family Law 111-136; Charlotte O'Brien Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK (Oxford: Hart, 2017).

Chapter 3: Frontier Workers in the Withdrawal Agreement

The previous two chapters outlined how EU law and its UK implementation affected frontier workers resident in or working in Northern Ireland prior to Brexit.

Chapter 3 considers the contents of the Withdrawal Agreement (WA) concluded between the UK and the EU as it affects, or protects, frontier workers at the time of Brexit. First, it will consider the contents of the Withdrawal Agreement itself – and it will then explore how the Withdrawal Agreement has been implemented in the UK, both in law and (as the previous chapter will have demonstrated, importantly) in policy and guidance. Following a summary table of the rights contained in the Withdrawal Agreement and its implementation in the UK, the chapter closes by discussing to what extent coverage of the Withdrawal Agreement itself, as implemented, and guidance from the UK authorities on the Withdrawal Agreement and its implementation, address the rights that frontier workers held under EU law.

3.1 Frontier Workers in the Withdrawal Agreement

Rights from the Citizenship Directive and the Workers' Regulation

Unlike most EU law on free movement of workers (excepting the Social Security Coordination Regulation), which alluded to frontier workers primarily in non-binding preambles, limited provisions where they were due exceptional treatment, Part 2 of the Withdrawal Agreement – which details Citizens' Rights as maintained by the Withdrawal Agreement – centres them immediately.

Article 9(b) of the Withdrawal Agreement thus actually defines 'frontier workers':

> "frontier workers" means Union citizens or United Kingdom nationals who pursue an economic activity in accordance with Article 45 or 49 TFEU in one or more States in which they do not reside;
>
> Article 9(b) WA.

Article 9 contains further definitions specific to frontier workers: paragraph (d) makes clear that the 'state of work' refers to, for EU nationals, the UK if they pursued economic activity there prior to 31 December 2020 and continue to do so afterwards; and for UK nationals, an EU Member State in which they did the same. However, 'reside' is not further defined – and, as we will see in Chapter 3.2, the concept of residence for frontier workers has been further specified in domestic UK law. This is perhaps a welcome development, but also potentially a restrictive one: the absence of the definition of 'frontier worker' in EU legislation means that there is no exhaustive list of scenarios covered, whereas any 'tightening' of the definition will delimit those scenarios.

Article 10 also specifically identifies both of these categories of frontier workers as beneficiaries of the contents of Part 2 of the Withdrawal Agreement. However, it is less clear on whether or not family members of frontier workers are covered specifically by Part 2 of the Withdrawal Agreement. Article 10(e) states that family members of frontier workers are covered if they fulfil one of three conditions:

> (i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter;
>
> (ii) they were directly related to a person referred to in points (a) to (d) and resided outside the host State before the end of the transition period, provided that they fulfil the conditions set out in point (2) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph;
>
> (iii) they were born to, or legally adopted by, persons referred to in points (a) to (d) after the end of the transition period, whether inside or outside the host State, …
>
> Article 10(e) WA.

Residence in the 'host' state thus appears to be necessary. Article 9(c)(i)-(ii) define 'host State' as:

> (i) in respect of Union citizens and their family members, the United Kingdom, if they exercised their right of residence there in accordance with Union law before the end of the transition period and continue to reside there thereafter;
>
> (ii) in respect of United Kingdom nationals and their family members, the Member State in which they exercised their right of residence in accordance with Union law before the end of the transition period and in which they continue to reside thereafter;

Frontier workers are unique in both EU law and the Withdrawal Agreement in that they explicitly do not live in the state where they work, which in the case of regular EU workers will be the 'host State'. Instead, they either live in their state of nationality and work elsewhere, or work in their state of nationality and live elsewhere – or they simply work and reside in two different Member States, neither of which are of their nationality. Family members of regular frontier workers thus will never 'reside in the host State' for EU law purposes, as the frontier worker themselves will also not 'reside in the host State'. Article 10(e)(i) consequently does not seem to apply to those frontier workers' families – but, much like the Citizenship Directive's content, it can cover 'reverse' or 'dual' EU frontier workers and their families (as family members of the EU frontier worker) who are resident in the UK but work in a different Member State, or 'reverse' or 'dual' EU frontier workers and their families (as family members of the EU frontier worker) who are resident in Ireland but work in the UK.

Article 10(e)(iii) refers to children born to EU nationals or UK nationals covered by the Withdrawal Agreement after Brexit – which is not specific to frontier worker families. This leaves Article 10(e)(ii), which extends Part 2 of the Withdrawal Agreement to direct family members of frontier workers (as defined by the Citizenship Directive) who resided outside of the host State, but now seek residence to join the frontier worker. This, again, does not describe the regular frontier worker lifestyle: their family members live outside a 'host State' and will continue to do so. These initial definitions on the personal scope of Part 2 consequently do not seem to address regular frontier workers' families where they remain resident in their country of nationality, any more than the Citizenship Directive did. While not a diminution of earlier EU law rights, it will be of particular concern for those frontier workers with non-UK or non-British family members, who appear to fall outside of the scope of the Withdrawal Agreement.

Frontier Workers and their Families: Rights after Brexit

In terms of residency rights for 'reverse' frontier workers and their families, or 'dual' frontier workers and their families, the Withdrawal Agreement in Articles 13-15 mostly copies over the relevant provisions of the Citizenship Directive, and so maintains the rights of exit and entry, rights of initial residence, and rights of permanent residence held by these frontier workers and their families prior to Brexit. Article 16 ensures that they can acquire permanent residence even after Brexit. The Independent Monitoring Authority has recently won a judicial review case against the Home Office, where it successfully argued that such acquisition, once a person has been awarded WA status under Article 18, should after five years be automatic.[100] The Home Office in contrast requires all EU nationals to re-register, or when their pre-settled status expires they will lose all WA-based residence rights in the UK. The WA version of 'permanent residence' is a 'stronger' version of the one set out in the Citizenship Directive: Article 15(3) makes clear that it can only be lost after an absence from the host State of more than 5 consecutive years, as compared to the Directive's two years absence rule (Article 16(4) CD) – presumably because once it has been lost, there is no possibility for regaining it

As discussed above, the Citizenship Directive also makes provision for 'quicker' permanent residence for 'onward' frontier workers, who live and work in an EU Member State and after 3 years, proceed to become frontier workers by working in a different Member State;[101] in theory this special rule is carried over into the Withdrawal Agreement, which provides for permanent residence in accordance with the periods of residence stipulated in Article 17 of the Citizenship Directive. In practice, for UK nationals to benefit they would have had to have exercised their free movement rights as migrant workers for three years, and then changed the state of work before 31 December 2020, while staying resident in the Member State of former work, where they should then be entitled to permanent residence under Article 15 of the Withdrawal Agreement. UK nationals do not have ongoing free movement rights, so the shift to frontier work under Article 17 of the Directive would have to have happened before EU law ceased to apply to them. For EU nationals, if they have worked and resided in the UK for three years, then should they shift their state of work to an EU state (before or after the end of the transition period) – including Ireland – while continuing to reside in the UK, they should be entitled to permanent residence in the UK, or 'settled status' under the EUSS.[102]

Article 18 sets out the rules applicable to what in the UK has become the EU Settlement Scheme, or the residency registration process that results in Part 2 rights being conferred to EU nationals by their 'host State'. As before, this provision can only be relevant for 'reverse' UK or 'dual' EU national (including Irish) frontier workers and their families who are resident in the UK and work in the EU. For our purposes, similar to the regime under the Citizenship Directive, frontier workers and their families resident in Northern Ireland could register for this new residency status ('Settled Status') as self-sufficient under Article 18(1)(k)(ii). The documentary requirements for the registration are essentially identical to those set out in the Directive, with the exception that Article 18(p) enables systematic checks on criminality and security – which was not possible under the Directive. There are, however, two fundamental differences between the WA and Directive registration regimes. First, the Directive provided for a declaratory scheme, (whereby the registration document was not in itself

[100] IMA v Secretary of State for the Home Department [2022] EWHC 3274 (Admin).
[101] Article 17(1)(c) CD.
[102] 'Person who has ceased activity'; para (c); under 'Definitions' Annex 1, Appendix EU to the Immigration Rules.

necessary for the recognition of the rights under the Directive – non-registration could only lead to a proportionate penalty, not a negation of rights). The WA, in contrast, permits a constitutive scheme whereby the new status in and of itself confers the rights in Part 2. The second key difference is that the Directive describes a registration regime which is optional for Member States; however, in contrast, those States adopting a constitutive regime under the WA are obliged to provide the registration rights and conditions described in Article 18 WA.

Article 23 of the Withdrawal Agreement copies over the Citizenship Directive's Article 24 equal treatment clause in full, including its limitations on student maintenance grants and its extension of equal treatment to resident family members of EU nationals residing in the host State. This complements Article 12, which references Article 18 TFEU's prohibition of discrimination on the basis of nationality and applies it to both the host State and the State of Work. Article 22, meanwhile, confirms that family members of EU nationals resident in the host State are entitled to take up work or become self-employed there as well.

A big change in terms of rights of 'reverse' and 'dual' frontier worker families resident in Northern Ireland but working elsewhere in the EU is found in Article 20, which makes clear that while decisions to deport anyone exercising residence rights under Title II, on the basis of conduct that took place before the end of transition will be taken in line with the Citizenship Directive (Article 20(1)), decisions on deportation on the basis of conduct that took place after the transition period are taken on the basis of national legislation (Article 20(2)).[103] Article 21, however, nonetheless requires that the Citizenship Directive's provisions on appeals to decisions taken on residency rights apply to those covered by Part 2 indefinitely, thus ensuring partial continuation of the Directive's restrictive processes for deporting EU nationals.

Chapter 2 of Part 2 discusses the specific rights of workers and self-employed persons. Article 24 here copies over the relevant rights set out in the Workers' Regulation, and adds a specific proviso for frontier workers:

> 3. Employed frontier workers shall enjoy the right to enter and exit the State of work in accordance with Article 14 of this Agreement and shall retain the rights they enjoyed as workers there, provided they are in one of the circumstances set out in points (a), (b), (c) and (d) of Article 7(3) of Directive 2004/38/EC, even where they do not move their residence to the State of work.
>
> Article 24(3) WA.

This is a useful supplement to the Citizenship Directive's content on retained worker status. Article 7(3) of the Citizenship Directive does not expressly consider that not all EU law workers will reside in their state of employment. Article 24(3) WA makes clear that worker status will be 'retained' for frontier workers regardless of where they are resident, and likewise, that they are entitled to enter and exit their State of work in the way that other persons covered by the Withdrawal Agreement are entitled to enter the 'host State'. A further express clarification is found in Article 25(3) WA, which makes clear that self-employed frontier workers likewise benefit from the contents of Article 24(3) WA.

Of particular importance is Article 26 WA:

> The State of work may require Union citizens and United Kingdom nationals who have rights as frontier workers under this Title to apply for a document certifying that they have such rights under this Title. Such Union citizens and United Kingdom nationals shall have the right to be issued with such a document.
>
> Article 26 WA.

[103] Article 20(2) WA.

As will be discussed in Chapter 3.3, the UK has set up a Frontier Worker Permit scheme in line with Article 26 WA, granting the rights in Part 2 of the Withdrawal Agreement to frontier workers who hold the status in question.

Title IV of Part II contains a few other provisions that are of relevance to frontier workers. Article 37 WA thus obliges the Member States and the UK to 'disseminate information concerning the rights and obligations of persons covered' by Part 2. Article 38(1) enables the UK and the Member States (as either host State or State of Work) to uphold 'more favourable provisions' than the baseline required by Part II; and Article 38(2) specifies that the Article 12 non-discrimination commitment and Article 23's equal treatment commitment operate 'without prejudice' to the Common Travel Area and more favourable treatment stemming from its operation. This latter article echoes the Common Travel Area exemption that was contained in Protocol 20 of the EU Treaties when the UK was a Member State, and so represents more continuity for relevant frontier workers.

Finally, Article 39 makes clear that those covered by Part II shall enjoy its rights for their lifetime, unless they cease to meet the conditions set out in Part II.

Rights from the Social Security Coordination Regulation

Title III of Part 2 addresses social security coordination under the Withdrawal Agreement. Article 30 makes clear that all types of frontier workers that involve either work or residency in the UK will be covered by Title III of the Withdrawal Agreement, which in effect preserves the EU social security coordinating system for those covered by the WA.

Article 31 WA makes clear that Title III's substantive contents are shaped by the Social Security Coordination Regulation and its implementing regulation (Regulation 987/2009).[104] It makes explicit that definitions of terms in the Social Security Coordination Regulation will apply across the Title, meaning that it effectively copies over and applies the Regulation in full. This includes the scope of the Social Security Coordination Regulation, and how it only covers frontier workers who return to their state of residence 'daily or at least once a week'. As discussed in Chapter 1.3, this potentially causes problems for seasonal frontier workers, who may be deemed to be resident in their country of employment – which can cause problems for them and their family members when trying to access certain rights in their state of residence.

One further provision of interest to all workers, including frontier workers, is Article 36, which makes clear that Title III of Part 2 is 'living' legislation, rather than creating a 'static' snapshot in the way that earlier Titles of Part 2 do. What this means is that where the Social Security Coordination Regulation and its implementing regulation are amended or replaced at any point in the future, these new social security coordinating Regulations will apply to all EU and UK nationals covered by the current ones – which is good news for all of those covered by the Withdrawal Agreement. Where there are significant changes to the benefits granted, this is a matter for discussion in the Joint Committee – but in any event, the contents of Title III ensure that those covered will be entitled to the same social security coordination rights as they were when the UK was an EU Member State.

[104] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (2009) OJ L 284/1.

Enforcement of Part 2 of the Withdrawal Agreement

In terms of public enforcement of Part 2, the Withdrawal Agreement offers an alternative to the Commission's Infringement Proceedings. Instead of granting the Commission a role in overseeing how Part 2 works in the UK, the Withdrawal Agreement (in Article 157) establishes an Independent Monitoring Authority (IMA) in the UK which

> shall have powers equivalent to those of the European Commission acting under the Treaties to conduct inquiries on its own initiative concerning alleged breaches of Part Two by the administrative authorities of the United Kingdom and to receive complaints from Union citizens and their family members for the purposes of conducting such inquiries. The Authority shall also have the right, following such complaints, to bring a legal action before a competent court or tribunal in the United Kingdom in an appropriate judicial procedure with a view to seeking an adequate remedy.
>
> Art 157 WA.

The IMA thus has powers of inquiry, of receiving complaints, and of litigation.

The EU Commission itself has a very limited role in the UK; it may submit written observations to UK courts and tribunals on pending cases where the interpretation of the Withdrawal Agreement is concerned and may seek permission to make oral observations (Article 162). The Commission's main role, as far as the agreement is concerned, is instead on monitoring the implementation of the Withdrawal Agreement in the EU. Both the IMA and Commission are required to report to the specialised committee on citizens' rights.

Supplementary to the Independent Monitoring Authority's oversight, the Withdrawal Agreement also contains more general dispute settlement provisions. Where either the EU or the UK believes the other is not complying with the Withdrawal Agreement, they can start consultations in the Joint Committee (Article 169 WA) – and in the absence of a resolution through consultations, it can request arbitration under Article 170 WA. This is an alternative to the CJEU – but ultimately not with very different outcomes, in that arbitration likewise can result in financial penalties in the form of 'proportionate countermeasures'.

A key feature of the Withdrawal Agreement is that it is, like EU law, directly effective (where it meets the relevant conditions) and supreme to domestic UK law.[105] This feature has been given effect in domestic law in the EU (Withdrawal Agreement) Act 2020, s5.[106] Because of Part 2's reliance on existing EU law that has been found to be directly effective, non-compliance with Part 2 can result in cases being brought before UK courts by affected EU nationals. Additionally, and exceptionally in relation to Part 2 of the Withdrawal Agreement, UK courts can continue to send preliminary references to the CJEU for a period of 8 years following the end of the transition period (Article 158 WA, with a slight exception to cases taken regarding residence status under Article 18, where the eight year clock instead starts 'from the date from which Article 19 applies') – with the CJEU's findings on those references being binding on the UK (Article 158(2)).

[105] And, as will be discussed in Chapter 3.2, the UK (in its implementing legislation, which added s7A to the EU Withdrawal Act 2018) expressly recognises this. See also Allister [2023] UKSC 5 [64-65].

[106] Section 5 EU (Withdrawal Agreement) Act 2020 inserted section 7A into the EU (Withdrawal Act) 2018.

3.2 Implementation of the Withdrawal Agreement in the UK

UK domestic legal implementation of the Withdrawal Agreement will be considered under three strands. As a starting point, we will consider the UK implementation of the residency status rights set out in the Withdrawal Agreement – the EU Settlement Scheme. Next, we will look at the contents of Title III by first considering the EU (Withdrawal Agreement) Act 2020 (the 2020 Act), and second, the secondary legislation adopted under the 2020 Act. A final category of law to consider is the law that has been amended in light of Brexit – which is the social security legislation that used to refer to EU nationals under categories set out by the Citizenship Directive. As before, we will consider those by examples of how national law has changed – not by a detailed survey of all social security legislation, as that is beyond the scope of this report.

The EU Settlement Scheme

The EU Settlement Scheme (EUSS) is the scheme by which the UK has given effect to the residence rights in the Withdrawal Agreement, and in so doing has exercised its prerogative under Article 18 WA to institute a constitutive registration system. The EU Settlement Scheme enables EU nationals who were resident in the UK on 31 December 2020 to register as Withdrawal Agreement right-holders. The details of how the EUSS works is set out Appendix EU to the Immigration Rules.[107]

For our purposes, the EUSS is only of relevance to frontier workers and their families that are resident in Northern Ireland (and so the frontier worker is employed in Ireland). Appendix EU sets out the following basic conditions for registration:

1. EU nationals resident at the end of the transition period could apply for either limited leave to remain ('Pre-Settled Status') or indefinite leave to remain ('Settled Status') depending on how long they had been resident and exercising Treaty rights under the Citizenship Directive at the end of the transition period:[108]

   a. if an EU national had been resident in the UK for five years at the point of application to the EUSS they qualify for 'Settled Status'.

   b. if an EU national was resident in the UK before the end of the transition period, but for a period of time that was less than five years, they qualify for 'Pre-Settled Status'. Rule EU4 makes clear that if they stay resident until they reach five years' residency, then they can qualify for 'Settled Status'.

2. The same basic qualification rules apply to family members of EU nationals (where the EU national meets the relevant residency conditions), whether from within or outside of the UK.[109]

3. The deadline for applications was 30 June 2021, though exceptions exist where there are reasonable grounds for why applications were late.[110] The Home Office has made it clear that the greater the delay, the harder it will be to persuade a decision maker that the grounds for the delay were reasonable.[111]

[107] The Immigration Rules are not secondary legislation but generally treated as such, and are where all applicable 'law' on the details of immigration-related decisions are kept for all visa and status categories.
[108] See Appendix EU, rule EU2, EU3.
[109] Appendix EU, rule EU2A, EU3A.
[110] The 'grounds' include family reunification rights with the relevant EU national resident in the UK by 'exit day' but the family members not yet having joined them, or being a victim of domestic abuse or having medical reasons for not having applied by the deadline. Appendix EU in Annex 1 alludes to the 'reasonable grounds' when discussing application deadlines, but does not specify what they are; they are to be determined by the Secretary of State.
[111] Home Office, EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members Caseworker guidance, Version 18, 9 November 2022, page 33.

4. The applicant must meet the ground of suitability. Rule EU15 indicates that suitability rejections can take place when applicants are subject to a deportation order or an exclusion order/decision, or where the Secretary of State decides that conduct after the date of application means that their presence 'is not conducive to the public good'. Rule EU16 adds to this that falsified or misleading information in the application can also lead to a refusal, as can a proportionate decision in light of public policy, public security or public health concerns that would have justified exclusion under the 2016 Regulations and so the Citizenship Directive.

5. The deadline has not passed for joining family members, where the 'sponsor' family member already has EUSS status, and the family member is joining after April 2021; their deadline is three months from their arrival.

6. However, in order to arrive, many will first need to have applied for an EUSS Family Permit.

One particular dimension of the rules in Appendix EU worth mentioning is the specific mention of a category of applicant called the 'relevant person of Northern Ireland'. This is defined as:

> a person who:
> (a) is:
> (i) a British citizen; or
> (ii) an Irish citizen; or
> (iii) a British citizen and an Irish citizen; and
>
> (b) was born in Northern Ireland and, at the time of the person's birth, at least one of their parents was:
> (i) a British citizen; or
> (ii) an Irish citizen; or
> (iii) a British citizen and an Irish citizen; or
> (iv) otherwise entitled to reside in Northern Ireland without any restriction on their period of residence
> Appendix EU Annex 1, "relevant person of Northern Ireland"

'Relevant persons of Northern Ireland' are treated in Appendix EU as EEA citizens and their family members can join them under the EUSS. As of 1 July 2021, there is the option for a non-EEA family member or dependent relative of such a 'specified relevant person of Northern Ireland' with British or dual British and Irish nationality to apply to the EUSS even when the 'specified relevant person' was not in the UK on 31 December 2020 for compelling reasons (such as the effects of COVID), or (in the case of dependent relatives) where an EUSS Family Permit has been issued to them so as to enable them to enter the UK.[112] This option is not available to Irish nationals who were not resident in the UK on 31 December 2020.

Finally, Appendix EU also makes clear the family members of 'frontier workers' count as relevant EEA citizens, provided that the frontier worker has fulfilled the relevant conditions set out in the Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020 and continues to do so.[113] It is not clear who this is meant to benefit, however, because any frontier worker holding a Frontier Worker Permit under the Frontier Workers Regulations will hold one because they are primarily resident somewhere other than the UK. Where their family holds residency rights in the UK, it seems unlikely that the worker themselves would be primarily resident in another Member State – but regardless, Appendix EU permitted this possibility for registration purposes.

In general, with the exception of specific rules applying to 'relevant' and 'specified' relevant persons of Northern Ireland,

[112] See Appendix EU (Family Permit) of the Immigration Rules in Annex 1.
[113] Appendix EU, Annex 1 – definition of 'relevant EEA citizen' for applications both before and after 1 July 2021.

this is a literal implementation of the relevant registration conditions in Article 18 WA, but as we will see below, it is supplemented with extensive decision-making guidance that should also be considered. The provisions on the rights of 'relevant' and 'specified' relevant persons of Northern Ireland appear additional to those rights required by the Withdrawal Agreement: they enable all those born in Northern Ireland to British and/or Irish parents, and resident there, to register on the same conditions that EEA nationals generally are able to register for the EUSS, and provide an additional route for family members and dependents of British and dual British/Irish nationals who were not resident in the UK on the 31 December 2020. This avenue falls outside the scope of the equal treatment commitment in Part 2 WA as it involves those of British nationality.

Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020

One further piece of legislation to mention here is the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, which amends the 1971 Immigration Act to give a bespoke immigration status to Irish citizens. This amendment reads:

> An Irish citizen does not require leave to enter or remain in the United Kingdom, unless subsection (2), (3) or (4) applies to that citizen.
>
> Immigration Act 1971, s3ZA(1).

The exceptions, in subsections (2) to (4), relate to deportation orders and exclusion orders, which the Secretary of State can make against Irish citizens as well as against all other non-British citizens. In general, therefore, Irish nationals are not required to register under the EUSS, nor are they required to apply for a frontier worker permit (as discussed below).

The EU (Withdrawal Agreement) Act 2020

The Withdrawal Agreement is implemented in the UK by the EU (Withdrawal Agreement) Act 2020. The primary mechanism for giving (direct) effect to the Withdrawal Agreement's content is via a 'reference' clause, set out in section 5 of the Act. It makes, 'without further enactment', the contents of the Withdrawal Agreement a part of UK domestic law, to be 'enforced, allowed and followed accordingly'.[114]

Likewise, the 2020 Act reintroduces the 'implied supremacy' clause that was at the heart of the ECA 1972, by making clear that 'every enactment (including an enactment contained in this Act) is to be read and has effect subject to' the contents of the Withdrawal Agreement.[115] This addresses the vast majority of the content of Part 2 of the Withdrawal Agreement, but there are specific sections in the 2020 Act that deal explicitly with Citizens' Rights.

Part 3 of the 2020 Act commences with a series of sections on entry and residence rights. Section 7 makes clear that legislation can set a deadline for applications to the EU 'Settled Status' scheme, and that it should also address the status of and protection for those applying for a status under the scheme while it was under consideration.[116] That deadline, for context, was set at 30 June 2021 and has now passed, and the regulations addressing section 7 consequently do not need to be considered in detail.

Section 8 is specific to frontier workers and gives Ministers the right to use secondary legislation to implement the provisions in the Withdrawal Agreement that are specific to frontier workers, and the issue of the 'frontier worker status' document alluded to in Article 26 WA.

[114] Section 5 EU (Withdrawal Agreement) Act 2020 inserted section 7A into the EU (Withdrawal Act) 2018.
[115] See again, Allister [2023] UKSC 5 [64-66], where the UK Supreme Court confirms that the 2020 Act's amendment of the EU Withdrawal Act 2018 in s7A has this effect.
[116] s7(1).

Sections 9 and 10 address restrictions to the right to enter and reside as set out in the Withdrawal Agreement – both where these restrictions are to be based on conduct taking place before the end of the transition period, and so based on EU law (s10) and where they can solely be based on national law (s9). Section 11 likewise enables secondary legislation on appeals to Part 2 immigration decisions.

Section 13 of Part 3 address social security coordination, and states that statutory instruments can 'make such provision as the authority considers appropriate… to implement Title III of Part 2', as well as to address any other matters arising out of Title III. Schedule 1 to the 2020 Act makes clear how the devolved administrations are to deal with the rights stemming from Title III of Part 2 of the Withdrawal Agreement.

Finally, and in a change from how the UK addressed the Citizenship Directive, section 14 states that statutory instruments can be passed to implement Article 12 WA on non-discrimination, Article 23 WA on equal treatment, and Articles 24 and 25 with regard to the rights of workers, the self-employed, and frontier workers.

These provisions enable the UK to legislate further to give full effect to the contents of the Withdrawal Agreement, and so the secondary legislation that contains the detail on how these rights (as applicable to frontier workers) now operate in the UK.

Statutory Instruments Implementing the Withdrawal Agreement

Among the statutory instruments (with relevance to frontier workers) adopted on the basis of, or to give effect to, the 2020 Act, are the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020/1209, which, as mentioned, are no longer necessary to explore given that their application lapsed on 1 July 2022.

Interestingly, no regulations have thus far been passed to give further effect to s13 of the 2020 Act (on social security coordination). However, as all of the Social Security Coordination Regulation has been made a part of UK law as 'retained EU law', it might be that further legislation has simply not proven necessary at this time. The 'retained' version of the Social Security Coordination Regulation is a copy of the original regulation, and as such not necessary to analyse in terms of its content. However, draft secondary legislation proposed by the Department for Work and Pensions that uses the powers conferred by the 2018 Act, seeks to reintroduce nationality discrimination for those not covered by the Withdrawal Agreement by repealing domestic (primary and secondary) legislative provisions that give effect to equal treatment rights for EU nationals, including provisions in hitherto 'retained EU law'.[117] Not only could this have an impact on how aspects of 'retained' social security coordination rules are implemented for those outside of the Agreement's scope, it could make the assertion of equality rights more difficult for those in the Agreement's scope. It is, in practice, extremely hard to assert rights based purely on international law to a first instance decision maker, and there are currently no plans that we know of to replace the repealed provisions – which represented domestic implementation of EU law – with any other form of domestic Agreement implementing legislation.

[117] Draft The Cessation of EU Law Relating to Prohibitions on Grounds of Nationality and Free Movement of Persons Regulations 2022.

The Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020

The Frontier Workers Regulations 2020 bring the Withdrawal Agreement's specific provisions concerning frontier workers into UK domestic law. They do so in significant detail.

Regulation 2 makes clear that the Frontier Workers Regulations apply to EEA nationals who are not also British nationals. Regulation 3 adds to this that the definition of a frontier worker for the purpose of the Regulations is an EEA national who is not primarily resident in the UK. It therefore appears that certain categories of frontier workers are not addressed by these regulations: UK nationals living in Ireland and working in the UK (eg, reverse frontier workers).[118] However, Regulation 3 defines 'primarily resident' in very generous terms: anyone who returns to their country of residence at least twice in every twelve month period is deemed to not be 'primarily resident' in the UK. This enables flexibility in terms of maintaining a 'second' residence in the United Kingdom – though of course, anyone who claims a primary residence in Ireland while also working there would not be a frontier worker at all.

Positively, Regulation 3 does identify that frontier workers can be workers, self-employed, or 'retained' workers (and can move between those categories) – with Regulation 4 here doing better than the 2016 Regulations in making clear that self-employed 'frontier workers' can also 'retain' status on account of involuntary unemployment or voluntary vocational training linked to their previous work. Those who have been frontier workers for less than a year can only retain that status for a maximum of six months. Those who have been frontier workers for over a year can retain their status for longer than six months, but only if they provide 'compelling evidence of continuing to seek employment or self-employment in the United Kingdom'. It is not clear how this will be interpreted, as the reference to 'compelling evidence' is not a requirement based on EU law; the cognate requirement in the old rules for a 'genuine prospect of work' was translated into a series of narrow rules in the decision maker guidance, and was later found (by the Upper Tribunal) to fall foul of EU law.[119]

A requirement of 'compelling evidence' of continued work-seeking could have implications for those who have historically engaged in very casual or seasonal frontier work, as will be discussed below. This could be characterised as a diminution of rights, since the compelling evidence criterion appeared in the most recently applicable Immigration (European Economic Area) Regulations 2016, pre-Brexit, and where UK law was out of alignment with EU law, an Article 2 claim under the WF can nonetheless be made – as the actual rights held under EU law are those protected by Article 2, and would be lost (with or without wrongful implementation) following Brexit.

The Regulations next deal with immigration requirements and rights of entry. Regulation 5 establishes that frontier workers are not subject to immigration control in the UK, and Regulation 6 provides that they must be admitted when they provide an identity document as well as a valid 'frontier worker permit'. Regulation 6(2) excepts Irish nationals from holding such a permit. Regulation 12 adds to this that exceptionally, frontier workers can be refused the right of entry into the UK under Regulations 18, 19 or 20, as well as if the immigration officer doubts they actually (still) are a frontier worker. Where they are denied entry, they are subject to regular UK Immigration Law as set out in the 1971 Immigration Act in that they will be 'removed' to their country of nationality.[120]

[118] This latter category of frontier workers, however, falls within the scope of relevant Irish legislation on frontier work after Brexit.
[119] KH v Bury MBC and SSWP [2020] UKUT 50 (AAC)
[120] See Schedule 2 of the Immigration Act 1971, paragraph 8.

Likewise, Regulation 14 establishes that where a decision to admit a frontier worker is revoked, they will be issued with a notice to leave the UK under the 1971 Immigration Act; and Regulation 15 adds that frontier workers can be removed if they cease to be frontier workers, or if there are removal grounds under Regulations 18 or 20. Regulation 16 again makes clear that removals will be processed under normal UK immigration law; the extent to which this represents a diminution of rights under Article 2 of the WF is considered in Chapter 4.4.[121]

Applications for the new frontier worker permits are the next issues covered. Regulation 8 sets out the application process. The key requirements are, in essence, biometrics, valid identification, and evidence that 'frontier work' is taking place. This is not specified further in the Regulations, beyond noting that applications missing relevant documentation should not be rejected unless the frontier worker applicant has had the opportunity to supplement their application. Regulation 10 adds that frontier worker permits are valid for two years in the case of an application from a 'retained' frontier worker, and five years for other frontier workers – but can otherwise be reissued under the same conditions as it was originally applied for.

The conditions for refusing a frontier worker permit are set out in Regulations 18, 19 and 20. Regulation 18 largely reproduces the former the Citizenship Directive grounds for removing EU citizens from the UK, namely, public policy, public security and public health. However, there is no cross-reference to the relevant EU law in the Frontier Workers Regulations, and Regulation 18 also does not specify that it is applicable only to decisions taken before the end of the transition period, when EU law continues to determine the grounds for removal from the UK (as confirmed in Regulation 10 of the EU (Withdrawal Agreement) Act 2020. Regulation 19 meanwhile addresses conduct taking place after transition, and simply states that a decision to remove or refuse entry to a frontier worker can be taken 'on the ground that the decision is conducive to the public good' in line with UK immigration law. Finally, Regulation 20 enables decisions to revoke frontier worker permits or remove frontier workers from the UK where frontier workers 'misuse' frontier worker rights – by, for example, travelling on a frontier worker permit when not engaged in frontier work. Regulation 20(3) makes clear that decisions on these grounds must be proportionate and 20(4) adds that 'misuse' decisions cannot be taken 'systematically'.

The process for appealing refusals and non-renewals of frontier work permits is detailed in Regulations 21 and 22, and Regulation 23 stresses that those appealing decisions cannot be removed from the UK. Regulation 24 amends the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 to specifically address frontier workers' appeals (which will be considered below), and Regulations 25 and 28 amend other domestic law so as to make provision for frontier workers' court appeals, data protection rights, and immigration clearance in light of travel between Ireland and Northern Ireland.[122]

In sum, this is a detailed and faithful implementation of the Withdrawal Agreement's content on frontier workers; it excludes from its consideration the scenario of the British national 'reverse' frontier worker, who (despite being a subject of EU law prior to Brexit) now is likely to be subject to UK social security legislation while resident in Ireland as a relevant Common Travel Area national.

[121] In this case, the Immigration Act 1971 and the Immigration and Asylum Act 1999. Whether this represents a diminution of rights as precluded by Article 2 of the Windsor Framework will be considered in Chapter 4.4.
[122] See on this the Immigration (Control of Entry through Republic of Ireland) Order 1972, which generally restricts the entry of non-Irish nationals into the UK to a period of 3 months – and now expressly does not apply to frontier worker permit holders.

However, British nationals are already not subject to immigration control, and have a right of entry to work, which are the rights contained in the FWP Regulations, so there would be little point including them.

Certain other dimensions of the Frontier Worker Regulations are unclear – for example, whether the provisions on public policy/security/health as exclusion grounds are meant to apply after transition, given the existence of, the much broader and vaguer, Regulation 19. Others highlight the limitations of the Withdrawal Agreement as a 'snapshot' settlement that creates a 'one-off' status which can be irreversibly lost; frontier workers regularly engaging in cross-border work in Northern Ireland but with significant interruptions between shifts or gigs, or between contracts may well fall outside the scope of Part 2. The issue of 'gaps' left by the implementation of the Withdrawal Agreement, and to what extent they represent a diminution of pre-Brexit frontier worker rights, will be considered in Chapter 4.4.

Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020

The Restrictions of Rights of Entry and Residence Regulations in essence save the application of the 2016 Regulations' deportation conditions for those covered by Part 2 of the Withdrawal Agreement. Given that frontier workers under the Frontier Worker Regulations will not be resident in the UK, these regulations are relevant for all EU national frontier workers resident in the UK and working elsewhere – as well as for their family members. They faithfully comply with the Withdrawal Agreement's requirements on deportation based on conduct prior to the end of the transition period.

Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020

The Citizens' Rights Appeals Regulations address all appeals made by EU nationals in light of decisions taken under the EUSS, as well as appeals made by EU frontier workers in light of a UK frontier worker permit.[123] The Withdrawal Agreement requires the UK to provide access to both administrative and judicial redress available against decisions taken not to grant status under the EUSS or the frontier worker permit – or any other decision to restrict entry and residence rights. These appeals will ordinarily be to the First-tier Tribunal's Immigration and Asylum Chamber, which also dealt with appeals under the 2016 Regulations. These provisions echo the system that the UK operated to comply with its obligations under the Citizenship Directive, and faithfully comply with the Withdrawal Agreement's requirements as well.

Changes to Social Security Legislation

As discussed, we will quickly assess how social security legislation has been amended in the aftermath of the Withdrawal Agreement by means of an example. The most logical choice of benefit to evaluate is Universal Credit, given how many other benefits it has and will continue to replace in the UK; but a quick comment on Child Benefit will likewise be made.

Rights in the State of Employment – the Universal Credit (Northern Ireland) Regulations 2016 (as amended)

The Universal Credit (Northern Ireland) Regulations 2016 have been amended by The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 to make clear that

[123] As inserted into regulation 6 by regulation 24 of The Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020.

frontier workers covered by the Frontier Worker Regulations, as well as their family members, are treated as 'being in Northern Ireland' under regulation 9.[124] This is significantly clearer on frontier worker's entitlement to Universal Credit in their state of employment than the Universal Credit (Northern Ireland) Regulations 2016 were prior to Brexit – and addresses access to employment-related benefits for all those frontier workers who work in Northern Ireland except for 'reverse' frontier workers.

However, they are captured by the fact that regulation 9 continues to treat all those habitually resident in the Republic of Ireland as being 'in Northern Ireland' – and on account of the Common Travel Area and its legislation, they also have the right to reside in the Republic of Ireland. All of the imagined versions of frontier work that involve Northern Ireland as the 'state of work' are consequently addressed by the amended Universal Credit (Northern Ireland) Regulations 2016 and its cross-reference to the Frontier Workers Regulations.[125]

Rights in the UK where the UK is the State of Residence

Non-Irish, EEA national frontier workers residing in the UK but working in Ireland, will, as noted above, have had to apply to the EUSS. If they have pre-settled status (PSS), they are not entitled to Universal Credit on the basis of that right alone; they must also have a right to reside in the UK that is distinct from pre-settled status.[126] Other rights to reside that would qualify them for Universal Credit and related benefits can be found under the partially-preserved 2016 regulations (implementing the Citizenship Directive/EC).

As EU national work-seekers are excluded from UC, and as frontier workers resident in the UK are actually workers elsewhere, the main right to reside they would typically need to rely upon would be that of self-sufficiency. However that means they would need to show that their earnings counted as 'sufficient resources not to become a burden on the social assistance system of the United Kingdom' – and this is a difficult hurdle, given that UK authorities tend to treat claims for means-tested benefits as by default a 'burden on the social assistance system', and as decisive evidence that a person's resources are insufficient. In the majority of cases, then, PSS-holding frontier workers who are not Irish would not be eligible for means-tested benefits like Universal Credit under relevant UK legislation: either because PSS is not a relevant right to reside for that purpose, and/or because the fact that they are applying for the benefit will be treated by the UK authorities as a sign that they do not hold sufficient resources.

The Court of Justice of the EU ruled in CG[127] that UK authorities should assess whether a refusal of subsistence benefits (such as Universal Credit) to someone with pre-settled status would jeopardise their rights, in particular their right to dignity, under the Charter of Fundamental Rights of the EU. However, the UK has declined to include any such assessment into the first instance decision making process, and has not incorporated any guidance on CG and the Charter into its Advice for Decision Makers, in spite of representations from the Child Poverty Action Group, the EU Rights & Brexit Hub, and the House of Commons Select Committee for

[124] The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020, regulation 77.
[125] Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020.
[126] This is set out in the Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations (Northern Ireland) 2019, which exclude pre-settled status (or 'limited leave to remain… by virtue of Appendix EU to the Immigration Rules') from counting as a right to reside for the purposes of establishing Universal Credit eligibility.
[127] Case C-709/20 CG EU:C:2021:602.

Work and Pensions,[128] all of which raises questions about a potential implementation gap between CJEU decisions and government responses. With regard to claims for Universal Credit that come after the end of the transition period, while EU law no longer applies, there is ongoing litigation to resolve the dispute as to whether (i) the Charter applies to Withdrawal Agreement rights at all; (ii) whether it requires an individualised assessment of claimant circumstances and (iii) whether the threshold for a potential infringement of a right to live in dignity has been set at an appropriate level.[129] In the context of this litigation, it has been suggested that the right to dignity is a special right, vested in the Charter, and which is potentially capable of conferring stronger rights to benefits than the rights either to family life or not to be subjected to inhumane treatment. If it is decided that the Charter does not apply to the Withdrawal Agreement rights - notwithstanding the requirement in Article 4 to interpret the WA 'in accordance with the methods and general principles' of Union law, and 'in conformity' with CJEU case law handed down pre-Brexit – then the loss of an entitlement to have one's rights interpreted in light of the right to dignity, would amount to a diminution of a fundamental right that underpins and runs through all the human rights listed in the Belfast Agreement, and which are protected by Article 2 of the Windsor Framework.

Rights in the State of Employment – the Child Benefit Regulations 2006 (as amended)

The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 also amend the Child Benefit Regulations 2006.[130] However, those amendments do not specifically address frontier workers after Brexit – and as was the case before Brexit, the real clarification on how frontier workers can access Child Benefit in the UK comes from the Child Benefit Technical Manual.

It has a new section called 'Withdrawal Agreement' which makes clear that all 'UK, EEA-EFTA and Swiss nationals, who at the end of the implementation period... are relying on a right to reside in the UK, an EEA-EFTA State or Switzerland under EU law ... or ... are subject to UK social security legislation' are within the scope of the Withdrawal Agreement, and consequently have access to Child Benefit via EU social security coordination.[131]

3.3 UK Government Policy and Guidance on Frontier Workers after Brexit

As with pre-Brexit social security regulation in the UK, much of the detail on the rights of frontier workers after Brexit will be contained in guidance, rather than in legislation. Guidance materials on social security legislation have already been considered in Chapter 3.2 above, and so Chapter 3.3 considers the guidance prepared by the Home Office in light of the EUSS and in light of the Frontier Worker Regulations.

[128] Correspondence to the Minister for Welfare Delivery about access to benefits for people with pre-settled status 20 July 2022 https://committees.parliament.uk/publications/23183/documents/169469/default/
[129] Before the Court of Appeal: SSWP v AT CA-2023-0000085 (hearing was 8-10 March 2023).
[130] The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020, regulation 66.
[131] Child Benefit Technical Manual, CBTM10015 – Withdrawal Agreement – the Immigration and Social Security Coordination (EU Withdrawal Act) 2020 - https://www.gov.uk/hmrc-internal-manuals/child-benefit-technical-manual/cbtm10015

Frontier Workers and their Families: Rights after Brexit

EUSS Guidance

The primary relevant guidance document is the 'EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members' (EUSS Guidance), which is currently on its 17th iteration.[132] As the guidance document on the EUSS is nearly 250 pages long, the below discusses points of interest rather than the guidance in full.

The most interesting aspect of the EUSS Guidance is that it reflects public-facing UK government websites prior to Brexit, and stresses on page 21 that Irish citizens 'do not need to apply for status under the scheme' but can do so if they want to. It adds to this that non-Irish and non-British family members do need to apply under the EUSS, but their Irish national family member does not need to. There is no further comment in the caseworker guidance on why Irish nationals might wish to apply for an EUSS status if they are resident in the UK; there is only a generic comment that 'Irish citizens enjoy a right of residence in the UK that is not reliant on the UK's membership of the EU'.[133]

This is of course correct with respect to their residency rights – as well as their employment rights – but ignores that the Withdrawal Agreement also contains detailed rules on equal treatment, social security coordination, retention of status, and appeal rights to decisions concerning residency. In the absence of registering a status under the Withdrawal Agreement, it is not clear to what extent those rights will be available to Irish nationals. We return to this point in Chapter 4.

A key aspect of the EUSS guidance is that it sets out a non-exhaustive list of examples of what 'reasonable grounds' might be for a late application to the EUSS.[134] The guidance makes clear that those who have reasonable grounds may include children; those with capacity or care needs; those with serious medical conditions; victims of modern slavery or those in abusive relationships, as well as further compelling practical or compassionate reasons. Of particular interest, however, is that the guidance makes much clearer than Appendix EU does that those who continue to be exempt from immigration control can make a late application to the EUSS while they remain exempt from immigration control. This, in effect, means that Irish nationals can apply for an EUSS status at any time during their lives, provided they have 'reasonable grounds for their delay in making their application'. The fact that UK government communications since Brexit have said consistently that Irish nationals do not need to apply can arguably be such a reasonable ground for a late application.

"EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members' (EUSS Guidance), which is currently on its 17th iteration."

[132] Home Office, 'EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members' (Version 17, 13 April 2022) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1069096/EU_Settlement_Scheme_EU_other_EEA_Swiss_citizens_and_family_members.pdf
[133] Ibid, p. 20.
[134] Ibid, p. 37-51.

Frontier Worker Permit Scheme Guidance

The Frontier Worker Permit Scheme Guidance[135] (FWP Guidance) is significantly briefer than the EUSS guidance, but commences with the same observation:

> Irish citizens enjoy a right to work and reside in the UK which is not reliant on the UK's membership of the EU.
>
> This means Irish citizens do not need to apply for a frontier worker permit and do not need to hold one in order to enter the UK to work. Nonetheless, Irish citizens can make an application under the frontier worker permit scheme, should they wish to do so.
>
> Frontier Worker Permit Scheme Guidance, p. 9.

It then immediately stresses that British citizens and British dual national citizens are not eligible to apply. This is broader than the Frontier Worker Regulations make it sound, as they specify that dual British/Irish nationals are not eligible but do not mention other dual nationalities.

Then, the FWP Guidance continues with a note on family members:

> Family members of frontier workers are not eligible to apply for a frontier worker permit. They may apply for entry clearance, in the form of an EU Settlement Scheme Family Permit, to join the frontier worker in the UK or to accompany them to the UK, under Appendix EU (Family Permit) to the Immigration Rules. They may also apply for pre-settled or settled status under the EU Settlement Scheme.
>
> Frontier Worker Permit Scheme Guidance, p. 10.

As is the case for the Frontier Worker Regulations, the guidance does not specify in what circumstances a frontier worker would be applying for a frontier worker permit (requiring them to be not resident in the United Kingdom) with their family resident in the United Kingdom. This would seem to benefit or affect a minority of frontier workers, who have families who live with them in the State of Work while they themselves are resident elsewhere – or who split their time between two different countries, within the Regulations' restrictions on time spent in the UK. These are quite expansive, including anyone who has spent less than 180 days in the UK in the previous 12 months, or anyone who has travelled to their 'country of residence' at least once in every 6 month period. Presuming they can prove that they have a 'residence' in that country, then, there is actually little requirement on frontier workers to be 'outside' of the UK. This introduces the possibility of frontier workers actually residing in the UK (with their families) while only twice-yearly travelling to the country where they 'on paper' reside. This kind of flexibility might help many of those who do not have 'regular' frontier work with a single employer throughout the year satisfy the conditions for 'frontier worker' after Brexit. This could help, for instance, those who did not apply to the EUSS, because they were not residing in practice or on paper in the UK at the material time, and so who might struggle to show good reason for applying late to it, but whose circumstances or working patterns have since changed such that they are spending more time in the UK, but whose right of access hinges upon their status as a frontier worker. They do however still need to have a residence in a country other than the one they work in as their 'primary residence', or they would simply be deemed to live and work in that country.

[135] Home Office, 'Frontier Worker Permit Scheme Guidance' (Version 2, 01 April 2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/976162/frontier-workers-v2.0ext.pdf

The FWP Guidance, like the Regulations, does not address the possibility of 'reverse' frontier work, thus once again leaving it outside the scope of UK implementation of the Withdrawal Agreement.

The FWP Guidance is generous as to when 'work' needs to have taken place in order for a 'frontier worker' to benefit from the status. It makes clear that applicants need to have been in work or engaged in self-employment at least once in the 12 months preceding the end of the transition period.[136] Likewise, to maintain frontier worker status, they have to come to the UK at least once every 12 months from 2020. The work does have to be 'genuine and effective', rather than 'marginal and ancillary' – but this captures seasonal work on a recurring basis well, in a way that the Frontier Worker Regulations themselves do not make clear.[137]

The FWP Guidance next addresses various specific situations that the regulations, being more general, do not. First, it makes clear that maternity or paternity leave does not terminate 'employment' and consequently does not interrupt a frontier worker's status. Second, it stresses that volunteering ('unpaid charitable work') is not 'work' for EU law purposes and so cannot lead to a frontier worker permit. Third, it addresses children and frontier work – and makes clear that part-time work can only be possible from age 13 onwards with exceptions for television, theatre and modelling, where the children will need to apply for a UK performance license to qualify.[138]

Interestingly, the FWP Guidance also notes that employment for the purposes of the frontier worker permit may be with an employer based outside of the UK – and that as long as the frontier worker can prove that they need to be in the UK to work, they can carry out this work. The work must, however, be paid for in the UK, which brings the frontier worker within the scope of UK social security legislation.[139] It also addresses the concepts of 'genuine work' and 'genuine economic activity' in line with EU case law examples and the requirement to assess each employment situation individually. Here, importantly, the guidance highlights that self-employment that is 'short-term, temporary, irregular and unstable' might actually be service provision, rather than self-employment.[140] This is very important for self-employed frontier workers to be aware of, as there is no provision within the Withdrawal Agreement for services work to or from the UK in line with EU law.

There is a series of COVID-related potential exceptions to the general rules on: travel to the primary residency; the exercise of economic activity; and travel to the UK, and specific guidance on retaining worker status in cases of illness, or involuntary unemployment caused by COVID. Where seeking to rely on an exception, the applicant is expected to provide proof that their inability to meet the condition in question was the result of COVID.

Next, the FWP Guidance addresses Article 20 WA and the 'suitability' requirements the UK has adopted in light of Article 20, decisions that can be taken in light of those requirements, and appeals that are possible for frontier worker permit applicants or holders.

[136] Ibid, p. 23.
[137] See also p.37, stating that 'For the purposes of determining retained worker status, working in the UK for "at least one year" does not mean an applicant has worked in the UK continuously for a total of one year or 365 days. It means they have met the definition of a frontier worker under regulation 3 of the [Frontier Worker Regulations] for more than 12 months immediately before becoming unemployed. This includes time where they were not present in the UK working but were nevertheless still a frontier worker under the Regulations.'
[138] Ibid, pp. 24-25.
[139] Ibid, p. 25.
[140] Ibid, p. 28.

The Guidance clarifies that the regulation 18 restrictions apply to behaviour prior to the end of the transition period – where regulation 19, restricting access for 'the public good', applies for conduct after the end of the transition period. The FWP Guidance contains considerable detail on the various checks that caseworkers can carry out in light of criminal convictions and immigration offences, and where those are found, their applications under the frontier worker permit scheme are to be escalated to a department called Immigration Enforcement. The shift from the thresholds imposed at EU level to the vague and brief domestic 'public good' requirement represents a transfer of rights from individuals to UK authorities, and in this respect arguably amounts to a diminution of rights, of the kind supposedly prohibited by Article 2 of the WF; this will be considered more in Chapter 4.4 below.

The particular case of Irish nationals and their status under UK immigration law is once more addressed near the end of the Guidance:

> Irish citizens are not required to hold a frontier worker permit, and have a legal right to enter, live and work in the UK under Common Travel Area arrangements. You must not refuse entry to an Irish citizen unless they are subject to a deportation order, exclusion order or international travel ban.
>
> However, should an Irish citizen specifically wish to be admitted to the UK as a frontier worker under the regulations, then they will need to comply with the relevant eligibility and suitability requirements, and you must refuse them entry as a frontier worker under regulation 12 if you do not believe them to be a frontier worker.
>
> Where an Irish citizen falls to be refused admission under regulation 6, you must then proceed to consider whether they qualify for entry in another capacity, in particular under Common Travel Area arrangements.
> Frontier Worker Permit Scheme Guidance, p. 61.

There are various practical issues that stem from the specific guidance given on this and other points to border agents: namely, where are they meant to be checking on these Irish nationals engaged in frontier work in the UK? Most Irish frontier workers will be crossing the unmonitored, invisible land-border on the island of Ireland, where none of this guidance can meaningfully be applied.

It is worth noting that all the examples the FWP Guidance cites at the very end, as helpful to caseworkers, do not involve Irish nationals. The example given of a cross-border frontier worker is that of a Polish veterinarian who lives in the Republic of Ireland and works in Northern Ireland –they obviously only have rights stemming from the Withdrawal Agreement, and so their case appears 'straight-forward' (even if they are used as the example of an applicant who fails to provide evidence of employment).[141]

3.4 Summary

The above survey of relevant Withdrawal Agreement and implementing UK law has made clear that in a number of ways, frontier workers are well-protected by Brexit… provided they are addressed by the Brexit settlement at all.

The key points that arise out of the specific situation on the island of Ireland are summarised below for convenience, with an indication of the source of the 'problem' (or where the law and guidance simply does not clarify sufficiently what should happen in practice).

[141] Ibid, p. 70.

Issue	Legal (or Guidance) Source	Explanation
Irish Nationals	Immigration Act 1971, Frontier Worker Permit Scheme Guidance, EUSS Guidance	Irish nationals are consistently told they do not have to apply for either frontier worker status or residency status – and when they have not they will not be covered by the Withdrawal Agreement's Part 2. See pages 53, 54, 56
Reverse Frontier Workers	Withdrawal Agreement, Frontier Worker Regulations	The existence of 'reverse' frontier workers – those who move to a state of which they are not a national and work in their state of nationality – is not captured in this legislation at all – meaning that rights these frontier workers hold are going to be determined elsewhere. See pages 39-41, 49.
Family Residency Rights	Frontier Worker Regulations, EUSS	Families of frontier workers can register for the EUSS and obtain residency rights in the UK under it – but the UK definition of a frontier worker excludes those 'primarily resident' in the UK, so who is this for? See pages 54-55.
Loss of Status	Withdrawal Agreement, Frontier Worker Regulations	Like all 'worker' statuses, a frontier worker who does not 'retain' frontier worker status will lose it permanently and cannot regain it under the Withdrawal Agreement or its implementing legislation. See pages 42, 48-50.
Equal Treatment/Non-Discrimination	Withdrawal Agreement	The UK has not transposed the requirements for equal treatment and non-discrimination set out in the Withdrawal Agreement. See pages page 47.
Access to Family Benefits	Child Benefit Regulations 2006 (and other 'family' benefits that are granted by the state of employment)	Only guidance makes clear that frontier workers are in principle entitled to these benefits via their state of employment on account of Part 2 of the Withdrawal Agreement – the law is silent on it altogether. See pages 52-53.
Self-Employment	Frontier Worker Permit Scheme Guidance	The distinction between 'services provision' and 'self-employment' will blur heavily in practice – the absence of reference on the distinction in the law applicable to frontier workers is problematic. See page 55.
Immigration decisions based on conduct	Frontier Worker Regulations	The shift from the threshold imposed at EU level to the domestic concept of 'public good' when determining whether conduct after the end of transition should lead to an adverse immigration status decision, is arguably a diminution of rights. See page 49.

Chapter 4: Other Frontier Worker Rights

There are two categories of shortcoming in the Withdrawal Agreement's settlement when it comes to frontier workers. The first is incomplete implementation; some of the contents of the Withdrawal Agreement have not been implemented in full, or with full clarity. However, the second, more substantial, problem on the island of Ireland is incomplete activation. The guidance on the UK's implementation of the Withdrawal Agreement consistently told Irish nationals that they did not have to register under the Withdrawal Agreement's registration schemes for EU nationals. The lasting effect of this advice is, consequently, that many will not have – with potentially significant consequences.

This Chapter assesses two separate but related issues. It looks at the extent to which other legislation binding on the UK complements the Withdrawal Agreement, by providing rights that it does not, or by filling gaps that it has left. It also looks at the rights that are available in the absence of the Withdrawal Agreement for those who are not covered by it – whether because they are not eligible to register as frontier workers under the Withdrawal Agreement, or because they simply did not register themselves in time to be covered by the Withdrawal Agreement's rights.

In considering these two issues, the Chapter will first explore the Common Travel Area (CTA) arrangement and discuss a) which potential frontier workers on the island of Ireland would benefit from its arrangements, and b) what those arrangements are. Second, it considers how the Trade & Cooperation Agreement (TCA) addresses frontier work and social security coordination between the EU and the UK. Third, it explores the status of frontier work under the ECHR and discusses a) which potential frontier workers on the island of Ireland would benefit from such a status, and b) what benefits would stem from that status. Fourth, it will look at Article 2 of the Windsor Framework (WF) and its commitment to 'no diminution' of 'rights, safeguards and equality of opportunity' as set out in the Belfast (Good Friday) Agreement 1998 (BGFA) – and will consider a) which potential frontier workers on the island of Ireland would benefit from Article 2, and b) what potential benefits there are under Article 2.

4.1 The Common Travel Area and Frontier Workers

The details of the CTA's arrangements for the purposes of the island of Ireland have been discussed in detail in earlier work,[142] and so this chapter will summarise the dimensions of it that are relevant to frontier workers in brief only. This will involve setting out overlaps between the CTA and EU law, and considering what additional benefits the CTA offers that go beyond those addressed in EU law.

[142] See Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, Discussion Paper on the Common Travel Area (October 2018), prepared for the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission: https://www.ihrec.ie/app/uploads/2018/11/Common-Travel-Area-Paper-13112018-1.pdf ('Discussion Paper')

Beneficiaries of the CTA Arrangements

The first element of the CTA that needs to be stressed is that its only beneficiaries are Irish citizens and UK citizens. Frontier workers of other EU nationalities who are resident in either Ireland and working in the UK, or resident in the UK and working in Ireland, will not be covered by CTA arrangements as set out in law.[143]

Contents of CTA Arrangements

The second element of the CTA that has to be considered is to what extent it establishes rights for these Irish and UK nationals that overlap with EU rights. The UK government has throughout the Brexit process stressed that the CTA provides the following rights:

- the right to enter and reside in each others' state without being subject to a requirement to obtain permission
- the right to work without being subject to a requirement to obtain permission
- the right to access education
- access to social welfare entitlements and benefits
- access to health services
- access to social housing
- the right to vote in local and parliamentary elections.[144]

Looking at the rights held by frontier workers set out in Chapter 1 of this report, there is significant overlap. The fundamental difference is that the rights in Chapter 1 are provided by and backed up by enforcement possibilities set out in EU law, whereas CTA rights are provided by reciprocal domestic legislation that enables both Irish and UK nationals to access these services on equal terms. However, these reciprocal rules are by and large not guaranteed by an overarching international legal infrastructure the way EU law rights are: both the UK and Ireland can each unilaterally change how their law on, for example, the right to access education, or the right to access health services, operates, purely on the basis of domestic UK and domestic Irish law respectively, without any obligations to maintain those rights existing under international law.[145] The UK and Ireland did sign a Memorandum of Understanding in 2019 to 'reaffirm' the CTA – but it did not introduce a more binding commitment to maintain the same arrangements as are currently in place.

The exception is in social security, where the UK and Ireland concluded a Treaty in February 2019 to ensure that 'the reciprocal rights enjoyed by British and Irish citizens under the Common Travel Area arrangements are protected following the withdrawal of the United Kingdom from the European Union.'[146] The indefinitely applicable[147] Social Security Convention cross-references EU social security coordination rules, and effectively copies the Social Security Coordination Regulation, including its definition of frontier workers:

> "frontier worker" means any person pursuing an activity as an employed or self-employed person in one Party and who resides in the other Party to which they return as a rule daily or at least once a week;
>
> The Social Security Convention, Article 1.

[143] See on this the Discussion Paper, Chapter 1, referencing UK government guidance on the rights of UK and Irish Citizens under the CTA Arrangements: https://www.gov.uk/government/publications/common-travel-area-guidance (updated 4 October 2021).
[144] Ibid.
[145] See Discussion Paper, p. 18.
[146] Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (2021) CP 379, Treaty Series No. 6
[147] Article 66 of the Convention.

This affects CTA-covered 'frontier workers' in the same way that the Social Security Coordination Regulation affects EU national 'frontier workers': prima facie, it limits entitlement to sickness benefits (and so care) in the state of work, rather than their state of residence, and only gives entitlement to those frontier workers engaged in very regular activities. Frontier workers, such as seasonal agricultural workers, who spend weeks in their state of work, for example, fall outside of this definition. As with the Regulation's definition, it may in practice have a broader impact, as the definition is applicable to the entire Convention even if not referenced elsewhere.

There are some other dimensions of the Social Security Convention worth noting. While the CTA itself claims to only extend rights to Irish and British nationals, Article 2 of the Convention suggests that stateless persons or refugees are also covered by it, as are their family members. The concept of family member is defined in Article 1 but does not make clear if this includes family members of non-Irish or non-British nationalities (or non-EEA nationalities). It indicates that family members are defined as anyone 'recognised as a member of the family … by the legislation of the Party under which the benefit concerned is provided' – but benefit legislation like the Universal Credit (Northern Ireland) Regulations 2016 or the Child Benefit Regulations 2006, or their underpinning legislation (eg, the Welfare Reform (Northern Ireland) Order 2015, the Social Security Administration (Northern Ireland) Act 1992, or the Social Security Contributions and Benefits (Northern Ireland) Act 1992), do not actually refer to 'family members' anywhere (though provisions of immigration legislation/rules such as Appendix EU, do). The Convention adds that where legislation referred to ('under which the benefit is provided') does not 'make a distinction between the members of the family and other individuals to whom it is applicable, the person's spouse, minor children and dependent children who have reached the age of majority shall be considered members of their family'. This does not, on its face, appear to make nationality of family members a condition of eligibility. However, as an international treaty with no direct effect, such provision might be overridden by, for example, a no recourse to public funds condition attached to a non-EEA national spouse's immigration status. The precise consequences of the Convention, and its interaction with other (immigration and social security) legislation, should be clearly spelled out, as it could currently give rise to confusion.

An important exclusion is that the Convention is treated as mutually exclusive to the Withdrawal Agreement: Article 3(4) states that the Convention 'shall not apply to or affect rights and obligations arising under' EU law, generally, and specifically the Withdrawal Agreement. This suggests that where an Irish national has registered for a frontier worker permit the sole law applicable to them will be the Withdrawal Agreement and its UK implementation; and so the Convention is there to address frontier workers who have not registered for a frontier worker permit.

The remainder of the Convention sets out a social security coordination system that is, as described, copied from what the Social Security Coordination Regulation provides for the EU: workers or the self-employed will be subject to the social security legislation of their state of work, and otherwise, the legislation of the state of residence will apply to them for benefit purposes.[148] The 'special circumstances' that the Social Security Coordination Regulation identifies – such as working in both States – are also copied over, as are the specific rules relating to all the benefits that the Social Security Coordination Regulation addresses. There are some minor differences in the precise execution of those benefits – for example, the Social Security Coordination

[148] Article 9 of the Convention.

Regulation requires at least 3 months of unemployment benefit to be paid, where the Convention specifies 13 weeks – but in practice, there will not be significant differences in treatment under the Withdrawal Agreement or the Convention when it comes to social security entitlements.

In summary, therefore, the CTA's Social Security Convention works as a 'back-up' for Irish and UK national frontier workers who either did not qualify for a frontier worker permit in December 2020 – because, perhaps, their frontier work started after that – or who failed to register for a frontier worker permit. It entitles them to identical social security benefit access as those holding frontier worker permits.

What is worth stressing, however, is that the CTA's arrangements, which are reciprocal, but (with the exception of the Convention) purely rooted in domestic law, do not benefit from the Withdrawal Agreement's enforcement possibilities. Under the Withdrawal Agreement, the application of, for example, the Social Security Coordination Regulation can be questioned in domestic courts, which for 8 years following the transition period can still ask the CJEU for clarification on these issues; and there is an Independent Monitoring Authority established in the UK to oversee the application of Part 2 of the Withdrawal Agreement, which assumes a similar role to the Commission in terms of oversight and enforcement). This is not the case for those rules stemming from the CTA, which also may not generally benefit non-Irish or non-British family members. As such, the CTA rules operate as an 'almost equal' to the Withdrawal Agreement's arrangements for a very specific subset of frontier workers only – and should the UK cease applying the Convention's rules, for example, there will be no judicial recourse for UK or Irish nationals who should have their social security coordinated to actually demand that this happens in practice.

4.2 The Trade & Cooperation Agreement and Frontier Workers

The report so far has not discussed what legislation those who start frontier work after the transition period are subject to, simply because they are outside of the scope of Withdrawal Agreement legislation. EU nationals who are not Irish or British citizens who wish to start any kind of work in the UK after the transition period have to apply for a UK visa. The details of UK immigration law are beyond the scope of this paper, but most 'work visas' available do not enable sporadic, flexible, or low-paying work and come with minimum earning requirements; and even visas available for more low-paying 'frontier' work, such as seasonal agricultural work, are valid for only 6 months and have conditionalities attached, such as sponsorship by an employer who is required to confirm to the Home Office that the worker is complying with the conditions of their visa.[149] EU nationals working in Ireland who wish to start living in the UK after Brexit are simply out of luck altogether: visas do not exist to enable longer-term 'residency' in the UK in the absence of work or pre-existing family members there. Frontier work on the island of Ireland will consequently prove much more difficult, if not impossible, for EU nationals who fall outside of the scope of the WA. However, should they find themselves successful in obtaining a relevant UK work visa, some of their rights are addressed by the TCA's Protocol on Social Security (PcSS).[150]

[149] See, for example, the post-Brexit UK Government 'Check if you need a UK Visa' answer for a German national. Note that these visas grant residency rights in the UK, but as they enable travel to and from the UK as well as residency there, nothing appears to preclude residency in a different country for a visa holder. Repeat 'absence' from the UK would make it harder to gain a permanent status (like indefinite leave to remain) – but provided the sponsor is willing to continue sponsoring a work visa, they can be renewed.

[150] It is implemented in UK law by s26 of the European Union (Future Relationship) Act 2020.

It is important to stress here that the PcSS addresses social security coordination for British and Irish nationals as well as other EU nationals. Article 489 of the TCA makes clear that the Protocol on Social Security (PcSS) applies to all those 'legally residing' in a Member State or the UK, which covers those British and Irish nationals engaging in frontier work who are not within the scope of the WA and/or failed to register under the WA, as well as any EU nationals holding relevant visas for the UK.

The definition of 'frontier worker' for the purposes of the PcSS is identical to that of the CTA's Social Security Convention, and is applicable once again only to sickness benefits in the state of work. Generally, the whole of the PcSS closely follows the structure of the CTA's Convention, with allusions to 'family members' likewise being determinable under domestic law. Once more, then, within the UK, the PcSS will address persons of any nationality who are currently or formerly economically active, and not their non-Irish or non-British family members, who under domestic law simply are not identified as relevant beneficiaries of these rules. We will revisit this as a potential area of diminution of rights in Chapter 4.4, when considering Article 2 of the WF.

A further distinction between the TCA's PcSS and the CTA's Convention lies in the possibilities of private enforcement (by individuals before national courts) of social security coordination decisions. These are explicitly foreseen by the PcSS but left entirely unaddressed by the Convention.

Article SSC.67 of the PcSS states:
1. The Parties shall ensure in accordance with their domestic legal orders that the provisions of the Protocol on Social Security Coordination have the force of law, either directly or through domestic legislation giving effect to those provisions, so that legal or natural persons can invoke those provisions before domestic courts, tribunals and administrative authorities.

2. The Parties shall ensure the means for legal and natural persons to effectively protect their rights under this Protocol, such as the possibility to address complaints to administrative bodies or to bring legal action before a competent court or tribunal in an appropriate judicial procedure, in order to seek an adequate and timely remedy.

Protocol on Social Security, Article SSC.67

This is a common construction of EU law, which in certain dualist Member States would have no legal effects unless explicitly established in domestic law. It means that individuals benefitting from the PcSS's social security rules in one of the eligible States can rely on the contents of the PcSS when appealing decisions taken by domestic authorities before national courts or tribunals – in essence giving the PcSS what in EU law would be called 'direct effect'. Interestingly, the CTA Convention contains no such obligation, meaning that the CTA in general[151] does not appear to produce directly effective rights for Irish or British nationals benefitting from it. They, of course, are able to rely on the domestic social security law itself when protesting decisions taken under that legislation – but if the domestic social security law were to change and, for example, exclude Irish nationals from certain UK benefits, the Convention itself does not appear to produce the same rights of enforcement before national courts. While the majority of the PcSS thus does exactly the same thing as the CTA's Convention on social security does, if UK domestic law changes in a way that contravenes equal treatment, the PcSS's existence will produce significantly stronger rights for UK and Irish nationals who otherwise would simply be covered by the CTA.

[151] With the exception of disputes about benefit recovery claims, which are foreseen in Article 54 of the Convention.

That said, the CTA's Convention has an explicitly indefinite duration, whereas the PcSS in principle will last 15 years – and then has to be renewed by agreement between the EU and the UK.[152] In the absence of renewal, all rights and benefits accrued prior to the PcSS's end of application date would be retained by relevant frontier workers, but further benefits would not be coordinated in the way indicated. At that time, the Convention would once more become the available 'back-up' for those British and Irish nationals not eligible for a frontier worker under the Withdrawal Agreement or unregistered for it.

4.3 The ECHR and Frontier Workers

Where frontier workers are treated differently, and deleteriously, by virtue of their frontier work status, as compared to 'standard' migrant workers, for instance, it might be possible to construct a case for their equal treatment based upon the ECHR, given effect in domestic courts through the Human Rights Act 1998.

Article 14 ECHR provides:
The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 ECHR – Prohibition of Discrimination (emphases added)

ECHR case law takes a broad approach to what counts as an 'other status' for the purposes of Article 14 ECHR,[153] (indeed, immigration status is capable of being an 'other status')[154] and it could be argued that frontier worker is such a status.

The Article 14 right to protection from discrimination is not an autonomous right but is 'ancillary' to other Convention rights;[155] to be triggered a case must come within the 'ambit' of another right (though that right need not be 'engaged'). Social security entitlements are typically considered a type of 'property' for the purposes of Article 1 Protocol 1,[156] and can also come within the ambit of Article 8, especially where the benefits help family unity,[157] so any rules that restricted access to benefits in a way that directly or indirectly discriminated against frontier workers, could be challengeable on the basis of Articles 8 and 14 ECHR. Examples might include residence requirements attached to special non-contributory benefits (or even social assistance) – benefits which would otherwise (generally)[158] fall outside of the rules on social security exportability provided for by virtue of the Withdrawal Agreement, or the TCA, or the CTA Convention, but which are funded through general taxation, to which the frontier worker contributed.

However, States have a fairly wide margin of appreciation when it comes to social rights, and the choices of legislatures; the actual standard of judicial review required is a matter of debate, with the

[152] Article SSC.70 PcSS.
[153] Carson and Others v. the United Kingdom [GC], no. 42184/05, ECHR 2010
[154] Hode and Abdi v. the United Kingdom, no. 22341/09, 6 November 2012
[155] Protocol 12 to the ECHR on non-discrimination does create autonomous equal treatment rights, but the UK is not a signatory.
[156] Stec and Others v. the United Kingdom [GC], nos. 65731/01 and 65900/01, ECHR 2006-VI.
[157] Okpisz v. Germany, no. 59140/00, 25 October 2005.
[158] Though it is worth noting that even special non-contributory benefits might have to be treated as exportable under EU law, and so presumably under these (EU-law-derived) instruments too, where a frontier worker has considerable links with the state of work – ie especially in cases of reverse frontier work where the state of work is also the state of nationality and former residence: Case C-286/05 Hendrix EU:C:2007:494.

'manifestly without reasonable foundation test' suggested in ECtHR cases having been applied in the UK in some cases such a restrictive way as to effectively render such issues non-justiciable.[159] The exact test to be adopted is still not a settled matter,[160] but it is clear that claimants face something of an uphill battle in persuading a court that it should upset the political settlement it considers represented by benefit rules. .

4.4 Article 2 of the Windsor Framework and Frontier Workers

One other possible route to rights for those not expressly covered by Part 2 of the Withdrawal Agreement is the existence of the Windsor Framework (WF), and its Article 2:

> The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.
> Protocol on Ireland/Northern Ireland, Article 2(1)

There has been significant debate as to the scope of this 'no diminution' commitment.[161] In terms of concrete rights protected, evidence to the Lords Committee on the WF has suggested that there are no clear limitations to the BGFA concept of 'rights, safeguards and equality of opportunity'— the BGFA only sets out a non-exhaustive list of examples.[162] The Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI) have produced a detailed working paper on the scope of Article 2 of the WF which highlights that EU measures that underpin the BGFA's 'rights and safeguards' are also subject to the non-diminution requirement, producing a detailed annex of all EU law that falls within the scope of Article 2.[163]The NIHRC/ECNI working paper also produces a helpful series of questions to consider if a breach of Article 2 has taken place, which forms the basis of the evaluation in this chapter:

(i) Does the right, safeguard or equality of opportunity protection fall within the relevant part of the Belfast (Good Friday) Agreement?

(ii) Was the right, safeguard or equality of opportunity protection:

(a) underpinned by EU law binding on the UK on or before 31 December 2020?

(b) given effect in NI law, in whole or in part, on or before 31 December 2020?

(iii) Has there been a diminution in the right, safeguard or equality of opportunity protection on or after 1 January 2021?

(iv) Would this diminution not have occurred had the UK remained in the EU?[164]

For the current purposes, there are several rights listed in the relevant part of the BGFA that can be clearly linked to the life of frontier workers.

First, there is the right to freely choose one's place of residence. Even taken very literally, the right implies that there should be no restrictions on the ability of someone in the UK deciding to go live in Ireland and work in the UK as a 'reverse' frontier worker, nor should there be any restrictions on an Irish national moving to the UK but remaining working in Ireland. The reference point for the purposes of Article 2, of course, is how Irish and UK nationals were able to exercise their right to reside in each other's jurisdictions prior to Brexit – with Article 2 only playing a role if this ability has been diminished because of Brexit.

Previous chapters identified several 'rights' under EU law that fall within this particular right protected by Article 2 and appear to have been diminished by the post-Brexit legislative regime. A starting point is the difference between those who registered in time to be encompassed by the Withdrawal Agreement, and those who did not. Where rights under the Withdrawal Agreement are broadly the same as they were under EU law, there is no diminution of rights possible – but the fact that Brexit introduced a 'cutting off point' for eligibility for those rights means that anyone wishing to engage in frontier work who would have been covered by EU law prior to Brexit now simply will not be covered by EU law or the Withdrawal Agreement. Those who do not hold a frontier worker permit consequently cannot have 'reverse' or 'dual' residency rights in the UK, whereas prior to Brexit, if engaged in an identical activity, they would.

A more specific example concerns the rules on deporting 'frontier workers' under the Frontier Worker Regulations (and the Withdrawal Agreement), as discussed in Chapter 3.1 and 3.2: where prior to Brexit, frontier workers were protected by the very restrictive EU law rights on deportation, the Withdrawal Agreement instead applies national legislation to the deportation of its rights holders – and this permits deportation where this serves the 'public good'. This is a clear diminution: a legislative change whereby it becomes easier to deport someone covered by the Withdrawal Agreement than it was to deport them under EU law indicates that rights that existed were altered.

A further very important example is the right of family reunification, which, as explained in Chapter 1, under EU law is effectively 'automatic' for all EU nationals who hold worker status, irrespective of whether the family members in question are EEA nationals or not. The Withdrawal Agreement as a whole puts a 'time limit' on the ability to bring family members to the UK under the far more generous EU law rules – which also affects the rights of frontier workers to be joined by their family members. The most obvious diminution of rights here relates to family members who are themselves EU nationals but did not live in the UK at the time of Brexit; they no longer have a right to reside in the UK in their own right, but can apply to join their family member (if they were resident in the UK on 31 December 2020). This may involve applying for an EUSS family permit to enter the UK, then applying to the EUSS within 90 days/three months of arrival – although it is possible to apply late providing 'reasonable

159 See the critique provided by: Meers, Jed, Problems With the 'Manifestly Without Reasonable Foundation' Test (April 1, 2020). Jed Meers, 'Problems with the "manifestly without reasonable foundation" test' (2020) 27(1) Journal of Social Security Law 12-22.

160 SC [2021] UKSC 26.

161 See C. Murray and C. Rice, 'Beyond Trade: implementing the Ireland/Northern Ireland Protocol's human rights and equalities provisions' (2021) 72(1) NILQ 1, and the ongoing series of reports published by the Northern Ireland Human Rights Commission, exploring the scope of Article 2: T. Harvey, 'Brexit, Health and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol' (NIHRC, March 2022) https://nihrc.org/uploads/publications/100269988_NIHRC_Access-to-Healthcare-and-Article-2-of-the-Ireland_Northern-Ireland-Protocol.pdf; A. Harvey, 'Human Trafficking and Article 2 of the Ireland/Northern Ireland Protocol' (NIHRC, March 2022) https://nihrc.org/publication/detail/human-trafficking-and-article-2-of-the-ireland-northern-ireland-protocol.

162 Protocol on Ireland/Northern Ireland Sub-Committee, 'Corrected oral evidence: Article 2 of the protocol' (parliament.uk, 15 September 2021) https://committees.parliament.uk/oralevidence/2739/pdf/, statement by Éilis Haughey on p. 8.

163 NIHRC and ECNI, Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol (21 December 2022) https://nihrc.org/publication/detail/nihrc-and-ecni-working-paper-the-scope-of-article-21-of-the-ireland-northern-ireland-protocol

164 Ibid, para. 6.18.

grounds' for doing so. There are special rules for applying to join a family member of Northern Ireland, which extend the family reunification rules under the EUSS to British citizens who are 'persons of Northern Ireland'. The same rules apply to third country national family members.

For 'dual' frontier workers, there is a further issue related to residency – in that when they lose frontier worker status, their residency rights also disappear (as they will not be living in their state of nationality). Prior to Brexit, any EEA national would have been able to stop and restart frontier work and remained resident in any Member State, provided they were self-sufficient at the time they lost frontier worker status. This ability to become a frontier worker again is gone in the Withdrawal Agreement and its domestic implementation, and that has knock-on effects of the ability of dual frontier workers who are neither British nor Irish nationals to remain living in the UK, as Chapter 3 will have shown.

Secondly, there is the 'right to equal opportunity in all social and economic activity'. This right does not specifically prevent discrimination on the basis of nationality, but encompasses a broader work-related equal treatment obligation. Here, again, if there are restrictions on the ability for someone from Ireland to go work in the UK, or someone from the UK to go work in Ireland, we find a potential violation of the relevant dimension of the BGFA. Likewise, if there are different benefits available to the same worker when they are a frontier worker as opposed to when they are a 'regular' worker, this would pose a possible problem in terms of 'equal opportunity' of economic activity. The preceding chapters of this report flagged a number of issues that clearly relate to 'social and economic activity'.

As just discussed, the inability to 'regain' frontier worker status is a clear loss: once a frontier worker stops frontier working, that status and its accompanying rights, as a matter of EU law is gone forever. We saw in Chapters 1 and 3 that both the EU and the Withdrawal Agreement definition of frontier worker is a combination of unclear and seemingly restrictive, requiring very frequent returns to the state of residence, which suggests that is quite easy to lose the status. UK implementing law here encompasses a broader range of types of frontier work, as Chapter 3 showed – but nonetheless does not guarantee that infrequent or seasonal frontier work will always meet the legal definition of frontier work. As above, the fact that once the status is lost, it can never be regained, is a clear diminution of rights under Article 2's requirements for equal opportunities in all economic activity to be preserved.

A further issue that is related to equal opportunity in social and economic activity, though it is clearly residency-related, is the EU law provision for 'quick' permanent resident for those EU national workers who live and work in a Member State not of their nationality for 3 years, and then proceed to work as frontier workers in a different Member State. Under EU law, as discussed in Chapter 1, they are entitled to permanent residency at the point of starting frontier work in this new Member State – so only three years. The Withdrawal Agreement and its UK implementation do not discuss this option for 'fast' permanent residency (or 'Settled Status', as it now is), meaning that frontier workers who engaged in the second step of this 'quick' process by remaining resident in a Member State not of their nationality, and starting work in the UK by the end of the transition period, cannot benefit from it. Given that this is a right available to all EU national frontier workers engaging in similar movement, but no longer to those who are 'ending'

their movement in the UK, and given that permanent residency comes with unconditional access to benefits in the UK that these frontier workers will not get until they have 'frontier worked' in the UK for five years, this is a clear diminution of rights set out in the BGFA.

There are further general concerns worth flagging here: for the first 8 years after Brexit, all concerns about UK compliance with Part 2 of the WA are overseen by the Independent Monitoring Authority[165] in addition to being directly effective and subject to preliminary references, meaning that domestic courts can ask the CJEU how Part 2 is meant to operate where UK law is silent on an issue. After those 8 years, however, the absence of 'law' reflecting Part 2 WA rights becomes significantly more problematic, as that connection to the CJEU will fall away – and the Independent Monitoring Authority may also be dissolved. Enforcing rights in Part 2 of the WA, in other words, will become a matter purely of domestic legal interpretation – which is a potential diminution, given that during EU membership, obtaining an authoritative interpretation from the CJEU was generally possible.

A final diminution-related observation worth making is one that also relates to the BGFA-related residency rights: the differences in the situation of those who were captured by the WA, and the situation of those who fall outside of it, is the clearest sign of diminution under Article 2 when it comes to the community in Northern Ireland, broadly considered.

The above discussion reveals that frontier workers can develop a number of claims of diminution after Brexit – but it would be misleading to suggest that those Article 2 claims will be straight-forward to pursue. Applying Article 2 in the context of immigration-related matters will be difficult, given the likely UK argument that ending free movement was one of the 'objects and purposes' of the Withdrawal Agreement, and so Article 2 must be read in that light. The counterargument is that Article 2 must also be read in light of the North-South dimensions to the BGFA chapter on Rights, and it will fall to the courts to strike a balance between those competing arguments when a claim of diminution reaches them.

4.5 Summary

Frontier workers and their families on the island of Ireland who, regardless of official advice, registered for frontier worker permits and, where appropriate, residency rights under the EUSS, have retained the majority of the rights they held when the UK was a Member State. This is true for both EU national frontier workers and for Irish and British national frontier workers.

It is when they did not register for either of the Withdrawal Agreement schemes that the supplementary or complementary rights offered by other international law become relevant, and as was shown above, they offer less protection than the Withdrawal Agreement itself does.

The CTA's Convention has limited personal scope and cannot be privately enforced by its beneficiaries. The TCA's PcSS has a broader personal scope and more explicit and internationally-backed enforcement powers, but is not guaranteed to last for the length of the frontier worker's lifetime. Many Irish or British nationals will not notice these differences in their day to day lives on account of the reciprocal structures in place in Ireland and the UK under the CTA – but in any situation where the rights they hold are in practice not being granted to them, the CTA and the PcSS offer less protection than the Withdrawal Agreement does.

[165] See page 40.

It is unclear to what extent frontier workers will succeed in making non-discrimination claims to the ECtHR, and it will be more straight-forward for them to demonstrate that Article 2 of the WF applies to their situation. If we consider the entire Brexit settlement for frontier workers from a non-diminution perspective, all frontier workers – whatever their nationality – have lost something crucial: the ability to stop and start frontier work, and so exercise freedom to reside and equal opportunity in economic activity rights, whenever they wanted to.

"The Withdrawal Agreement preserves a 'snapshot' of frontier workers actually working in the UK by 31 December 2020."

The Withdrawal Agreement preserves a 'snapshot' of frontier workers actually working in the UK by 31 December 2020 and protects them, but does not address the reality of the island of Ireland, where new frontier work will be started on a very regular basis, and simply is not underpinned by the same enforceable set of EU law rights as it was when the UK was a Member State. The CTA does not address these differences in enforceability, and the PcSS only starts to help non-Irish and non-British frontier workers on the island of Ireland once they have obtained immigration rights to engage in frontier work – itself a significant diminution as well. Making that non-diminution argument will undoubtedly be complex and politically sensitive, but if 'frontier work' is to be a meaningful category of post-Brexit rights holder as time goes on, it may be a necessary step to take.

Chapter 5: Conclusion

This report has set out in detail what rights frontier workers held in the UK before Brexit (Chapters 1 and 2), and what has happened to those rights in light of Brexit, the Withdrawal Agreement and its UK implementation (Chapter 3). Finally, the Common Travel Area's rules, the UK-EU Trade & Cooperation Agreement and its Protocol on Social Security, and Article 2 of the Windsor Framework were considered in light of changes identified in Chapter 3, for the purposes of coming to an overall finding of whether frontier workers have 'lost' rights in the Brexit settlement, and to what extent they are or can be mitigated for by other existing legal structures.

Given the volume of information in the preceding chapters, this concluding chapter commences with an overview of the position that frontier workers and their families now find themselves in. It then summarises the primary findings of the report, and concludes with recommendations for UK actions that would improve the legal landscape in which frontier workers in Northern Ireland find themselves.

5.1 Frontier Workers

The below table sets out a summary of the observations made across the entirety of this report in those categories for frontier workers themselves; the situation of frontier workers' families will be considered separately.

The highest level of 'protection' of rights for all frontier workers on the island of Ireland is that granted by the Withdrawal Agreement and its provisions on frontier work. However, those rights come with one significant change from how frontier work operated when the UK remained a Member State (whether we consider Article 45 TFEU and its subordinate legislation, or how the UK implemented relevant EU law, as we discussed in Chapter 2): a frontier worker covered by the Withdrawal Agreement has to be a frontier worker by December 2020 and cannot stop being a frontier worker without losing their rights to exercise that status.[166]

When they fall outside of the definition of frontier worker or retained frontier worker, they simply cease to be covered by the Withdrawal Agreement altogether. As discussed in Chapter 3, the UK's implementation of the Withdrawal Agreement offers a generous definition of 'frontier work' that enables those who only sporadically return to their country of residence to fit within the scheme – but that still excludes any frontier workers who do not engage in frontier work continuously and with great regularity. It would not have done so prior to Brexit, as anyone resident in the UK or Ireland in line with EU law would have been able to start and stop frontier work whenever they wished to. Given the connections between frontier work and the BGFA rights to reside in a place of one's choice and equal opportunity in economic activity, the mere fact that protected 'frontier worker status' now has an included expiration date for those who stop their frontier work amounts to a diminution of rights held prior to Brexit under Article 2 of the WF.

[166] See the discussion in Chapter 3.1.

Type of 'Island of Ireland' Frontier Worker	Nationality	Pre-Brexit Rights	Post-Brexit Right Source	Changes Affecting Rights Held under Article 2 of the Windsor Framework
Regular Frontier Worker (stays in state of nationality, works in state of non-nationality (whether UK or Ireland))	Irish	Indefinite ability to start and stop frontier work with social security protected in state of employment or residence (as appropriate)	FWP or CTA or PcSS	**Under FWP or Irish equivalent:** no ability to 'restart' frontier work once status lost **Under CTA:** harder to enforce pre-Brexit economic/social rights **Under PcSS:** potentially time-limited social security cover.
	British		Irish FWP or CTA or PcSS	
	Other EU		FWP	**Under FWP:** no ability to 'restart' frontier work once status lost, and no ability to gain access to the status after 1/7/2021.
Reverse Frontier Workers	Irish (working in Ireland, living in UK)	Indefinite ability to start and stop frontier work with social security protected in state of employment or residence (as appropriate)	EUSS, TFEU work rights, CTA or PcSS	**Under EUSS:** no ability to leave the UK for more than 5 years and return **Under CTA:** harder to enforce pre-Brexit economic/social rights **Under PcSS:** potentially time-limited
	British (working in the UK, living in Ireland)		Ireland equivalent of EUSS, CTA or PcSS	**Under Ireland equivalent of EUSS:** no ability to leave the MS for more than 5 years and return **Under CTA:** harder to enforce pre-Brexit economic/social rights, **Under PcSS:** potentially time-limited social security cover.
Dual Frontier Worker (works in MS or UK, lives in the UK or MS, is national of neither)	EU National (non-Irish/ British) living in Ireland and working in the UK	Indefinite ability to start and stop frontier work with social security protected in state of employment or residence (as appropriate)	Ireland equivalent of EUSS, FWP PcSS	**Under Ireland equivalent of EUSS:** no ability to leave the MS for more than 5 years and return **Under FWP:** no ability to 'restart' frontier work once status lost **Under PcSS:** potentially time-limited social security cover. Note: PcSS cover requires the holding of a UK worker visa (which comes with requirements for earnings and usually has other conditions attached).
	EU National (non-Irish/ British) living in the UK and working in the Ireland		EUSS, TFEU work rights PcSS	**Under EUSS:** no ability to leave the UK for more than 5 years and return; registered as economically self-sufficient rather than frontier worker (with relevant conditions applicable) **Under PcSS:** potentially time-limited social security cover. Note: PcSS cover requires the holding of a UK visa that is not dependent on work in the UK in this case, such as holding a student visa or spousal visa or indefinite leave to remain more generally

This diminution will not be alleviated for many frontier workers even when we consider the CTA and the PcSS as 'alternatives' or 'supplements' to the Withdrawal Agreement, as discussed in Chapter 4.2 and 4.3. Irish and British nationals who are not covered by the Frontier Worker Regulations can, of course, start and stop frontier work as they see fit under the CTA arrangements, but the social security coordinating rules applicable under the CTA are less enforceable than the Withdrawal Agreement. The PcSS to the TCA is more enforceable than the CTA – but it may not remain in force forever. Consequently, there may be some Irish and British frontier workers who fall outside of the scope of the Withdrawal Agreement, and are covered by the CTA, but nonetheless find that their rights have been diminished because they are trying to enforce the BGFA 'equality of opportunity in economic activity' right they have but find that they cannot as a matter of domestic law outwith reliance on Article 2 WF, which (as discussed in Chapter 4.4) may be difficult.

For EU nationals outside the scope of the Withdrawal Agreement, the situation is far worse, in that they will find 'stopping' and 'restarting' frontier work significantly more difficult than UK and Irish nationals. UK immigration law will make something that is automatic for those covered by the CTA much harder for other EU nationals who are living in Ireland or another Member State and wish to work in the UK, as they would have to meet the salary conditions attached to UK work visas as well as comply with all other conditions therein. As just an example, a UK 'seasonal work' visa requires a certificate of sponsorship as well as 1270 pounds of savings just to be granted, and it precludes doing additional work to the work the visa is granted for. It also is only valid for a 6-month period and is thus very distinct from 'frontier work' as set out in EU law.[167]

In sum, as the worked example on the next page shows, even the 'best covered' frontier worker imaginable, who is a UK or Irish national, resident in Ireland and working in the UK, will lose the added protection of the Withdrawal Agreement if they take an extended 'break' from frontier work, and will not see that compensated for by the CTA or the PcSS. This seems a clear Article 2 WF diminution of the right to reside freely, as well as the right to equal opportunity in social and economic activity.

Worked Example: Conall

Frontier worker Conall, an Irish national, lives in Dundalk. He spent the years between 2010 and 2018 working for his brother's construction company in Dundalk, but then decided he wanted to do something different with his life, and started looking for work in Northern Ireland. He started working in as a shop assistant in Newry in March 2018 and continued to work there regularly – four days a week – until April 2022. He applied for a Frontier Worker Permit when Brexit happened – even if he was not very clear on what it would mean for him, given that he did not need a visa to work in Northern Ireland anyway. In April 2022, however, he quit working in the shop to help out in his brother's construction company, back in Dundalk.

Conall, when he starts to work in the shop in Newry again in January 2023, realises that he is no longer covered by the Withdrawal Agreement or its UK implementation at that time. He has not looked for work in Northern Ireland in the last six months, and so cannot provide 'compelling evidence' that he has done so, and the UK authorities inform him that he's lost his Frontier Worker Permit.

[167] See https://www.gov.uk/seasonal-worker-visa

This initially does not feel overly problematic for Conall himself, given that – as an Irish national – he can work in Northern Ireland no matter what. But he starts to realise in 2040 that there are issues with how the UK is calculating his pension entitlement, in that they are not considering some of the years he worked in Ireland. He obtains legal advice, which informs him that when the UK was in the EU, or if he were covered by the Withdrawal Agreement because he was still a frontier worker, he would have been able to take the UK to court for not coordinating his benefits in line with EU social security law. The TCA PcSS is no longer in force in 2040. At this point, his rights stem only from the CTA, and he cannot make an argument about how his social security should be coordinated in local courts on the basis of the CTA.

His legal team advises him instead to start an Article 2 claim under the Protocol – but cautions him that it is not clear that this will succeed.

5.2 Frontier Workers' Families

The situation of the families of frontier workers as defined by Brexit is sometimes illogical and incoherent, as has also been the case under EU law. Much of the legislation applicable to frontier workers simply does not address anything except the state of work of the frontier worker; the general rules in the Workers' Regulation about family members all assume family members who live with an EU national worker in a host Member State.

With frontier workers, these family members will be resident in a different Member State than the one that extends rights to the frontier worker themselves, and consequently will be subject to separate legislation. They gain the majority of their rights from the Citizenship Directive, whereas the frontier worker gains the majority of their rights from the Workers' Regulation, with the Social Security Coordination Regulation working as the 'bridge' between them.

Chapter 3 of this report will have shown that while this regulatory 'split' is in practice generally a mere oddity under EU law, it comes with significant problems in the context of Brexit. As such, the following is true for family members of Irish and British frontier workers on the island of Ireland after Brexit.

- In the case of Irish national frontier workers working in the UK, with Irish or UK national families resident in Ireland, very little changes before and after Brexit provided that Irish national has registered under the Frontier Worker Permit scheme, for reasons set out above.
- In the case of UK national frontier workers working in the UK, with UK or Irish national families resident in Ireland, they fall outside of the scope of the Frontier Worker Permit Scheme and the EUSS – but can register for similar statuses in the Republic of Ireland.
- In both above cases, where the frontier worker has not registered for the relevant Frontier Worker Permit Scheme, their rights are protected under domestic law and the CTA, as well as (to an extent) the PcSS. The rights are also addressed solely to the frontier worker, with their families unmentioned.
- Family members of UK or Irish national frontier workers who themselves are British but reside in Ireland, or are Irish and reside in Britain, can apply for their own residency status under the EUSS (though they do not have to). This brings them within the scope of the Withdrawal Agreement, though they have to apply as self-sufficient given that their family member who is exercising relevant rights is doing so in a different country. This means that the family has to satisfy the 'sufficient resources' and comprehensive sickness insurance conditions of the Citizenship Directive – depending on the latter for domestic law applicable via the CTA arrangements.
- Where a UK national works in Ireland while maintaining residence in the UK, but loses their frontier worker status as a result of a gap in frontier working, and thereby lose the coverage of the Withdrawal Agreement, they risk losing their family reunification rights. Even if they have resumed frontier work, they will not have WA rights to extend to their spouse, who will have to comply with domestic immigration laws in order to reside in either Ireland or the UK (see Jenny's worked example below).
- Family members of UK or Irish national frontier workers who are not themselves British or Irish fall into two categories:
  - Where they registered under the EUSS, they are entitled to reside under the EUSS for the duration of their lifetimes, with relevant equal treatment rights.
  - Where they were eligible to do so, and resident in the UK, but did not register under the EUSS, and had not secured some other leave to remain, they are technically now unauthorized or undocumented migrants unless and until they make a late application (for which delay they will also need to show a reasonable ground).
  - Those not yet resident in the UK can apply for an EUSS family permit to join their family member in the UK, where that family member is an EEA national or a 'specified relevant person of Northern Ireland', though different rules apply to each

Worked Example: Jenny

Jenny is a UK national living in Northern Ireland. She began working in Ireland before Brexit. When the EUSS scheme opened, she asked whether she was required to have a Frontier Worker Permit and was told that she did not need one as she was covered by the CTA and the WA while working in Ireland (and Ireland did not require UK nationals to register for such a permit for them to be covered by the WA). While working in Ireland, and before the end of the transition period, she met and moved in with her long-term partner, Neema, who was then a third country national on a student visa in Northern Ireland.

She changed jobs to reduce her commute in January 2022, and started working in Northern Ireland. However, she soon found herself being offered positions at a higher level back in Ireland.

This means that in December 2022, Jenny resumed cross-border working. As she is covered by the CTA and is free to work in Ireland, and had no Frontier Worker Permit to lose, she does not realise this new frontier work falls outside of the scope of the Withdrawal Agreement.

Neema, meanwhile, is living and working in Northern Ireland, in accordance with the conditions attached to a work visa issued by the UK.

In 2025, Jenny and Neema get married. Neema's work visa is about to run out and they discover that she does not have residence rights in either Ireland or the UK as Jenny's spouse or durable partner by virtue of the Withdrawal Agreement: Jenny herself is no longer covered by the Withdrawal Agreement, and so neither Neema nor Jenny can benefit from rights retained in the Withdrawal Agreement.

They now have to navigate the complicated and very expensive domestic immigration laws of either Ireland or the UK in order to live together.

EU national frontier workers who are not Irish, but living in Ireland and working in the UK, or living in the UK and working in Ireland, face a quite different set of circumstances when it comes to their families:

- In the case of EU national frontier workers working in the UK, with (non-Irish) EU national families resident in Ireland, they need to have registered under the Frontier Worker Permit scheme and their families will be resident in Ireland under the EU free movement rules per the Citizenship Directive, with social security addressed by Part 2 of the Withdrawal Agreement for all. Where they have not registered under the Frontier Worker Permit scheme, their families' residence is unaffected but they will not be able to carry out their work in the UK unless they hold a relevant UK worker visa, and so their family members would need to be self-sufficient as defined in the Citizenship Directive. If they hold such a visa, their social security is addressed by the PcSS.
- In the case of EU national frontier workers working in the UK, with non-EU national families resident in Ireland, they need to have registered under the Frontier Worker Permit scheme in order to be able to sponsor their families under the Citizenship Directive's residency rights for family members, with social security addressed by Part 2 of the Withdrawal Agreement for all. Where they have not done so, they are not able to work in the UK unless they qualify for a relevant worker visa, and consequently would have to be self-sufficient as defined in the Citizenship Directive in order to sponsor their family's residence in Ireland. If they hold a visa, their social security is addressed by the PcSS.
- In the case of EU national frontier workers working in Ireland, but living in the UK, with families of any nationality other than Irish or British living there as well, the entire family needed to have applied for a new residence status under the EUSS. Their social security is addressed by Part 2 of the Withdrawal Agreement if so, but where they have failed to register, under current UK immigration law, they would find it nearly impossible to gain residency rights: there very few visas available that allow holders to simply 'reside' in the UK and work elsewhere, but if they managed to apply for one, their social security would then be addressed by the PcSS.[168]

The consequences of non-registration under the Withdrawal Agreement is thus significantly more severe for EU nationals than it is for Irish or British nationals, who – unless they have non-Irish or non-British family members – at the very least are able to reside and work in either of the two states without facing legal obstacles. However, the security of that right to reside and right to work in all situations where the relevant families have not registered under the EUSS is significantly lessened: as discussed in Chapter 4, the CTA has 'hard law' on social security coordination that is echoed (and improved upon) by the PcSS, but all of its other content is effectively dependent on unenforceable, lasting domestic reciprocity commitments. Such commitments are far less stable and enforceable than the content of the Withdrawal Agreement or the PcSS.

[168] An example of a 'residency' visa is the High Potential Individual visa, which allows those with advanced degrees to live in the UK for a period of two or three years, during which it is expected that they find a job. The period of time is not long enough to gain indefinite leave to remain, and so this is not a lasting 'solution' to the absence of a frontier worker status.

Frontier Workers and their Families: Rights after Brexit

5.3 Summary of Findings

This report has considered UK compliance with relevant UK-EU agreements both before Brexit and after Brexit, and to what extent frontier workers in Northern Ireland (and their families) have lost rights because of Brexit. Here, the report's primary findings are summarised.

To what extent was relevant EU law was appropriately implemented pre-Brexit? (See Chapter 2.3.)

- Implementation in law was lacking on a few minor points when it came to relevant EU directives (eg, UK implementation missed out on the equal treatment obligation in the Citizenship Directive and failed to implement the full scale of 'retention' possibilities for the self-employed).
- Implementation of directly applicable EU sources (eg the Treaties, Regulations 492/2011 and 883/2004) was purely done by guidance – there were not even references to these EU law sources in the applicable legislation on social security in particular. This will have made the rights held by frontier workers in the UK less clear to those workers, which may have led to their disapplication in practice.
- Beyond these two points, however, UK compliance with EU law on workers and their rights in the UK has never been as problematic as UK compliance with EU law on economically inactive EU workers – so provided the threshold for 'frontier worker' was met by a given worker, and their work took place in the UK, they will have generally been treated as EU law required – though the UK approach to defining 'work' is likely to have disproportionately penalised seasonal or on-call frontier workers.

What has 'disappeared' since Brexit, in that it has not carried over into the Withdrawal Agreement? (See Chapter 3.4.)

- The most pertinent loss is the ability to restart frontier work as EU nationals are always able to do. Once the status is 'lost' under the WA, it is lost forever.
- The second most visible loss lies in enforcement of rights: whereas under EU law, the rights held by frontier workers would be both domestically enforceable and referrable to the CJEU, this falls away after 8 years under the Withdrawal Agreement. From then, interpretation of the Withdrawal Agreement will be done in the absence of CJEU oversight – but with the Independent Monitoring Authority nonetheless providing a 'Commission-style' role. It has demonstrated already that it intends to take this role seriously, and ultimately any political contestation of how Part 2 of the Withdrawal Agreement works in the UK would require arbitration with references to the CJEU. This is a loss, in that individual domestic cases will not result in CJEU input (even though Article 4 of the Withdrawal Agreement ensures that cases about Part 2 can always be heard, with Part 2 needing to be applied by the domestic judiciary) – but such CJEU input can still be pursued through other means. Finally, there is also the potential for Article 2 WF breaches being pursued in Northern Ireland if the failure to enforce Part 2 correctly results in a diminution of relevant rights.
- There is no mention of 'reverse' frontier workers in any of the post-Brexit legislation, whether at EU level or at UK implementation level. Granted, they should be captured by Irish law (as working there) and domestic UK law (as applicable to UK nationals who have not left their state of residence), but they no longer appear to have the same supranational protections

that they were afforded under EU law, such as a right to equal treatment with regards to social advantages in the Member State of work, while their rights to social security coordination will be determined by a combination of the CTA and the TCA, with reduced enforcement mechanisms (and consequently reduced recognition of rights accrued pre-Brexit as a result of social security contributions)[169] - so this is a gap that should be filled.

- The UK domestic definition of a 'frontier worker' is more generous than the EU definition they could have borrowed from the Social Security Coordination Regulation (which only covers those who return to state of work 'daily or at least once a week') by giving a broad definition of residence that will be easier to fulfil – but it still excludes a number of types of frontier worker who engage in their frontier work in atypical patterns, and it does not address the issue of 'restarting' frontier work addressed above.
- Beyond that, the WA retains existing EU social security coordination – and the UK continues to implement some of the rules in the Social Security Coordination Regulation only by guidance, rather than legislation. (Universal Credit has been updated to now fully refer to EUSS holders as being right holders, albeit imposing extra conditions on those with pre-settled status under the EUSS.) Guidance-based law is not optimal even if it were fully compliant with how the Withdrawal Agreement is intended to be implemented (which it is not).
- In terms of residency rights in the UK for family members of frontier workers, the combination of the EUSS and the Frontier Worker Permit Scheme result in a mismatch of relevant rights: the EUSS is indicated as giving residency rights in the state of work, but that is never where a frontier worker will reside.

What frontier worker rights have 'disappeared' since Brexit on account of UK policy or practice? (See Chapter 3.3.)

- The biggest problem facing frontier workers is that the UK government guidance has consistently indicated that Irish nationals did not have to register for either the EUSS or Frontier Worker Permits, without making clear what they would gain from registering for these schemes. Suggesting Irish nationals do not need to register for any of these schemes continues to be the approach taken to this day (when registrations under the EUSS and for the Frontier Worker Permits are no longer possible, barring exceptions). Many entitled to register simply will not have because of this – and will therefore at best be captured by any of the supplementary sources discussed in Chapter 4, or at worst, not at all (see below).
- In terms of residency rights in the UK for family members of frontier workers, the combination of the EUSS and the Frontier Worker Permit Scheme result in a mismatch of relevant rights: the EUSS and its guidance both explicitly give residency rights to families of frontier worker permit holders in the UK, but the FWP Scheme and its guidance make clear that the only eligible applicants are those who are working but not primarily resident in the UK. A frontier worker (under UK law)'s family would not be resident in the UK, and so the relationship between these schemes needs to be reconsidered.
- The guidance on the Frontier Worker Permit scheme stresses the distinctions between frontier work and service provision abroad – but the law and outward-facing guidance do not make this distinction clear, and in the absence of a stricter definition of 'frontier worker', a significant number of beneficiaries of WA rights could fall in this definitional gap and thus in practice retain fewer rights than they are entitled to (in that services provision is not covered by the WA, but self-employment-based frontier work is.)

[169] Similar to the loss experienced by Conall when he lost his Frontier Worker Permit in the worked example above on page 71.

Do any of the supplementary sources in Chapter 4 help mitigate those disappearances? (See Chapter 4.)

The CTA

- The CTA only covers Irish and British nationals, and so excludes all EU nationals who qualify as 'frontier workers' under EU law or the WA automatically.
- The shortcomings of the CTA in terms of protecting relevant rights are:
  - It is not domestically enforceable, in that it reflects only reciprocal domestic law arrangements.
  - The CTA's Social Security Convention is also not domestically enforceable in the UK courts as a stand-alone source of rights.
- What this ultimately means is that claimants can argue on a domestic law basis that they are entitled to benefits, but if the domestic law changes, they have no recourse to the CTA's arrangements themselves (or the Convention) to enforce those rights.

The TCA

- The TCA's Protocol on Social Security (PcSS) covers Irish and British nationals as well as other EU nationals.
- The shortcomings of the PcSS in terms of protecting relevant rights are:
  - It does not mitigate the falling away of frontier worker status under the WA.
  - It is domestically enforceable unlike the CTA – but it has an automatic expiry date of 15 years, after which new benefits will not be accumulated.
- Its more general shortcoming is that for EU nationals, it will only apply once they have successfully applied for a visa to engage in work in the UK. Conditions attached to UK immigration law will exclude many who could have been 'frontier workers' under EU law, and so in practice, will help very few people.

In summary, the combination of the CTA and the PcSS means that only Irish and British nationals will be in a position to engage in 'frontier work' on the island of Ireland (as they do not need a visa, per CTA) and then retain their benefits in an enforceable manner (as they are covered by the PcSS).

The ECHR

- There is some underexplored potential for the ECHR to be drawn upon to protect frontier worker rights – but there are significant obstacles in terms of the standard of judicial review deployed in social security cases.

Article 2 of the Windsor Framework

- Article 2 of the Windsor Framework, on non-diminution of relevant rights protected by the BGFA, covers the Northern Ireland communities.
- The relevant rights listed in the BGFA are the 'right to freely choose one's residence' and the 'right to equal opportunity in all social and economic activity'.
- In terms of diminution of those rights as a consequence of Brexit:
    - The fact that the WA permits a permanent loss of status is itself a diminution, as the previous right was to frontier work in the UK at will, or to reverse frontier work in Ireland at will, with relevant economic activity 'opportunities' in the shape of benefits.
    - The introduction of 'time limits' for registration for frontier worker status is a diminution, in that this was not a requirement prior to Brexit.
- The rules applicable to the deportation of frontier workers have moved away from EU law, and the UK law offers fewer protections. This is clearly a possible diminution.
- Family reunification rights of frontier workers have been significantly diminished by Brexit, with 'time limits' for applications again being applied and affecting both EU national and third country national family members.
- Dual frontier workers risk losing residency rights where they lose frontier worker rights, which was not possible prior to Brexit.
- The EU law right for 'fast' permanent residency has been lost in Brexit. This is a clear diminution of rights.
- Enforcing any of the relevant rights becomes significantly more complex after 8 years; while they remain directly effective, preliminary references to the CJEU on disputes about rights preserved in Part 2 of the WA will no longer be possible, and the Independent Monitoring Authority may no longer be operable.

5.4 Recommendations

On the basis of the findings of the report, its authors make the following recommendations for UK actions to improve and preserve the rights of frontier workers and their families in Northern Ireland.
The recommendations come at various 'levels' of recommendation, with 'gold' offering the best protection for frontier workers, and 'bronze' offering the least.

The authors recognise that 'gold' solutions are likely the most complex to implement, as most require further negotiations to revise existing or adopt new international agreements with Ireland or the EU; and in the absence of the political will for engaging in such negotiations, they would stress that solutions at every level would offer real improvements to the existing legal and policy framework affecting frontier workers in Northern Ireland.

The recommendations come at various 'levels' of recommendation, with 'gold' offering the best protection for frontier workers, and 'bronze' offering the least.

Recommendation 1: The codification of all rights entitlements of those covered by WA Part 2, including frontier workers.

Gold level solution:	Amending social security legislation in the UK to make express reference to frontier workers and other WA beneficiaries as entitled regardless of residency conditions.
Silver level solution:	Issuing UK-based user guidance (not caseworker guidance) on the rights frontier workers and other WA beneficiaries continue to hold and in what state they hold them.

Recommendation 2: A reworking of the definition of 'frontier worker' in the Frontier Worker Permit Regulations.

This reworking should explore:

- What type of work the current definition excludes – and address the risk of risk of declaring an activity 'services provision' rather than 'work', for example.
- Exceptional cases of clear frontier work and how they can be covered.
- 'Restarting' of frontier work and reconceptualising what a clear 'break' in work looks like for a frontier worker.

Gold level solution:	Renegotiating a definition of 'frontier worker' with the EU, ensuring that it encompasses the concept of 'restarting' frontier work so as to capture more of those on the island of Ireland affected by Brexit.
Silver level solution:	Addressing 'frontier worker' status shortcomings via Article 2 'non-diminution' claims – if successful, these will require the UK government to change relevant implementing legislation accordingly, with oversight and enforcement overseen by the relevant human rights bodies charged with this duty in the Windsor Framework.
Bronze level solution:	Introducing domestic (UK) legislation that addresses the above points.

Recommendation 3: Building on the CTA as a genuine 'safety net'.

Gold level solution:	The UK negotiating with Ireland to make the CTA domestically enforceable rather than merely based on reciprocal obligations.
Silver level solution:	The UK negotiating with Ireland to introduce a memorandum specifically on frontier work (similar to the Social Security Convention), so as to clarify and highlight rights held by frontier workers under the CTA arrangements.

NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Northern Ireland Human Rights Commission
Alfred House,
19-21 Alfred Street,
Belfast,
BT2 8ED

T: +44 (0)28 9024 3987
E: info@nihrc.org
W: www.nihrc.org