

# Access to Work for Those Seeking Asylum: Concerns Arising from British and Swedish Legal Strategies

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## ABSTRACT

This article seeks to probe the controversial relationship between seeking asylum and the permission (or obligation) to work. In doing so, we recognise the concurrent claims that can be made for asylum and access to the labour market, problematising the concept of ‘work’ and its relationship to freedom and dignity from the perspective of international refugee law and European human rights norms alongside European Union (EU) law. We examine how British and Swedish legal systems have reflected two starkly opposed policy stances. The UK has long denied asylum seekers the financial and psychological benefits that come with work usually until refugee status is formally granted, but the Swedish system has facilitated a complementary pathway for asylum seekers whose labour can make (what is determined politically to be) a sufficient contribution to the economy. We identify the perceived benefits and failings of each strategy. In this context, we observe that the *status quo* in both countries is changing and even arguably converging around an illiberal consensus regarding the relationship between asylum and work, which will demand further attention and potentially legal challenges in the years to come.

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## 1. INTRODUCTION

On 26 February 2022, a United Kingdom (UK) Conservative Member of Parliament for Torbay and the Parliamentary Under Secretary of State for immigration, Kevin Foster, suggested that there were a ‘number of routes’ for Ukrainian asylum seekers to come to the UK following the Russian invasion of their home country. These included ‘not least our seasonal worker scheme ... alongside the family route for those with relatives here’.<sup>1</sup> This statement responded to the short supply of horticultural workers in the UK but did not seem to indicate great sympathy for those fleeing war who could claim entry purely on humanitarian grounds rather than their economic productivity. Indeed, the very notion that a seasonal worker visa should be the mode of application for entry by Ukrainian refugees caused an outcry.<sup>2</sup>

The relationship between asylum and work has been and remains contentious whether in the UK or elsewhere. In this article, we explore in a British and Swedish context the dynamics of this interaction between responses to claims for refugee status and consequent inclusion or exclusion in the labour market.

Primarily, we might wish to see the two issues of ‘asylum’ and ‘work’ as distinct, which is arguably the established British position. We could perhaps from a communitarian political perspective regard these as two separate spheres of justice with distinguishable moral claims according to our commonly shared understandings.<sup>3</sup> In the UK, as Bridget Anderson has observed, ‘non-citizens are divided into three broad categories of entrant: workers and refugees/asylum seekers, and family members’.<sup>4</sup> Officially, these categories are not to be conflated. The ‘economic migrant’ entering as a worker is treated as ‘bad’, while refugees and family members are regarded as having more compelling claims.<sup>5</sup> In Sweden, the picture has been more ambivalent, but

<sup>1</sup>See the record of the subsequently deleted tweet at: <https://twitter.com/JMPSimor/status/1497696368667684868>.

<sup>2</sup>BBC News, ‘Kevin Foster MP: Anger over minister’s work visas for refugees comment’ 27 February 2022 at: <https://www.bbc.co.uk/news/uk-england-devon-60545019>.

<sup>3</sup>Cf. Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (New York: Basic Books, 1983); although it should be noted that this communitarian avenue has led Walzer (at 51) into asserting sovereign rights to close borders in the interests of one’s own citizens with limited moral obligations to asylum seekers, a view which we do not share. See Joseph H. Carens, ‘Refugees and the Limits of Obligation’ (1992) 6(1) *Public Affairs Quarterly* 31.

<sup>4</sup>Bridget Anderson, *Us and Them: The Dangerous Politics of Immigration Control* (Oxford: Oxford University Press, 2013), 53.

<sup>5</sup>*Ibid.*

these legal distinctions are still made and their preservation may have implications for further legal reform.<sup>6</sup> For many humans on the move, however, such distinctions are less relevant. Economic, political and social motivations for movement across borders may blend and combine.<sup>7</sup> The approach taken in the UK has been that asylum should be based on the need for protection from potential harm, entailing some financial support to those making such a claim, but consistent with extensive restrictions on access to work.<sup>8</sup>

A stark alternative is the Swedish view that asylum seekers can be expected to be as self-supporting as possible and encouraged to work, if not required to do so. That approach has been endorsed by academic literature celebrating self-reliant refugees as ‘entrepreneurs’ as well as workers.<sup>9</sup> This perspective on the right to work leads to an expectation that those seeking asylum will make an economic and social contribution to the country that they enter, which may be helpful to them, but also to employers and host states at a time when there are severe labour shortages following the COVID-19 pandemic.<sup>10</sup> Self-sufficiency is an ethical value often associated with work,<sup>11</sup> but of course this will be contingent on the terms on which

<sup>6</sup>Christer Lundh and Rolf Ohlsson, *Från arbetskraftsimport till flyktinginvandring*, 2nd edn. (Stockholm: SNS Förlag, 1999).

<sup>7</sup>Motivations for migration are of course the subject of ongoing study and this brief analysis does not pretend to cover the full remit of issues or their implications for access to work. See, for example, Jonathan Kent, Kelsey P. Norman, and Katherine H. Tennis, ‘Changing Motivations or Capabilities? Migration deterrence in the global context’ (2020) 22(4) *International Studies Review* 853.

<sup>8</sup>See the brief UK Government information ‘Claim Asylum in the UK’ at <https://www.gov.uk/claim-asylum>, which states: ‘You will not usually be allowed to **work while your asylum claim is being considered**’.

<sup>9</sup>Claudena Skran and Evan Easton-Calabria, ‘Old Concepts Making New History: Refugee, Self-reliance, Livelihoods and the “Refugee Entrepreneur”’ (2020) 33(18) *Journal of Refugee Studies* 1; Khizran Zehra and Sadia Usmani, ‘Not Without Family: Refugee family entrepreneurship and economic integration process’ (2023) 17(1) *Journal of Enterprising Communities: People and Places in the Global Economy* 158; and Sibylle Heilbrunn and Rosa Lisa Iannone, ‘From Center to Periphery and Back Again: A systematic literature review of refugee entrepreneurship’ (2020) 12(18) *Sustainability* 7658.

<sup>10</sup>Monica Costa Dias, Robert Joyce, Fabien Postel-Vinay, Xiaowei Xu, ‘The Challenges for Labour Market Policy during the COVID-19 Pandemic’ (2020) 41(2) *Fiscal Studies* 371; Dionysis Bochtis, Lefteris Benos, Maria Lampridi, Vasso Marinoudi, Simon Pearson and Claus G. Sørensen, ‘Agricultural Workforce Crisis in Light of the COVID-19 Pandemic’ (2020) 12(19) *Sustainability* 8212.

<sup>11</sup>See, in other contexts, Philip Young P. Hong, Dara Lewis, and Sangmi Choi, ‘Employment Hope as an Empowerment Pathway to Self-sufficiency among Ex-offenders’ (2014) 53(5) *Journal of Offender Rehabilitation* 317; and Sanne Boschman, Ineke Maas, J. Cok Vrooman, and Marcus H. Kristiansen, ‘From Social Assistance to Self-sufficiency: Low Income Work as a Stepping Stone’ (2021) 37(5) *European Sociological Review* 766.

work is made available and accepted, as well as the consequences of any refusal to take on a job or a decision to leave it.

The tension between these perspectives was evident from the responses that Kevin Foster's tweet provoked.<sup>12</sup> The established UK approach may be in part due to a xenophobic reaction to inclusion of 'others' in the labour market but may also have more worthy motives. For example, Martin Ruhs has pointed to the 'dangers of instrumentalizing refugees, in the sense of creating new policies that make the admission to high-income countries dependent, at least partially on their perceived economic usefulness'.<sup>13</sup>

In this article, we begin by problematising what we understand by 'work', alongside its tangible and intangible benefits, as well as potential pitfalls for those in the position of refugees and those seeking asylum. Denying work or making work obligatory each have distinctive consequences. We seek to unpack these with reference to international law, especially the Refugee Convention 1951, but also the International Covenant on Economic, Social and Cultural Rights 1966, the Convention on the Protection of the Rights of all Migrant Workers and their Families 1990 and International Labour Organization (ILO) instruments. We further examine European Union (EU) law which has historically shaped UK law and continues to bind the Swedish government. We then consider the application of European human rights law, with particular reference to the European Social Charter 1961, as well as European Convention on Human Rights 1950. It emerges from these sources that while a right to work (in law, if not practice) has emerged for refugees, the entitlement of those seeking asylum (but who have not yet been granted refugee status) is more contested and more limited. In both contexts ensuring that it is 'decent work' that is accessible has been and remains a challenge.

Our article then proceeds to examine the strategies established regarding asylum and work in Sweden and the UK. We set out the baldly prohibitive UK approach, which has generally prevented asylum seekers from entering the labour market unless and until refugee status was granted, with minimal exceptions where applications are unreasonably delayed. So-called 'illegal working' is harshly penalised in a context where it is hard for asylum seekers to subsist on state grants. Driving the work of asylum seekers underground through criminalisation has led to exploitative working conditions,

<sup>12</sup> See ns 1 and 2 above.

<sup>13</sup> Martin Ruhs, 'Can Labour Migration Work for Refugees?' *Current History* January 2019, 29.

compounded by problems of labour standards enforcement. We contrast this with Swedish encouragement to asylum seekers to take work, support themselves and reduce the burden of their presence on the state; with the promise of a potential alternative economic track to visa status if employed, dependant on salary levels. Here a right to residence is linked to economic productivity, with the risk that asylum seekers will accept problematic terms and conditions of employment to meet official requirements through either of these ‘twin tracks’. Drawing on our theoretical analysis of ‘work’ and critical discussion of human rights norms, we probe the legality and effects of each national policy and its implementation. In doing so, we observe that the national snapshots of law and practice in the UK and Sweden provided here continue to shift. Indeed, we may be witnessing a confluence of increasingly harsh approaches to asylum and work, less sympathetic to those in need of refuge. In the UK, the Illegal Migration Act 2023, complementing the Nationality and Borders Act 2022, is intended to block asylum claims by those who enter the country illegally from or through a ‘safe third country’, and thereby prevent any future access to lawful work apart perhaps briefly in a detention centre prior to deportation.<sup>14</sup> Meanwhile, a new Swedish government is seeking to adopt measures, which look familiar to those previously accepted in the UK, contemplating a ban on access to work for those seeking asylum beyond the bare requirements of EU law,<sup>15</sup> regardless of the economic benefits their labour might bring. In both countries, the closure of lawful avenues to asylum and work could mean that more irregular and undocumented work takes place, which is unregulated, with significant consequences for decent work that we seek to highlight.

## 2. CONCEPTUALISING ‘WORK’ IN THE CONTEXT OF ASYLUM

When investigating the significance of ‘work’ for asylum seekers, we need to consider what the word means and, perhaps more importantly, what the

<sup>14</sup>See Illegal Migration Act 2023, discussed further in section 3.A below; also Jennifer Morgan and Lizzy Willmington, ‘The Duty to Remove Asylum Seekers under the Illegal Migration Act 2023: Is the government’s plan to “Stop the Boats” now doomed to failure?’ (2023) 52(4) *Common Law World Review* 103.

<sup>15</sup>Tidöavtalet, 36. The Tidöavtalet is a political agreement between the right wing, liberal and nationalistic parties in the Swedish Parliament establishing a political foundation for a right wing/liberal government after the election in September 2022. See: <https://www.liberalerna.se/wp-content/uploads/tidoavtalet-overenskommelse-for-sverige-slutlig.pdf>.

term evokes. Revolving around debates about access to work are appeals to myriad normative values. We begin this part by considering what ‘work’ means and to whom. We discuss the approach taken to work under international refugee law, mapping how that has developed prior to and after adoption of the 1951 Refugee Convention in the broader context of international law. We then examine the ways in which ‘work’ is identified as important and worthy of protection under EU law and in the Council of Europe, on the basis that these are the norms that have shaped and continue to affect domestic policy.

### A. The Significance of ‘Work’ and Its Relevance to Those Who Seek Asylum

There are many different views of the role of ‘work’ and its significance for individuals, their communities and society at large.<sup>16</sup> Work can be seen as a mere economic exchange, namely the exchange of labour for pay, where labour is supplied for the benefit of another.<sup>17</sup> However, work also has significant social aspects and implications. For example, employment has been approached by Hegelian advocates as a means by which to foster dignity and self-discipline.<sup>18</sup>

It has been observed that, for migrants, work can bring independence of income and agency (rather than managing on basic levels of state welfare payments), and nurturing of identity especially in relation to certain kinds of skilled work. Further, integration into a workplace community has the potential to lead to broader social integration, as well as associated intangible merits relating to dignity, pride and a sense of belonging.<sup>19</sup> Guy Mundlak has observed that the many benefits of work can ‘be achieved outside work, but it is the integrative effect that pulls them all together, which makes work

<sup>16</sup> John W. Budd, *The Thought of Work* (Ithaca, New York: Cornell University Press, 2011).

<sup>17</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Revised ed. (Harmondsworth: Penguin, 1979), advocating efficiencies stemming from division of labour. See, for example, Book 1, ch. viii.

<sup>18</sup> Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right* (Cambridge: Cambridge University Press, 1994); discussed by Anne-Laure Fayard, ‘Notes on the Meaning of Work: Labor, Work, and Action in the 21st Century’ (2021) 30(2) *Journal of Management Inquiry* 207, 209.

<sup>19</sup> See, for example, Jennifer M. George, ‘The Wider Context, Costs, and Benefits of Work Engagement’ (2011) 20(1) *European Journal of Work and Organizational Psychology* 53; and more broadly contributions to Virginia Mantouvalou (ed.), *The Right to Work: Legal and Philosophical Perspectives* (Oxford: Bloomsbury, 2014).

so meaningful.<sup>20</sup> The opportunity of refugees and asylum seekers to access work is therefore protected by EU law and in other contexts pursued fiercely by various civil society lobby-groups.<sup>21</sup> There is strong evidence that there are significant effects on the mental health of refugees and asylum seekers who cannot access work. These effects stem from ‘enforced passivity and boredom’, when they are unable to access work or when they are prevented from performing the ‘meaningful work’ that would be ‘commensurate with their education, training and experience’.<sup>22</sup>

Marx also saw ‘labour power’—namely ‘work’—as a fundamental and valuable human activity.<sup>23</sup> That said, work in the context of capitalist production can be viewed in Marxist terms as fundamentally ‘exploitative’, as it almost invariably involves economic exploitation of the person providing their labour for the benefit of those who own capital, entailing alienation from what they have produced.<sup>24</sup> Virginia Mantouvalou uses the term ‘exploitation’ in a different sense in relation to the right to work to mean ‘abuse of a person’s vulnerability that is created or exacerbated by law, in order to make a profit’.<sup>25</sup> Even in less structural terms, work can be ‘a source of individuals’ frustration, fatigue, subordination and low self-esteem’.<sup>26</sup> Certainly whether inclusion in work is regarded as beneficial for the asylum seeker may turn on the view taken of the extent to which their labour (and compensation for it) is rewarding or burdensome, as well as whether it is fundamentally exploitative.

<sup>20</sup>Guy Mundlak, ‘Working Out the Right to Work in a Global Labour Market’ in Mantouvalou n.19, 292.

<sup>21</sup>See our analysis in section 2.C below; also Roger Zetter and Héloïse Ruauzel, *Refugees’ Right to Work and Access to Labor Markets – An Assessment* (Washington DC: Knomad/World Bank Working Paper, 2016); Lucy Mayblin, ‘Troubling the Exclusive Privileges of Citizenship: Mobile solidarities, asylum seekers, and the right to work’ (2016a) 20(2) *Citizenship Studies* 192; and Caroline Fleay and Lisa Hartley, ‘“I feel like a beggar”: Asylum seekers living in the Australian community without the right to work’ (2016) 17(4) *Journal of International Migration and Integration* 1031.

<sup>22</sup>University of Cambridge Report, *Mental Health in a Migration Crisis: Designing front-line services for refugees, asylum seekers and local populations at-risk in the United Kingdom: Insights from an academic—policy knowledge exchange workshop* (Cambridge: Cambridge University, 2023), 51–3.

<sup>23</sup>See Matt Vidal, ‘Work and Exploitation in Capitalism: The labour process and the valorization process’ in Matt Vidal, Tony Smith, Tomás Rotta, and Paul Prew (eds), *The Oxford Handbook of Karl Marx* (Oxford: Oxford University Press, 2019); Sean Sayers, ‘Why Work? Marx and human nature’ (2005) 69(4) *Science & Society* 606.

<sup>24</sup>Karl Marx, *Capital* (Ware: Wordsworth, 2013); Fayard, n.18, 209.

<sup>25</sup>Virginia Mantouvalou, ‘The Right to Non-Exploitative Work’ in Mantouvalou n.19, 40.

<sup>26</sup>Mundlak n.20, 292.



It is difficult to reconcile these two contrasting views of work, but any reconciliation seems likely to depend on the terms on which asylum seekers are able to participate in the job market. Arguing from a human rights perspective, demanding protection of entitlements under EU law, Emily Cunliffe has argued that it is crucial to ensure that access to the right to work is respected in law but also in an effective way in the asylum process.<sup>27</sup> However, her focus in her study of EU norms and their implementation in Ireland and Sweden remains on the barriers to work, rather than the quality of work which asylum seekers do access.<sup>28</sup> Of course, both are important.

Our concern is that work undertaken by asylum seekers and refugees is often associated with increased vulnerability (regarding language, equivalence of qualifications and experiences that cause forms of psychological harm) and must therefore be combined with efficient safeguards to prevent asylum seeker or refugee labour becoming a vehicle for exploitation. We would argue that it is crucial to have *both* the opportunity to work and to do so on terms and conditions which at least satisfy the bare requirements of what the ILO deems ‘decent work’, including promotion of employment, social protection and social dialogue and tripartism, while protecting fundamental principles and rights at work.<sup>29</sup> The latter entails: ‘(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; (d) the elimination of discrimination in respect of employment and occupation; and, since 2022, (e) a safe and healthy working environment.’<sup>30</sup> There is also an important relationship between social security provision and the kinds of work which asylum seekers are willing to accept. The more minimal the social welfare provision granted, the more likely precarious and poor terms and conditions of employment will be accepted by asylum seekers (and refugees) to provide

<sup>27</sup> Emily Cunliffe, ‘Non-Economic Migrants as Workers: Securing the right to work for asylum applicants in the EU’ (2022) 24 *European Journal of Migration and Law* 112.

<sup>28</sup> Her excellent study also does not dwell on the ramifications of the parallel economic track to apply for a work permit, which asylum seekers may opt into; discussed further below in section 3.B.

<sup>29</sup> See for the ingredients of decent work, ILO Declaration on Social Justice for a Fair Globalization 2008; for a broader exploration of acceptable forms of work, Deirdre McCann and Judy Fudge, ‘Unacceptable Forms of Work: A multidimensional model’ (2017) 156(2) *International Labour Review* 147.

<sup>30</sup> Article 2 of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted at the 86th Session of the International Labour Conference (1998) and amended at the 110th Session (2022).



alternative income.<sup>31</sup> In this sense, the ILO definition of ‘decent work’, with its acknowledgement of both promotion of employment and social protection, is highly pertinent for our discussion.

Evidence to date of schemes operating in relation to asylum seekers in countries like Jordan suggests that their access to the labour market has been concentrated in spheres where ‘decent work’ is not necessarily provided.<sup>32</sup> Asylum seekers’ labour has also often been concentrated in the agri-food system, well known for poor working conditions.<sup>33</sup> Moreover, it may matter whether jobs are made available on terms of equality with local workers, for example, with respect to pay, working time and other terms and conditions of employment. It will be relevant whether hire is discriminatory and if the labour market is segmented, that is, whether asylum seekers are able to also engage in the skilled jobs for which they may be qualified, rather than those jobs that the local population is unwilling to perform due to poor pay and other terms and conditions.<sup>34</sup> It will also matter whether there is a duty to work,<sup>35</sup> as opposed to access to work, the penalties imposed for not working, as well as what kinds of work one is required to undertake.

Whether access to work for asylum seekers is desirable for the host state in which they are situated would, in purely instrumental terms, depend on whether their participation in the labour market brings economic benefits to the wider economy. Those insisting that asylum seekers should work could protect the public purse from costs associated with social welfare

<sup>31</sup>Cf. reflections on the relevance of social security in Simon Deakin, ‘Article 1: The Right to Work’ in Niklas Bruun, Klaus Lörcher, Isabelle Schömann and Stefan Clauwaert (eds), *The European Social Charter and the Employment Relation* (Oxford: Hart, 2017), 150–1 and 159.

<sup>32</sup>See Jennifer Gordon, *Refugees and Decent Work: Lessons learned from recent refugee jobs compacts* (Geneva: ILO Employment Policy Department EMPLOYMENT Working Paper No. 256 2019); Jennifer Gordon, ‘The International Governance of Refugee Work: Reflections on the Jordan compact’ (2021) 1 *Global Public Policy and Governance* 239.

<sup>33</sup>Andrea Iossa and Niklas Selberg, ‘Socio-Legal Aspects of Labour Market Segmentation in the Agri-Food Sector in Sweden: Spatio-Temporal dimensions’ (2022) 24 *European Journal of Migration and Law* 241, 252, 254; Letizia Palumbo, ‘Exploitation in the Agri-Food Sector in Europe: A comparative analysis of the impact of migration and labour regimes in producing migrants’ vulnerabilities’ (2022) 24 *European Journal of Migration and Law* 287, 300.

<sup>34</sup>See also Katharina Lenner and Lewis Turner, ‘Making Refugees Work? The Politics of Integrating Syrian Refugees into the Labor Market in Jordan’ (2019) 28(1) *Middle East Critique* 65, reached the conclusion that attempts to reconcile ‘humanitarian obligations toward Syrian refugees and Jordan’s economic development needs’ have yet to be successful, in part due to stark labour market segmentation and inferior terms and conditions of employment.

<sup>35</sup>Cf. Bob Hepple, ‘A Right to Work’ (1981) 10(1) *Industrial Law Journal* (ILJ) 65, 69–70, describing the obligations in socialist Eastern bloc countries.

provision and raise tax revenue.<sup>36</sup> Yet, if their inclusion in the labour market merely excludes local workers from jobs, which are then more poorly paid as a result, economic benefits may be questioned.<sup>37</sup> In countries like the UK, there would be clear economic and social advantages to enabling refugees and asylum seekers to convert their qualifications and work in the NHS where there is a shortage of trained medical staff: a ‘win–win’ scenario.<sup>38</sup>

We would argue that important preconditions for the mutual benefit of asylum seekers and host states are access to ‘decent work’ protections as a minimum, but that ideally there should be imposition of equal terms and conditions of employment (to those workers with citizenship or a right to residence) and access to agency (namely capacity to improve those terms and conditions) in the form of trade union membership and collective bargaining. In this way, aspirations for equality and capabilities can be realised.<sup>39</sup> In this context, we note the past understanding of work in terms of a ‘standard employment relationship’ (SER), a requirement which can operate as an obstacle to equal treatment and collective representation at work.<sup>40</sup> Still the SER involves greater certainty and therefore a better basis for decent work than contemporary work practices which also often involve an imbalance in mutuality, so that the person doing the work is required to be available, but no work is regularly or even necessarily promised. There are emergent issues regarding the ‘boundaries’ of what we understand as

<sup>36</sup>Johanna K. Schenner and Anders Neergaard, ‘Asylum-seekers and Refugees within Europe and Labour Market Integration’ (2019) 25(1) *Transfer: European Review of Labour and Research* 13.

<sup>37</sup>This has been an allegation made in Britain by the UK Independence Party (UKIP), discussed in Francesca Caló, Tom Montgomery and Simone Baglioni, “‘You have to work – but you can’t!’” Contradictions of the Active Labour Market Policies for Refugees and Asylum Seekers in the UK’ (2022) *Journal of Political Science* 1, 9.

<sup>38</sup>University of Cambridge Report n.22, 47 and 57–8; note that the scheme which enabled refugee doctors and international medical graduates to work for the UK National Health Service (NHS) while undertaking registration with the General Medical Council was discontinued in June 2023.

<sup>39</sup>Amartya Sen, *Development as Freedom*, (Oxford: Oxford University Press, 1999); Martha Nussbaum and Amartya Sen (eds) *The Quality of Life*, 2nd edn. (Oxford: Clarendon Press, 2002); Simon Deakin, ‘*Capacitas*: contract law, capabilities, and the legal foundations of the market’ in Simon Deakin and Alain Supiot (eds), *Capacitas: Contract Law and the Institutional Preconditions of a Market Economy* (Oxford: Hart, 2009); Martha Nussbaum, ‘Labour Law and the Capabilities Approach’ in Brian Langille (ed.), *The Capability Approach to Labour Law* (Oxford: Oxford University Press, 2019).

<sup>40</sup>See Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford: Oxford University Press, 2011); Zoe Adams and Simon Deakin, ‘Institutional Solutions to Precariousness and Inequality in Labour Markets’ (2014) 52 *British Journal of Industrial Relations* 779.

work, such as ‘platform work’ where those who supply their labour are described in contractual arrangements as self-employed,<sup>41</sup> and ‘domestic’ (or ‘care’) work within a household which can be regarded (notoriously) as exempt from standard statutory protections.<sup>42</sup> New forms of the precarious supply of labour are all too often compounded by vulnerability caused by uncertain immigration status.<sup>43</sup> In the context of the fissuring of work relations nationally and across global supply chains,<sup>44</sup> ILO instruments have begun to make reference to the wider ‘world of work’,<sup>45</sup> which can be understood to include the formal and informal labour market, so as to circumvent the use of the SER as a precondition for the imposition of labour standards internationally and at the national level.<sup>46</sup>

## B. Work for Asylum Seekers Under International Law

The first international cooperation to manage refugees arose in the wake of the Russian Revolution, in which it is estimated that as many as 800,000 displaced persons were in need of urgent assistance.<sup>47</sup> Curiously, the 1919 Treaty of Versailles establishing the League of Nations made no reference to refugees in the wake of the First World War, although Part XIII stated that one of the ILO’s ambitions would be ‘protection of the interests of workers when employed in countries other than their own’.<sup>48</sup> By 1921 a

<sup>41</sup>See Jeremias Prassl, *Humans as a Service: The promise and perils of work in the gig economy* (Oxford: Oxford University Press, 2018); and on migrant labour hired by platforms, see ILO *World Employment and Social Outlook (WESO) Report, The Role of Digital Labour Platforms in Transforming the World of Work* (Geneva: ILO, 2021), 139. For a recent example of the exclusionary effects of employment status in the UK in terms of trade union recognition, see *Independent Workers Union of Great Britain (IWGB) v Central Arbitration Committee (CAC) and another* [2023] UKSC 43, 21 November 2023.

<sup>42</sup>Discussed by Vera Pavlou, *Migrant Domestic Workers in Europe: Law and the Construction of Vulnerability* (Oxford: Hart 2021), at 49 et seq; Natalie Sedacca, ‘Domestic Workers, the “Family Worker” Exemption from Minimum Wage, and Gendered Devaluation of Women’s Work’ (2022) 51(4) *ILJ* 771.

<sup>43</sup>Lisa Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (Cheltenham: Edward Elgar, 2016); Judy Fudge, ‘Illegal Working, Migrants and Labour Exploitation in the UK’ (2018) 38(3) *Oxford Journal of Legal Studies* 557.

<sup>44</sup>David Weil, *The Fissured Workplace: Why work has become so bad for so many and what can be done to improve it* (Cambridge, Mass.: Harvard University Press, 2014).

<sup>45</sup>See preamble to the ILO Declaration on Social Justice for a Fair Globalization 2008.

<sup>46</sup>As elaborated in Article 2 of the ILO Convention No. 190 on Violence and Harassment 2019.

<sup>47</sup>Katy Long, ‘When Refugees Stopped Being Migrants: Movement, labour and humanitarian protection’ (2013) 1(1) *Migration Studies* 4, 9.

<sup>48</sup>See ‘Section 1’ and ILO Official Bulletin, April 1919 to August 1920 (Geneva, 1923), 332–43.

High Commissioner for Refugees had been established to return prisoners of war and address the pressing situation of Russian refugees.<sup>49</sup> The appointee to the post, Fridtjof Nansen, sought to promote ‘the admission of refugees to countries where they would be able to support themselves’ through the ‘Nansen passport’ system, seeking to foster self-reliance and access to the labour market of host states.<sup>50</sup> Gradually, other migrants were added to this ad hoc system.<sup>51</sup> Katy Long describes this as a double-edged sword, since this policy encouraged continued movement of refugees in search of work rather than an entitlement to remain and receive support.<sup>52</sup> Moreover, discrimination in the labour market of host states posed problems.

The first international convention relating to the status of refugees was adopted in 1933.<sup>53</sup> This standardised the system, introducing the principle of *non-refoulement*, but its treatment of the issue of ‘work’ is of the most interest for our purposes. The preamble referred to the obligation of members of the League ‘to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries, and in all countries to which their commercial and industrial relations extend’. Chapter IV (titled ‘labour conditions’) stated in Article 7 that the usual restrictions on access to the national labour market should ‘not be applied in all their severity to refugees domiciled or regularly resident in the country’ and would be ‘automatically suspended in favour of refugees domiciled or regularly resident in the country’ to which certain conditions applied. There was not full entitlement to equality as regards terms and conditions of employment, but Article 8 in Chapter V provided in respect of ‘industrial accidents’ that: ‘Each of the Contracting Parties undertakes to accord to refugees who may be victims of industrial accidents in its territory, or to their beneficiaries, the most favourable treatment that it accords to the nationals of a foreign country’. The 1933 Convention was later supplemented by a

<sup>49</sup>Norman Bentwich, ‘The League of Nations and Refugees’ (1935) 16 *British Yearbook of International Law* 114.

<sup>50</sup>Long n.47, 9–10.

<sup>51</sup>*Ibid.* See also Louise W. Holborn, ‘The League of Nations and the Refugee Problem’ (1939) 203 *The Annals of the American Academy of Political and Social Science* 124.

<sup>52</sup>Long n.47, 9.

<sup>53</sup>League of Nations Convention Relating to the Status of Refugees, 1933, LNTS Vol. CLIX No.3663.

1938 Convention regarding treatment of German refugees, which retained but did not improve on these provisions.<sup>54</sup>

Today Sweden and the UK are longstanding ratifying parties to both the 1951 Refugee Convention and the 1967 Protocol.<sup>55</sup> The UNHCR Introductory Note to the published instruments on the UN website observes that: ‘the Convention lays down basic minimum standards for the treatment of refugees, without prejudice to States granting more favourable treatment. Such rights include access to the courts, to primary education, to work ...’.<sup>56</sup> Article 17 of the 1951 Convention, which relates to ‘wage-earning employment’, entitles ‘refugees lawfully staying’ in the host state ‘to engage in wage earning employment’, indicating that ‘restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee’ who satisfies certain conditions.<sup>57</sup> Further, contracting states are to ‘give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes’. This speaks of the social inclusion often associated with joining the labour market of the host state.<sup>58</sup>

Moreover, Article 24 provides that ‘refugees lawfully staying’ are entitled to ‘the same treatment as is accorded to nationals’ in relation to such matters as remuneration, hours of work, holidays with pay, minimum age of employment, ‘women’s work and the work of young persons’ and ‘the enjoyment of the benefits of collective bargaining’. For refugees, it is clear that they have a right to work, and in work have a right to ‘the same treatment as nationals’, thus, equal treatment. The conditions mentioned in Article 24 are not exhaustive as the wording ‘such as’ indicates. If there is an outer limit to

<sup>54</sup> Articles 9 and 10 of the League of Nations Convention Concerning the Status of Refugees coming from Germany, 10 February 1938, LNTS Vol. CXCH, No. 4461. For more wide-ranging criticism, see Paul R. Bartrop, *The Evian Conference of 1938 and the Jewish Refugee Crisis* (London: Palgrave Macmillan, 2018).

<sup>55</sup> See <https://www.unhcr.org/uk/protection/convention/5d9ed32b4/states-parties-including-reservations-declarations-1951-refugee-convention.html>.

<sup>56</sup> Published at: <https://www.unhcr.org/3b66c2aa10>.

<sup>57</sup> Set out in Article 17(2): (a) He has completed 3 years residence in the country; (b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefits of this provision if he has abandoned his spouse; and/or (c) He has one or more children possessing the nationality of the country of residence.

<sup>58</sup> Cf. Jenny Phillimore and Lisa Goodson, ‘Problem or Opportunity? Asylum seekers, refugees, employment and social exclusion in deprived urban areas’ (2006) 43(10) *Urban Studies* 1715.

the requirement of equal treatment, that is not clear from the text of either the Convention or the Protocol.

Refugees ‘are all persons who meet the eligibility criteria under an applicable refugee definition, as provided for in international or regional refugee instruments, under UNHCR’s mandate, or in national legislation.’<sup>59</sup> By way of contrast, asylum seekers are those claiming refugee status which has not yet been accepted by UNHCR or national authorities. As has recently been observed, ‘[f]or 99% of refugees, the only way to find safety in a country in the prosperous democracies of the Global North is to reach its territory and then ask for asylum.’<sup>60</sup> The right to work may elude them and depends on national discretion,<sup>61</sup> even though the UNHCR has made clear that: ‘Refugees should not be penalized for their illegal entry or stay. This recognizes that the seeking of asylum can require refugees to breach immigration rules.’<sup>62</sup> ‘Everybody has a right to seek asylum in another country’ and ‘an unsuccessful asylum application is not equivalent to a bogus one’.<sup>63</sup>

The right to work is an internationally acknowledged human right, being recognised by Article 23 of the Universal Declaration of Human Rights 1948 and Article 6 of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). While the text of Article 6 makes no specific reference to migrants, the Committee on Economic, Social and Cultural Rights (CESCR) has done so in General Comment 18 issued in 2005.<sup>64</sup> The Introduction to the General Comment connects the right to work and Article 7 of the ICESCR, which further provides for ‘the right of everyone to the enjoyment of just and favourable conditions of work’. Additionally, the CESCR makes the link between Article 6 and Article 8, namely the right to form and join trade unions, as well as to engage in trade union activities including the right to strike.<sup>65</sup> The ‘normative content’ of the right is said

<sup>59</sup>See the UNHCR Mandate for Refugees, Stateless Persons and Internally Displaced Persons available at: <https://emergency.unhcr.org/entry/55600/unhcrs-mandate-for-refugees-stateless-persons-and-idps>.

<sup>60</sup>David Scott Fitzgerald, *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers* (Oxford: Oxford University Press, 2019), 3.

<sup>61</sup>Cathryn Costello, ‘EU Migration and Asylum Law. A Labour Law Perspective’ in Alan Bogg, Cathryn Costello and A.C.L Davies (eds), *Research Handbook on EU Labour Law* (Cheltenham: Edward Elgar Publishing, 2016), 299 and 313.

<sup>62</sup>UNHCR Mandate for Refugees, Stateless Persons and Internally Displaced Persons n.59.

<sup>63</sup>See <https://www.unhcr.org/uk/asylum-uk>, quoting Kofi Annan.

<sup>64</sup>The Right to Work, General Comment No. 18, 24 November 2005 E/C.12/GC/18.

<sup>65</sup>*Ibid.*, [8].

to include the right not to be forced to work and to have access to work, but also it is clear that the work in question must be ‘decent work’.<sup>66</sup> Further, ‘migrant workers’ are to be protected from discrimination in relation to their exercise of the right to work, although there is no express discussion of refugees or asylum seekers.<sup>67</sup>

Under Article 1 of the ILO Migrant Workers (Supplementary Provisions) Convention No. 143 adopted in 1975, ILO Member States undertake ‘to respect the basic human rights of all migrant workers’.<sup>68</sup> Under the Preamble to this Convention (and indeed the ILO Constitution to which the instrument refers) this is consistent with the task for the ILO to protect ‘the interests of workers when employed in countries other than their own’. Similarly, Article 10 of ILO Convention No. 143 provides that ‘the term migrant worker means a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account’. It is a moot point as to whether asylum seekers enter to escape persecution or to be employed; they may be moving across borders for both reasons. In the ILO supervisory system, it is made clear that ILO Convention 143 also applies to irregular workers.<sup>69</sup> The basic human rights that apply to migrant workers (as broadly understood) can be expected to correspond to what is provided for in the ILO fundamental Conventions and is recognised in international and regional human rights instruments.<sup>70</sup> Sweden has ratified ILO Convention No 143, but the UK has not done so.

A distinction between regular and irregular migration (which can be linked to the manner of entry to a state) is made in the United Nations (UN) Convention on the Protection of the Rights of all Migrant Workers and their Families 1990 (ICRMW) which indicates that some basic human rights are applicable to all workers irrespective of the regularity of their status set out in Part III, while those whose entry is illegal or who lack the lawful entitlement to work, cannot claim other rights (such as those specific to

<sup>66</sup>Ibid., [6–7].

<sup>67</sup>Ibid., [18 and 23].

<sup>68</sup>ILO, *Promoting Fair Migration: General Survey concerning the migrant workers instruments* (Geneva: ILO Report III (IB) Committee of Experts on the Application of Conventions and Recommendations, 2016), [275 et seq., 39–40 and 89]. See: [https://www.ilo.org/ilc/ILCSessions/previous-sessions/105/reports/reports-to-the-conference/WCMS\\_453898/lang--en/index.htm](https://www.ilo.org/ilc/ILCSessions/previous-sessions/105/reports/reports-to-the-conference/WCMS_453898/lang--en/index.htm).

<sup>69</sup>Ibid., [119–20]; and [274 et seq.]. International Labour Organization (ILO), *Protecting the Rights of Migrant Workers in Irregular Situations and Preventing Irregular Migration: A compendium* (Geneva: ILO, 2021), 13 et seq and 116 et seq.

<sup>70</sup>ILO n.68, [300].



employment) in Part IV.<sup>71</sup> Notably, this instrument has not been ratified by either Sweden or the UK, more likely due to the imposition of obligations in respect of irregular migrants in Part III than the lack of generosity in Part IV.<sup>72</sup> Still the ICRMW serves as a reference point in efforts to regulate the working conditions of asylum seekers in host states, at least ensuring most basic human rights protections when employed, even if there is no necessary right to work provision made for them.<sup>73</sup>

### C. Work for Asylum Seekers Under EU Law

A right to work for asylum seekers was included in the first Reception Directive 2003/9/EC,<sup>74</sup> one piece of the jigsaw puzzle to create a Common European Asylum System.<sup>75</sup> The other important facet of this system was the first Qualification Directive 2004/83/EC, which established ‘minimum standards for the qualification and status of third country nationals or stateless persons as refugees’ but also ‘subsidiary protection’ for those identified

<sup>71</sup>For discussion, see Judy Fudge, ‘Precarious Migrant Status and Precarious Employment: The paradox of international rights for migrant workers’ (2012–13) 34 *Comparative Labor Law and Policy Journal* 95; and Alan Desmond, ‘The Triangle that could Square the Circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review’ (2015) 17(1) *European Journal of Migration and Law* 39, 45.

<sup>72</sup>See the overview of the position of the EU Member States including at that time Sweden (at 84) and the UK (at 87) in René Plaetvoet and Marika Sidoti, *Ratification of the UN Migrant Workers Convention in the European Union: Survey on the position of the government and civil society actors* (Brussels: European Commission, 2010) at: [https://ec.europa.eu/migrant-integration/library-document/ratification-un-migrant-workers-convention-european-union-survey-positions\\_en](https://ec.europa.eu/migrant-integration/library-document/ratification-un-migrant-workers-convention-european-union-survey-positions_en). Further discussed in Petra Herzfeld Olsson, ‘The Role of Effective Enforcement in International Law on Labour Migration’ (2020) 17(1) *International Organizations Law Review* 206.

<sup>73</sup>Bernard Ryan, ‘In Defence of the Migrant Workers Convention: Standard Setting for Contemporary Migration’ in Satvinder S. Juss (ed.), *The Ashgate Research Companion Migration Law, Theory and Policy* (Aldershot: Ashgate, 2013), 491; Alan Desmond, Introduction: The continuing relevance of the UN ICRMW’ in Alan Desmond (ed.), *Shining New Light on the UN Migrant Workers Convention* (Pretoria: Pretoria University Law Press, 2017).

<sup>74</sup>Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, Article 11.

<sup>75</sup>For the historical background see Daniel Thym, *European Migration Law* (Oxford: Oxford University Press, 2023), 338 et seq and on the introduction of the Common European Asylum System see 341 et seq.

as being in need under international human rights law.<sup>76</sup> Those seeking asylum might be found to qualify for humanitarian assistance under the Qualification Directive, even if not as refugees.<sup>77</sup>

The aim of the Reception Directive was to provide asylum seekers with a ‘dignified standard of living and comparable living conditions in all Member States’.<sup>78</sup> A time limit was provided clarifying that if a first-instance decision of the asylum application had not been taken within a year and the delay could not be attributed to the applicant, the Member States should decide the conditions for granting access to the labour market for the applicant.<sup>79</sup> As we shall see, this is the norm that the UK continues to apply; although this is by virtue of current statutory requirements rather than ‘retained EU law’.<sup>80</sup> By way of contrast, Swedish access to work for asylum seekers currently far exceeds these minimum entitlements, but EU law will continue to set these baseline standards for Sweden as a member of the EU.

The Reception Directive has been revised once in 2013 and another revision is proposed by the Commission.<sup>81</sup> A major aim of these revisions is to narrow the margin of discretion given to the Member States and promote harmonisation.<sup>82</sup> Accordingly the Commission has been pushing to limit the time periods restricting access to the labour market.<sup>83</sup>

<sup>76</sup>Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. See also Hélène Lambert, ‘The EU Asylum Qualification Directive: Its impact on the jurisprudence of the United Kingdom and International Law’ (2006) 55(1) *International and Comparative Law Quarterly* 161.

<sup>77</sup>See Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). This directive was revised in 2013 (see below).

<sup>78</sup>Directive 2003/9/EC, Article 11.

<sup>79</sup>*Ibid.*, Article 11(2).

<sup>80</sup>*R (on the application of AAA (Syria) and others v Secretary of State for the Home Department* [2023] UKSC 42, 15 November 2023, [107 et seq].

<sup>81</sup>Commission Proposal for a directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (recast) COM(2008) 815 final; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast); and Commission Proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (Recast) COM (2016) 465 final.

<sup>82</sup>COM(2008) 815 final, 4.

<sup>83</sup>See further in Cunneiffe, n.27, 118 et seq.

The Commission's argument is that access to employment is beneficial both for the asylum seeker and the hosting Member State, facilitating integration, promoting self-sufficiency among asylum seekers and thereby also limiting costs on the State through the payment of additional social welfare payments. Links between labour market restrictions and illegal working have been acknowledged; risks of the latter and resultant labour exploitation are higher in Member States which create obstacles to access to the labour market, while granting very low welfare assistance to asylum seekers at the same time.<sup>84</sup> The terms of EU directives must also be read in light of the EU Charter of Fundamental Rights (EUCFR), such as the right to dignity (Article 1), the right to asylum (in Article 18) and the right to non-discrimination on the basis of race, colour and ethnicity (Article 21).<sup>85</sup> Interestingly the right to work and to equivalent working conditions for third-country nationals which is protected in Article 15(3) has not been mentioned by the Commission nor in the adopted Directives.

The significance of work has also been acknowledged by the Court of Justice of the European Union (CJEU) in 2021, which has observed that 'work clearly contributes to the preservation of the applicant's dignity, since the income from employment enables him or her not only to provide for his or her own needs, but also to obtain housing outside the reception facilities in which he or she can, where necessary, accommodate his or her family.'<sup>86</sup>

Other actors have been more reluctant to contemplate greater access to work of asylum seekers in a host state, with France, Germany and the UK expressing fears that reducing time limits would make it more difficult to eject asylum seekers.<sup>87</sup> Daniel Thym has described the tension as a 'clash of interests between, on the one side, migrant self-sufficiency and, on the other side, the minimisation of "pull" factors.'<sup>88</sup>

<sup>84</sup> COM(2008) 815 final, 4–5; Commission Proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (Recast) COM (2016) 465 final, 1, 4.

<sup>85</sup> COM(2008) 815 final, 7–8.; Directive 2013/33/EU, recital 35; COM (2016) 465 final, 9–10. See also Steve Peers, 'Immigration, Asylum and Human Rights in the European Union' in Sioaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Cheltenham: Edwards Elgar, 2017) 442, 444–6.

<sup>86</sup> *K.S., M.H.K v. The International Protection Appeals Tribunal, The Minister for Justice and Equality, Ireland, The Attorney General* (C.322/19) and *R.A.T., D.S v Minister for Justice and Equality* (C-385/19) 14 January 2021. ECLI:EI:C:2021:11, [69–72].

<sup>87</sup> Lieneke Slingenberg, 'Chapter 9, Reception Conditions for Asylum Seekers: Inherent Duality' in Evangelia Tsourdi, and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Cheltenham: Edward Elgar, 2022), 218.

<sup>88</sup> Thym n.75, 412.

In the new proposal currently presented by the Commission, the time period would in normal cases be 6 months and only 3 months if the lodging is likely to be well-founded.<sup>89</sup> This time it seems that the first part of the Commission's proposal (the 6-month rule) has gained the necessary support, although the final adoption of the new recast is not taken yet.<sup>90</sup> The proposed Article 15.3 would provide for equal treatment with nationals on terms of employment, freedom of association and affiliation and other rights which align it with provisions on equal treatment in the EU Charter of Fundamental Rights.<sup>91</sup> The aim behind this new proposal is to help to 'avoid distortions in the labour market and reduce employment-related asylum-shopping and incentives for secondary movements'.<sup>92</sup>

The EU is also notable for having taken some first steps towards provision of 'twin track' immigration routes, that is, enabling applications under both protective (such as asylum) and economic (labour) routes. After entry into force of the Amsterdam treaty, a number of labour migration directives were also adopted by the EU.<sup>93</sup> Yet, it was evident that the intention in early EU directives was not to open up a possibility for those applying for or having been granted international protection as a refugee or otherwise to change track and apply for any of the other available work permits. It did not matter whether this protection was based on EU or national rules.<sup>94</sup> However, a

<sup>89</sup>COM (2016) 465 final, 1, 4. See Lieneke Slingenberg, 'Political Agreement on a Recast Asylum Reception Conditions Directive: Continuation of Tents, Containment and Discipline?' in Daniel Thym (ed.), *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*, Schriften zum Migrationsrecht, Vol. 38 (Baden-Baden: Nomos, 2022), 269. For a critique of these time limits as being unrealistic see Enarnación La Soana, 'Reforming the Reception and Inclusion of Refugees in the European Union: Utopian or Dystopian Changes' (2022) 10(3) *Social Inclusion* 15, 17.

<sup>90</sup>Cunniffe n.27, 122–3. Slingenberg n.87, 269–70.

<sup>91</sup>See further Slingenberg n.87, 270 et seq; COM (2016) 465 final 1, 4.

<sup>92</sup>COM (2016) 465 final, 9–10.

<sup>93</sup>See, for example: Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment; Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers; Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

<sup>94</sup>See, for example, the original EU Blue Card Article 3(2) Council Directive 2009/50/EC and Article 3(2)(f)–(h) in the Single Permit Directive 2011/98/EU.

process of revision of these directives has been initiated. A new directive for highly qualified work (the EU Blue Card Directive) was adopted in 2021<sup>95</sup> and a revised Single permit directive is proposed and being negotiated.<sup>96</sup> In the new EU Blue Card Directive, one change is that beneficiaries of international protection of the basis of EU directive 2013/32, the Qualifications Directive, are no longer excluded,<sup>97</sup> although the applicants for such protection (for our purposes, asylum seekers) are still excluded.<sup>98</sup>

A similar exclusion of applicants and beneficiaries of international protection has been a feature of the Single Permit Directive.<sup>99</sup> However, it seems that the Commission's ambition to widen the scope of the directive has been overturned by the Council in its common position from June 2023.<sup>100</sup> It is as yet unclear what the outcome will be. In this context, the direction of travel within the EU seems to be to extend access to the right to work for refugees, reducing the time limits affecting the ability of asylum seekers to enter the labour market and envisaging a twin track process for work permits. Nevertheless, this is a gradual incremental process, which could still be halted depending on the constitution of the European Parliament and the next Commission.<sup>101</sup>

#### D. The Right to Work in the Council of Europe

In the Council of Europe, Article 1 of the European Social Charter 1961 (ESC)<sup>102</sup> (and the Revised Social Charter 1996)<sup>103</sup> protects a 'right to work',

<sup>95</sup> Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC.

<sup>96</sup> Proposal for a Directive of The European Parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) COM (2022) 655 final.

<sup>97</sup> EU Blue Card Directive (2021/1883/EU) Article 3.2; Tesseltje de Lange and Zvezda Vankova, 'The Recast EU Blue Card Directive: Towards a Level Playing Field to Attract Highly Qualified Migrant Talent to Work in the EU?' (2022) 24 *European Journal of Migration and Law* 489, at 496 and 499.

<sup>98</sup> Article 3(2)(a) and (b); see also de Lange and Vankova n.97, 500.

<sup>99</sup> Article 3(2)(g), in Directive 2011/98/EU.

<sup>100</sup> See [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_10464\\_2023\\_INIT](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_10464_2023_INIT); cf. COM (2022) 655 final, 10–11.

<sup>101</sup> Cf. Simon Hix and Bjørn Høyland, *The Political System of the European Union*, 4th edn. (Hart: Bloomsbury Publishing, 2022).

<sup>102</sup> Ratified by both Sweden and the UK in 1962.

<sup>103</sup> Ratified by Sweden in 1998; the UK has not ratified this instrument.

including an obligation ‘to protect effectively the right of the worker to earn his living in an occupation freely entered upon.’ This is significant in terms of the element of ‘freedom’ which accompanies this acknowledgement of the right and the capabilities of potential workers that this entitlement enables.<sup>104</sup> Further, as Simon Deakin has observed ‘the unifying idea in Article 1 is that of *a right to access the labour market*,’<sup>105</sup> which chimes with Cunniffe’s central concerns with both legal and practical obstructions.<sup>106</sup> Moreover, Article 1 when read in tandem with other provisions in the Social Charter indicates that work should not only be ‘accessible’ but ‘acceptable.’<sup>107</sup> If read together with the ICESCR, the argument can be made as the CESCR did that the work in question should be ‘decent work.’<sup>108</sup> There is no duty to work, however, under Article 1.<sup>109</sup>

However, the parameters and influence of a right to work remain disputed, especially as regards asylum seekers’ status in the labour market. Article 18 covers only the right of workers in one Contracting Party ‘to engage in a gainful occupation in the territory of other contracting Parties.’<sup>110</sup> This provision covers Ukrainian workers, given that Ukraine has signed and ratified the Revised Social Charter, but not many other refugees could claim rights under this provision, being from third countries. Article 19, which provides for ‘the right of migrant workers and their families to protection and assistance’ may be the more reliable source of recourse for them.<sup>111</sup>

The difficulty may be that there seems to be an expectation under Articles 18 and 19 ESC that residence in the host state must be lawful, if Charter rights are to apply.<sup>112</sup> While it seems probable that all stateless persons and refugees should be able to claim assistance under Article 19,<sup>113</sup> there remain questions regarding asylum seekers forced to forge papers or enter illegally in order to evade their current circumstances. On the one hand, the UNHCR

<sup>104</sup>Deakin n.31, 149. See also sources cited at n.39 above.

<sup>105</sup>Deakin n.31, 148.

<sup>106</sup>Cunniffe n.27.

<sup>107</sup>Deakin n.31, 150.

<sup>108</sup>Colm O’Cinnéide, ‘The Right to Work in International Human Rights Law’ in Mantouvalou n.19, 115. See discussion above of the CESCR Right to Work, General Comment No. 18, 24 November 2005 E/C.12/GC/18, [6–7].

<sup>109</sup>Deakin n.31, 150. Cf. Hepple n.35.

<sup>110</sup>*Digest of the Case Law of the European Committee of Social Rights* (Council of Europe, 2022), 157.

<sup>111</sup>Stefan Clauwaert, ‘Article 19: The Right of Migrant Workers and Their Families to Protection and Assistance’ in Bruun et al n.31.

<sup>112</sup>See European Union Agency for Fundamental Rights (FRA) *Handbook on European law relating to Asylum, Borders and Immigration* (FRA, 2020), 250.

<sup>113</sup>See Clauwaert n. 111, 345.

has recognised that such practices are inevitable for many needing to seek refuge in another country,<sup>114</sup> while a literal reading (such as that adopted by the Sunak government in the UK) would take the view that such persons enter illegally.<sup>115</sup>

The European Committee of Social Rights (ECSR) has been proactive in promotion of social security protections for refugees (especially asylum seeking children).<sup>116</sup> However, the ECSR position regarding access to the right to work for asylum seekers is unclear. Cathryn Costello and Colm O'Cinnéide have observed that the significance of the ESC provisions relating to a right to work are applicable to asylum seekers when read in tandem with the EU treaties, especially Article 151 of the Treaty on the Functioning of the European Union (which imports ESC norms) and Article 18 of the EUCFR (which creates a right to asylum).<sup>117</sup> This is a strong argument, but may have less sway in the UK post-Brexit. Moreover, the enforceability of the socio-economic rights protected under the ESC remains notoriously limited in the UK where the instrument has no direct legal effect.<sup>118</sup> For that reason, we take note also of emerging jurisprudence under the European Convention on Human Rights, which is implemented in the UK through the Human Rights Act 1998, and the ways in which the European Court of Human Rights (ECtHR) attributes social value to work.

The ECtHR has not been overly generous to those persons seeking asylum, finding in *Saadi v UK* that detention was permissible to enable authorities to 'quickly' and 'efficiently' determine a claim to asylum, in line with a determination to prevent 'unauthorised entry'.<sup>119</sup> However, recent ECtHR case law after *Denisov* has stressed that, while there is 'no general right to

<sup>114</sup>See UNHCR ns 62 and 63.

<sup>115</sup>See the UK Government, 'Illegal Migration Bill: overarching factsheet' updated 20 July 2023 available at: <https://www.gov.uk/government/publications/illegal-migration-bill-factsheets/illegal-migration-bill-overarching-factsheet>.

<sup>116</sup>Luis Jimena Quesada, 'Protection of Refugees and Other Vulnerable Persons under the European Social Charter' (2015) 92 *Journal of Political Law* 245..

<sup>117</sup>Cathryn Costello and Colm O'Cinnéide, *The Right to Work of Asylum Seekers and Refugees* (Brussels: ASILE Working Paper, 2021), 19–20. Available at: [https://www.asileproject.eu/wp-content/uploads/2021/07/CostelloOCinneide\\_RightToWorkASILE\\_10May2021.pdf](https://www.asileproject.eu/wp-content/uploads/2021/07/CostelloOCinneide_RightToWorkASILE_10May2021.pdf). See also this part, section C. above.

<sup>118</sup>Colm O'Cinnéide, 'The European Social Charter and the UK: Why it matters' (2018) 29(2) *King's Law Journal* 275, 282–5 on the lack of impact in the UK, although the ESC should matter.

<sup>119</sup>App no.13229/03, *Saadi v UK*, 29 January 2008, [77–80]; see Yiannis Ktistakis, *Protecting Migrants under the European Convention on Human Rights and the European Social Charter*, 2nd edn. (Strasbourg: Council of Europe, 2016), 26.



employment', Article 8 can be understood as the basis for a claim to employment, insofar as the workplace is viewed as an opportunity to establish and develop relationships and community, quite apart from the financial benefits that work can bring.<sup>120</sup> Where the state's actions have 'serious negative effects' as regards working life, there is scope for accountability under Article 8.<sup>121</sup> That principle has been understood in UK courts in the context of claims made to work permits to mean that 'where an individual is wholly or substantially deprived of the right to work altogether, Article 8(1) is at least arguably engaged'.<sup>122</sup> Of course, even then the interference with the Convention right can be justified under Article 8(2), with reference to the principle of proportionality but also a state's margin of appreciation.

In short, the approach taken by the ECtHR endorses the positive view of work highlighted above but currently imposes negligible limitations on state restrictions on the right to work. There are more extensive protections for workers whose immigration status is irregular, decided by the ECtHR under Article 4 of the ECHR, but these cases have not directly been concerned with issues of asylum but rather slavery, servitude and forced labour.<sup>123</sup> There is also promising case law on Article 14, suggesting that discrimination on grounds of migrant status and national origin will be inappropriate in terms of access to family reunification visas<sup>124</sup> and access to social security,<sup>125</sup> but it is harder to find any jurisprudence directly concerning the right to work of asylum seekers.<sup>126</sup>

The cautious approach of the ECtHR can be contrasted with the bolder of the Inter-American Court of Human Rights that: 'The migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment'.<sup>127</sup>

<sup>120</sup> App. No. 76639/11, *Denisov v Ukraine*, 25 September 2018, [100].

<sup>121</sup> *Ibid.*, [107–8 and 110–7].

<sup>122</sup> See App Nos 50421/08 and 56213/08 *Sidabras v Lithuania* 23 June 2015; principle applied in UK courts by *Husson v Secretary of State for the Home Department* [2020] EWCA Civ 329, [35–41]; cited in *Kulumbegov v The Home Office* [2023] EWHC 337 (KB), [29].

<sup>123</sup> App No. 73316/01 *Siliadin v France*, 26 July 2005; App No. 25965/04 *Rantsev v Cyprus and Russia*, 4 May 2010; App No. 4239/08 *CN v UK*, 13 November 2012; App No. 21884/15 *Chowdury v Greece*, 30 March 2017.

<sup>124</sup> App No. 38590/10, *Biao v Denmark*, 24 May 2016; and App no 22341/09 *Hode and Abdi v UK*, 6 November 2012.

<sup>125</sup> App No. 58453/00 *Niedzwiecki v Germany*, 25 October 2005; and App no 59140/00 *Okpiz v Germany*, 25 October 2005.

<sup>126</sup> *Costello and O'Cinnéide* n.117, 25–7.

<sup>127</sup> Inter-American Court of Human Rights, *Advisory Opinion OC-18/03 of 17 September 2003 Requested by the United Mexican States* available at: <https://www.unhcr.org/media/29525>, [134].

However, that said, this opinion also found no obligation to offer work to undocumented migrants.<sup>128</sup> Their labour rights only arose when they were actually engaged in work, in which context they could be protected from discriminatory treatment.<sup>129</sup> The 2019 Inter-American Commission on Human Rights Resolution did however go further, asserting ‘access on equal terms to just and favorable working conditions and to all labor rights’.<sup>130</sup> That combination of a positive entitlement to access decent work, as well as equality in terms and conditions, might seem extremely promising, but has yet to be replicated in the Council of Europe.

Bearing this context in mind, we go on to examine current features of British and Swedish treatment of the relationship between asylum seekers and work, which have been very different. However, we also seek to highlight how, in both countries, this relationship is changing, in ways which we consider are suggestive of a problematic alignment of approach.

### 3. COMPARING AND CONTRASTING BRITISH AND SWEDISH APPROACHES TO ASYLUM AND WORK

The most recent accessible UNHCR statistics record that, in November 2022, there were 231,597 refugees, 127,421 pending asylum cases and 5,483 stateless persons in the UK.<sup>131</sup> In Sweden, on 30 June 2022, there were 276,381 refugees, 14,131 asylum seekers and 46,515 stateless persons.<sup>132</sup> Notably, the population of the UK is 67 million and Sweden 10 million, so it is clear that the latter takes a larger proportion of refugees *per capita*. In this part, we seek to identify how asylum seekers’ access to work is treated within British and Swedish legal frameworks. We identify, in the UK, the attempt to prevent those seeking asylum from working until they gain full refugee status, or unless there is a substantial delay in their applications. In Sweden, those seeking asylum have been not only permitted but encouraged to work.

In this exercise, we do not claim to be able to identify discrete measures which are the functional equivalent of that in the other jurisdiction. We do

<sup>128</sup>Ibid, [135].

<sup>129</sup>Ibid., [136].

<sup>130</sup>Principle 36 of the Inter-American Principles on the Human Rights of all Migrants, Refugees, Stateless Persons and Victims of Human Trafficking (Resolution 04/19 approved by the Commission on December 7, 2019) available at: <https://www.oas.org/en/iachr/decisions/pdf/Resolution-4-19-en.pdf>.

<sup>131</sup><https://www.unhcr.org/uk/asylum-in-the-uk.html>.

<sup>132</sup><https://reporting.unhcr.org/document/3435>.

acknowledge that there may be quite different legal mechanisms by which comparable objectives are realised that are best set in their national context. In this respect, we are reminded of Otto Kahn-Freund's seminal article, which drew on Montesquieu's identification of 'environmental determinants of law', and the significance of different geographical and cultural locales. We accept also that we are examining the relationship of asylum seekers to work in two countries in the Global North. However, we do see this as a helpful beginning to larger scale problematisation of the issues which experiences in Sweden and the UK expose.

### A. British Restrictions on Access to Work for Asylum Seekers

UK law relating to asylum and refugee status has been based on the EU Reception and Qualification Directives, as well as the Refugee Convention and human rights instruments such as the ECHR, discussed above. It was therefore predicted that, despite Brexit, as a consequence there were unlikely to be substantial legal changes.<sup>133</sup> That prediction now seems overly optimistic, given the rapid enactment by a Conservative Government of the Nationality and Borders Act 2022, swiftly followed by the Illegal Migration Act 2023. The UK legal framework is currently in a state of flux, which perhaps reflects the dynamics of the past 20 years in which various governments have veered between different approaches, albeit with the same aim of placing restrictions on the right to work of asylum seekers to the extent this was legally and politically feasible.

Until 25 July 2002, asylum seekers could apply for the right to work if resident in the UK after waiting for the outcome of their application for asylum for 6 months or more.<sup>134</sup> A Labour Government then removed that entitlement, making clear that those who wished to enter the UK for economic reasons would have to pursue independent economic routes to migration in order to do so: there was to be 'a distinct separation between asylum processes and labour migration channels'.<sup>135</sup> The fear was that enhancing

<sup>133</sup> Gina Clayton and Georgina Firth, *Immigration and Asylum Law*, 9th edn. (Oxford: Oxford University Press, 2021), 378.

<sup>134</sup> Lucy Mayblin, 'Complexity Reduction and Policy Consensus: Asylum seekers, the right to work, and the "pull factor" thesis in the UK context' (2016) 18(4) *The British Journal of Politics and International Relations* 812, 815.

<sup>135</sup> *Ibid.*, 816 citing Beverley Hughes, HC Deb, 23 July 2002: c1041W.

the employment prospects of asylum seekers could operate as a ‘pull factor’, attracting a larger number of people to apply to the UK.<sup>136</sup> Despite doubt subsequently cast on this theory of ‘asylum shopping’, it still remains influential in the UK today.<sup>137</sup> Overall, UK policy on access to work for asylum seekers can fairly be described as ‘more restrictive than many comparable countries’.<sup>138</sup>

From 2002 to 2005, it remained possible for Home Office caseworkers to exercise discretion, granting permission to work in ‘exceptional cases’, although the House of Commons Library has been unable to find any ‘published policy on what those might be’.<sup>139</sup> In 2005, the UK government opted into the Reception Directive,<sup>140</sup> Article 11 of which led to a new rule that asylum seekers could apply for permission to work in the UK if they had been waiting for over 12 months for an initial decision on their case, but only if the delay was not the fault of the applicant.<sup>141</sup> The UK subsequently opted out of the EU Recast Directive of which would have led to a shorter time period being imposed.<sup>142</sup> The House of Lords in their proposed amendments to the Nationality and Borders Bill in 2022 sought to introduce a power to make regulations which would enable permission to take up employment if there is no decision on asylum status within 6 months. More importantly, their amendment would have ensured that such regulations would provide that employment would be on terms ‘no less favourable than the terms granted to a person with recognised refugee status’. That amendment was rejected by the government when the Bill returned to the House of Commons and no such regulatory powers are provided by the legislation.<sup>143</sup>

<sup>136</sup>Melanie Gower, CJ McKinney and Lulu Meade, *Asylum Seekers: The permission to work policy* (London: House of Commons Library, 2022), 5.

<sup>137</sup>*Ibid.* See Lucy Mayblin, ‘Imagining Asylum, Governing Asylum Seekers: Complexity reduction and policy making in the UK Home Office’ (2019) 7(1) *Migration Studies* 1; and Lift the Ban Coalition, *Lift the Ban: Why giving people seeking asylum the right to work is common sense* (London: Refugee Action, 2020), 8 available at: <https://www.refugee-action.org.uk/wp-content/uploads/2020/07/Lift-The-Ban-Common-Sense.pdf>.

<sup>138</sup>Gower et al n.136, 5.

<sup>139</sup>*Ibid.*, 9.

<sup>140</sup>See above text accompanying n.74 et seq. above.

<sup>141</sup>Mayblin n.134, 815.

<sup>142</sup>Gower et al n.136, 10 citing the Government’s reasons based again on an assumed ‘pull factor’ presented in HL Deb 3 June 2013 cWA101. See also above text accompanying n.81.

<sup>143</sup>See regarding the progress of this legislation, <https://bills.parliament.uk/bills/3023/publications>.

The 12-month rule continues to prevail.<sup>144</sup> Moreover, while the 12-month rule reflects the original requirements of the Reception Directive, the UK is no longer bound by its terms or those of the Qualification Directive, having introduced its own legislative provision for humanitarian protection for those who will be unable to meet the threshold of ‘refugee’ status by virtue of the Nationality and Borders Act 2022 and consequent changes to Part 11 of the Immigration Rules.<sup>145</sup>

In 2010, following a significant Supreme Court judgment,<sup>146</sup> the UK Immigration Rules were amended to include access to work for asylum seekers who submitted further representations after the initial refusal of their application.<sup>147</sup> At the same time, the then Coalition government introduced a shortage occupation list, which would limit the jobs that asylum seekers could take.<sup>148</sup> The current list made available online tends to require high skilled professional work, but also includes, for example, care work, so that there is now also a risk that asylum seekers can still be diverted into much needed but low-income occupations that may not reflect their actual skills and qualifications.<sup>149</sup> Those who are genuinely high skilled could apply at the outset for a skilled worker visa with a sponsoring employer, but the Home Office advice is that asylum seekers cannot change track in this way.<sup>150</sup>

Without access to work, asylum seekers are dependent on state support that is barely enough to live on. Where they are not detained pending proof of identity, the UNHCR notes that ‘[h]ousing is provided, but asylum-seekers cannot choose where it is, and it is often “hard to let” properties

<sup>144</sup> As set out in detail in *Guidance: Permission to work and volunteering for asylum seekers* (UK Visas and Immigration, 2023) available at: <https://www.gov.uk/government/publications/handling-applications-for-permission-to-take-employment-instruction/permission-to-work-and-volunteering-for-asylum-seekers-accessible#considering-permission-to-work-applications>.

<sup>145</sup> As set out in two Home Office documents, *Humanitarian Protection in Asylum Claims Lodged on or after 28 June 2022* (Home Office, 2023); and *Humanitarian Protection in Asylum Claims Lodged Before 28 June 2022* (Home Office, 2022). On the findings of the Supreme Court, *R (on the application of AAA (Syria) and others v Secretary of State for the Home Department* [2023] UKSC 42, 15 November 2023, [107 et seq.], regarding ‘retained EU law’ concerning asylum and immigration, see text accompanying n.80.

<sup>146</sup> *R (on the application of ZO (Somalia) and others) v Secretary of State for the Home Department* [2010] UKSC 36, 28 July 2010.

<sup>147</sup> Gower et al n.136, 9; Mayblin n.134, 815.

<sup>148</sup> Gower et al, n.136, 9–11. See also the *Guidance* at n.144 above.

<sup>149</sup> See empirical findings and implications for mental health discussed above at n.22.

<sup>150</sup> Kasia Janucik, ‘Can Asylum Seeker Apply for Skilled Worker (former Tier 2 General) Visa in the UK’ *Mondaq*, 7 July 2023.

which Council tenants do not want to live in.<sup>151</sup> Cash support is currently at the level of £47.39 (622.92 Swedish kroner or SEK) per person per week, but only £9.58 (125.92 SEK) if the accommodation provided serves ‘meals’. Further small allowances are provided in the event of maternity and for mothers with young children.<sup>152</sup> There is therefore a strong incentive to seek to supplement this income by pursuing some form of employment even when permission to work has not been granted.

Until 2016, working after having entered the country illegally, or when not entitled to do so according to the terms of one’s visa (eg, as an asylum seeker without permission to work), was not itself criminally actionable, although employers could be found criminally liable.<sup>153</sup> Nevertheless, working in breach of immigration restrictions could render unenforceable actions by a migrant worker against their employer, whether in tort or in contract. Notably, in 2004 in the case of *Vakante*, the Court of Appeal rejected a claim for racial discrimination brought by an asylum seeker against the school where he worked, because the claimant knew that he was not entitled to seek such employment.<sup>154</sup> The application of the common law illegality doctrine has since been modified with reference to a new public policy balancing exercise.<sup>155</sup> This is designed to address numerous incidences in which those workers with irregular or precarious migrant status are more likely to be subject to exploitation by their employers.<sup>156</sup> However, it still remains likely that statutory illegality, namely intentional breach of a statutory provision creating a criminal offence, would be understood to indicate Parliamentary intention to preclude recovery under a contract of

<sup>151</sup> See <https://www.unhcr.org/uk/asylum-in-the-uk.html#:~:text=What%20benefits%20do%20asylum-seekers%20receive%20in%20the%20UK%3F,sanitation%20and%20clothing.%20%28Source%3A%20Home%20Office%29%20How%20>.

<sup>152</sup> *Ibid.*

<sup>153</sup> See section 21 of the Immigration, Asylum and Nationality Act 2006, as now amended by section 35 of the Immigration Act 2016; but note limitations on effective implementation against employers and the ability of employers to evade liability by enabling immigration raids in their workplace. See Katie Bales, ‘Immigration Raids, Employer Collusion and the Immigration Act 2016’ (2017) 46 *ILJ* 279; and Judy Fudge, ‘Illegal Working, Migrants and Labour Exploitation in the UK’ (2018) 38 *Oxford Journal of Legal Studies* 557.

<sup>154</sup> *Vakante v Governing Body of Addey and Stanhope School (No 2)* [2004] ICR 231.

<sup>155</sup> See the evolution of case law from *Hounga v Allen* [2014] ICR 847 onwards to *Patel v Mirza* [2016] UKSC 42, [101]: ‘In assessing whether the public interest would be harmed by allowing the workers claims, it will be necessary to consider a) “the underlying purpose of the prohibition which has been transgressed” and b) whether “any other relevant public policies” have been rendered ineffective or less effective by denial of the claim and c) keeping a due sense of proportionality’.

<sup>156</sup> Cf. *Taiwo v Olaigbe and another* and *Onu v Akwivu and another* [2016] UKSC 3.

employment (eg, of unpaid wages),<sup>157</sup> and could very probably prevent a claim in tort. There is the possibility for a defence under section 45 of the Modern Slavery Act 2015 to operate with respect to an immigration offence, in a manner consistent with Article 4 of the ECHR.<sup>158</sup> However, the remit of this exception is likely to be very narrow.<sup>159</sup> The UK has opted out of the EU Sanctions Directive,<sup>160</sup> which would, for example, permit claims for backpay for work done by an asylum seeker without permission to work.

While illegal immigration has long been a criminal offence in the UK under section 24 of the Immigration Act 1971, and employers could be liable for hiring a person who did not have the right to work in the UK,<sup>161</sup> it was not until 2016 that legislation was adopted making a worker criminally liable for working in breach of immigration conditions. Section 34 of the Immigration Act 2016 created for the first time the offence of ‘illegal working’ for workers where a person knows, or has reasonable cause to believe, that he or she is not entitled to do so by reason of their immigration status. This was done by inserting section 24B into the Immigration Act 1971; and it is this statutory amendment which would seem to consolidate the lack of enforceable employment rights for an asylum seeker like *Vakante*.<sup>162</sup> The provision states that the person in question may be ‘disqualified from working’ because they do not have leave to enter or remain in the UK or their leave to do so is invalid, has ceased to have effect or is subject to a condition preventing the person from doing that kind of work. Engagement in such work may then lead an asylum seeker who lacks permission to work to be liable to up to 6 months imprisonment, a fine or both. ‘Working’ under section 24B(1) is very broadly defined, when compared to the ‘employment’

<sup>157</sup> *Okedina v Chikale* [2019] EWCA Civ 1393, per Underhill LJ delivering the leading judgment, and at [65] per Lord Justice Davies. Note approval of Underhill LJ’s analysis in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43, especially [75–8]. See also Alan Bogg, ‘*Okedina v Chikale* and Contract Illegality: New Dawn or False Dawn?’ (2020) 49(2) *ILJ* 258.

<sup>158</sup> App Nos 77587/12 and 74603/12 *VCL and AN. v. United Kingdom*, judgment of the ECtHR, 16 February 2021 (made final 5 July 2021).

<sup>159</sup> Virginia Mantouvalou, ‘The Modern Slavery Act 2015: Three years on’ (2018) 81(6) *Modern Law Review* 1017.

<sup>160</sup> Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (EU Sanctions Directive) OJ L 168, 30 June 2009.

<sup>161</sup> Immigration, Asylum and Nationality Act 2006, section 21, amended by section 35 of the Immigration Act 2016; see also n.153.

<sup>162</sup> A fourth version of the Code of Practice on Illegal Working was issued on 1 July 2021, post British exit of the European Union (Brexit).



required for an employer's offence under section 21 of the Immigration, Asylum and Nationality Act 2006 (as amended). In the meantime, indications are that illegal working in precarious forms continues to supplement the otherwise meagre income provided by the UK state for asylum seekers, with, for example, over-representation of this demographic in the 'gig' or 'platform' economy, such as food delivery couriers.<sup>163</sup>

There have been a recent spate of arrests relating to illegal working among delivery couriers, alongside detention and deportation of those who might otherwise be prosecuted.<sup>164</sup> Overall, rates of detention in the UK remain high, so that at the end of September 2022, 2,077 people remained in immigration detention in the UK, of which 1,383 (67%) had claimed asylum (either before or during detention).<sup>165</sup> Immigration detention is justified in the UK to establish identity, facilitate forcible removal or where there has been some breach of conditions attached to entry, such as unlawful working.<sup>166</sup>

The UK is currently different to Sweden in that once refugee or humanitarian protection leave is granted, that leave does not seem to be contingent on the ability to work; there is no express 'duty to work' imposed in this context. As Gina Clayton and Georgina Firth have observed:

In the cases where refugee status is granted, five years' leave to remain in the UK is granted. At the end of that period an application can be made for indefinite leave to remain, which is likely to be granted if there has been no significant change in the refugee's country of origin or circumstances and if they do not have a criminal record.<sup>167</sup>

Nevertheless, the paucity of UK social welfare provision is such that, even when applied equally to refugees and other British residents, it is

<sup>163</sup>Pedro Mendonça, Ian Clark and Nadia Kougiannou, "'I'm always delivering food while hungry': how undocumented migrants find work as substitute couriers in the UK" *The Conversation*, 4 May 2023. UK Government Press Release, 'Food Delivery Companies Urged to End Unchecked Account Sharing', 14 November 2023, available at: <https://www.gov.uk/government/news/food-delivery-companies-urged-to-end-unchecked-account-sharing>.

<sup>164</sup>This was apparently the response in approximately 15% of arrests made of delivery couriers working illegally January–July 2023. See Miriam Burrell, 'Scores of Delivery Riders Arrested in London this Year amid Clampdown on Illegal Workers' *The Standard*, 9 August 2023.

<sup>165</sup>According to UNHCR sources available at: <https://www.unhcr.org/uk/asylum-in-the-uk.html>.

<sup>166</sup>Katie Bales and Lucy Mayblin, 'Unfree Labour in Immigration Detention: Exploitation and coercion of a captive immigrant workforce' (2018) 47(2) *Economy and Society* 191, 194–5.

<sup>167</sup>Clayton and Firth n.133, 424. See the UK Immigration Rules, [339Q].

still usually necessary for those accepted as refugees to work and the terms on which they do so remain problematic, given ongoing issues regarding enforcement of labour standards in the UK. It is very difficult to secure decent work as a migrant worker, let alone enforce those rights.<sup>168</sup>

It should also be noted that a distinction is now drawn, by virtue of section 12 of the Nationality and Borders Act 2022, between Group 1 and Group 2 refugees, the latter being those who do not fulfil the requirements of having come to the United Kingdom ‘directly from a country or territory where their life or freedom was threatened entered’ and ‘having presented themselves without delay to the authorities’, but who can be said to have entered or to be present in the United Kingdom unlawfully and cannot ‘show good cause for their unlawful entry or presence’. These are the target of Rishi Sunak’s Conservative Government’s current ‘stop the boats’ policy, which aims at deportation to Rwanda as a safe country enabled by the Illegal Migration Act 2023.<sup>169</sup> The asylum seekers making up Group 2 might therefore never be expected to have access to work, except potentially in a detention centre with extraordinarily low rates of pay and poor terms and conditions.<sup>170</sup> The Government’s plans have now been challenged by the judgment of the Supreme Court to the effect that Rwanda cannot be regarded as a ‘safe country’ given UNHCR evidence,<sup>171</sup> but the statement made in response by Sunak indicates that there will be an attempt to work around these restrictions.<sup>172</sup> What form any supplementary legislation or further measures may involve remains uncertain at the time of writing.

<sup>168</sup> At the UK Government’s own admission, see Government Plans for a ‘Single Enforcement Body’ in 2021, which were not eventually pursued at: <https://assets.publishing.service.gov.uk/media/60be1b47e90e0743a210de29/single-enforcement-body-consultation-govt-response.pdf>. See also on the experience of migrant workers seeking to enforce labour standards, Nicole Busby, Morag McDermont, ‘Fighting with the Wind: Claimants’ Experiences and Perceptions of the Employment Tribunal’ (2020) 49(2) *ILJ* 159.

<sup>169</sup> See Morgan and Willmington n.14 above.

<sup>170</sup> See Bales and Mayblin n.166; Virginia Mantouvalou, *Structural Injustice and Workers’ Rights* (Oxford: Oxford University Press, 2023), 64 et seq.

<sup>171</sup> *R (on the application of AAA (Syria) and others v Secretary of State for the Home Department* [2023] UKSC 42, 15 November 2023.

<sup>172</sup> PM remarks on Supreme Court Judgement: 15 November 2023, available at: <https://www.gov.uk/government/speeches/pm-remarks-on-supreme-court-judgement-15-november-2023>.

## B. Swedish Employment for Asylum Seekers but with Insufficient Safeguards

The right of asylum seekers to work in Sweden is not recent, but dates from 1992 when it was decided that it would be preferable for them (as for all Swedish citizens) to take responsibility for supporting themselves and their families. Making the migrant less passive was regarded as important for their future.<sup>173</sup> A long waiting period before granting approval to work was also considered to cause the society unnecessary costs and could give the Swedish public a negative view of asylum seekers.<sup>174</sup> A new principle would accordingly govern the reception of the asylum seeker: 'Every asylum seeker should in accordance with their abilities take responsibility for their and their families support and housing'.<sup>175</sup> However, very few asylum seekers worked on the open labour market. Of those entitled to work only about 5 % did so.<sup>176</sup> In order to increase participation, a 4-month 'quarantine' period was abolished in 2010.<sup>177</sup>

The importance of a right to work as an asylum applicant is presently reflected on the Migration Agency's website.<sup>178</sup> The message is the following: 'It is important that you can support yourself. If you do not earn your own money and you do not have some other resources, you can apply for financial support from the Migration Agency'.<sup>179</sup> The financial support provided is minimal. The daily allowance for an adult differs from 24 SEK to 71 SEK (£2–5.50) depending on whether the accommodation provided by the authorities also provides for food or not. No more money is provided if the migrant decides to find their own housing.<sup>180</sup>

In 2008, the Swedish government opened up the possibility for asylum seekers denied asylum to change track and apply for a work permit from

<sup>173</sup>Legislative Bill 1990/90:195, 108, Parliamentary committees, 1990/91: SfU13 and 1991/92:SfU11 and Legislative Bill 1993/94:94, 33 et seq. See further Dominika Borg Jansson 'Asylsökande och rätten att arbeta' in Catharina Calleman and Petra Herzfeld Olsson (eds) *Arbetskraft från hela världen – Hur blev det med 2008 års reform?* (Stockholm: Delmi, 2015:9), 333–55.

<sup>174</sup>Legislative Bill 1993/94:94, 36–7.

<sup>175</sup>Legislative Bill 1993/94:94, 25.

<sup>176</sup>Catharina Calleman, 'Byta spår'—ett nålsöga mellan asyl och arbete' in Calleman and Herzfeld Olsson n.173, 295.

<sup>177</sup>Regulation adopted 10 June 2010 (SFS 2010:607).

<sup>178</sup>See <https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/While-you-are-waiting-for-a-decision/Financial-support.html>.

<sup>179</sup>Ibid.

<sup>180</sup>See <https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/While-you-are-waiting-for-a-decision/Accommodation/Your-own-accommodation.html>.

within Sweden, if they had been working for a specific period of time (6 months, now 4 months), the working conditions previously applied were in accordance with the collective agreement or custom in the sector, and the applicant was still in employment which would last for at least another year.<sup>181</sup> This new possibility was part of a huge reform. The Swedish rules on labour migration from countries outside the European Economic Area (EEA) for so-called ‘third country nationals’ changed radically in 2008. The system went from being strictly regulated, based on labour market tests conducted by the Swedish Employment Agency, to being dependent on whether an individual employer wishes to recruit a worker from abroad. No labour market tests are now carried out. The aim of the change was to facilitate recruitment of workers from third countries and to satisfy employers’ labour needs both more fully and more quickly.<sup>182</sup>

The possibility to change track (from asylum to work) was supported by trade unions and employers’ organisations but criticised by others.<sup>183</sup> The importance of keeping the right to asylum and the labour migration regime apart was, for example, emphasised by the appointed inquiry.<sup>184</sup> However, the government pointed to the common sense approach that a suitably qualified applicant for a job should not have to leave the country and apply from abroad to meet formal requirements for a work permit, with all the inconvenience for the asylum seeker and delays for the employer which that would entail.<sup>185</sup>

One important requirement for changing track was (and is) that the working conditions during the asylum application process would be the same as those required for being approved a work permit. This means that terms and conditions of employment should accord with the collective agreement or custom applicable in the sector, mandating equality so that asylum seekers cannot be offered working conditions worse than those applicable to workers already established in Sweden.<sup>186</sup>

Changing track will lead to a temporary work and residency permit. All Swedish work permits are since 2008 issued on a temporary basis. They can last as long as the employment, but for a maximum of 2 years, and can then be extended. For the first 2 years, the work permit is connected to a specific

<sup>181</sup> Legislative Bill 2007/08:147, 48; Legislative Bill 2013/14:213, 30 et seq.

<sup>182</sup> Legislative Bill 2007/08:147, 1 and 25–6.

<sup>183</sup> See Calleman n.176.

<sup>184</sup> Government inquiry report SOU 2006:87, 208 et seq.

<sup>185</sup> Legislative Bill 2007/08:147, 47 et seq.

<sup>186</sup> Legislative Bill 2007/08:147, 27.

employer and a specific occupation. After 2 years, it is connected only to a specific occupation.<sup>187</sup> After 4 years of legal work, it is possible to apply for a permanent residence permit. If the labour migrant loses their employment, or does not start the job, the permit is revoked. The labour migrant does however have the right to stay for 3 months to try to find a new employment and any public support is limited to this period.<sup>188</sup>

The ordinary labour migration system has however been used by unscrupulous employers and has led to labour exploitation in the sense identified by Mantouvalou.<sup>189</sup> The problems mainly occur in the low-skilled service sector.<sup>190</sup> The measures taken have been insufficient to prevent exploitation and are widely discussed by scholars. Temporariness, as well as tying the work permit to a specific employer, are well-known vulnerability facilitators.<sup>191</sup> Recent reports have also indicated that the system of track change and those migrants' vulnerable position in the society has been exploited by unscrupulous or (as they are described in Sweden) 'unserious' employers.<sup>192</sup> The Swedish labour market system, which depends on trade union membership and coverage of collective agreements to provide safeguards, does not enable ready scrutiny of treatment of these asylum seekers who have changed track and are unlikely to be members.<sup>193</sup>

The applications for changing track have increased and now stand at about 2,000–3,000 per year.<sup>194</sup> The approved applications are concentrated on the low skilled service sector and in particular unqualified work in restaurants, shops, ware houses and as cleaners, carpenters and chefs.<sup>195</sup> Studies have also shown that the majority of applicants were refused because the

<sup>187</sup> Aliens Act (2005:716) ch 6 s 2a.

<sup>188</sup> Legislative Bill 2007/08:147, 33.

<sup>189</sup> Mantouvalou n.25.

<sup>190</sup> See, for example, National Audit Office 2020: 27, *Government initiatives to combat labour exploitation—regulations, inspections, information and support to victims*; and Iossa and Selberg n.33.

<sup>191</sup> See, for example, Anderson n.4; Palumbo n.33, 298–9.

<sup>192</sup> Swedish National Audit Office 2020: 27, n.190, 16. Another report from the National Audit Office has detected deficiencies in terms of controls and follow-up which leads 'a risk that sham employment and misuse go undetected, and that vulnerable people are exploited by unscrupulous employers', Swedish National Audit Office, RIR 2022:21 *Spårbyte i migrationsprocessen—kontroller och uppföljning*, 5.

<sup>193</sup> Iossa and Selberg n.33; Petra Herzfeld Olsson, 'The Same, Only Different: How to Make Swedish Labour Law Work for Labour Migrants' in Bernard Ryan and Rebecca Zahn (eds), *Migrant Labour and the Reshaping of Employment Law* (London: Bloomsbury, 2023), 58 et seq.

<sup>194</sup> Swedish National Audit Office, RIR 2022:21 n.190, 5.

<sup>195</sup> Government decision 30 June 2022, Instructions for inquiry (Dir. 2022:90) *En behovsprövad arbetskraftsinvandring*, 8. See also similar results from earlier studies Calleman n.176, 307.

previous work or working conditions did not fulfil the working condition requirements or length of employment.<sup>196</sup> The Swedish National Audit Office has scrutinised the system. They detected grave deficiencies in terms of controls and follow-up and observed that the system to change track can be used to circumvent legislation on asylum and labour immigration. They summarised their conclusions in the following way:

The consequences of deficiencies in the control activities include a risk of wage dumping, that sham employment goes undetected, that vulnerable people are exploited in the labour market, and that people who do not meet the criteria for changing tracks can still be granted residence and work permits. Ultimately, there is also a risk of people losing confidence in the system.<sup>197</sup>

The government took these results as an additional reason to abolish the system, which they have now prepared to do.<sup>198</sup>

Sweden was known as having generous provision for those seeking asylum, but that changed after the refugee crisis of 2014–15 when numbers reached more than 163,000 in a year.<sup>199</sup> This ‘system collapse’ led to the tightening of entry, and the ‘sharpening’ of policy in a new Temporary Law placing further restrictions on obtaining a residence permit in Sweden, even as an asylum seeker,<sup>200</sup> which has since been made permanent in July 2021.<sup>201</sup>

<sup>196</sup> Calleman n.176, 317.

<sup>197</sup> Swedish National Audit Office, RIR 2022:21 n.192, English summary, 2, [https://www.riksrevisionen.se/download/18.1fb813a51866e3987c745d6/1676896219596/RiR\\_2022\\_21\\_summary.pdf](https://www.riksrevisionen.se/download/18.1fb813a51866e3987c745d6/1676896219596/RiR_2022_21_summary.pdf)

<sup>198</sup> Government’s written communication 2022/23:63 *Riksrevisionens rapport om spårbyte i migrationsprocessen – kontroll och uppföljning*.

<sup>199</sup> Rebecca Thorburn Stern, ‘Proportionate or Panicky: On developments in Swedish and Nordic Asylum Law in Light of the 2015 “Refugee Crisis”’, in Vladislava Stoyanova and Eleni Karageorgiou (eds), *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis* (Leiden: Brill, 2018), 237. Ildikó Asztalos Morell and Mehrdad Darvishpour, ‘The Securitization of Asylum Seeking in Sweden after 2015 in Light of Experiences of Asylum-seeking Girls with Roots in Afghanistan’ in Dina Siegel and Veronika Nagy (eds), *The Migration Crises? Criminalization, security and survival* (The Hague: Eleven, 2018), 363–88.

<sup>200</sup> Torun Elsrud, ‘Resisting Social Death with Dignity: The strategy of re-escaping among young asylum-seekers in the wake of Sweden’s sharpened asylum laws’ (2020) 23(3) *European Journal of Social Work* 500, 501–3.

<sup>201</sup> Lagen (2016:752) om tillfälliga begränsningar att få uppehållstillstånd i Sverige (Den tillfälliga lagen) 17 §, these provisions have been provisional but are permanent from 20 July 2021, see Legislative Bill 2020/21:191 Ändrade regler i utlänningslagen, Government’s communication 2020/21:412; Catharina Calleman, ‘Rätt till arbete, arbetsrätt och försörjningskrav för asylsökande’ in Kerstin Ahlberg, Petra Herzfeld Olsson and Jonas Malmberg (eds), *Niklas Bruun i Sverige, En vänbok* (Uppsala: Iustus, 2017), 52–4.

Migrants with a recognised need of protection are divided into two groups: refugees and migrants eligible for subsidiary protection. A refugee is someone who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.'<sup>202</sup> Refugees can first only be admitted on a temporary residence permit lasting for a maximum 3 years as asylum seekers, but this will not be tied to a particular employer. It is possible to apply for a permanent residence permit after that period, if specific conditions explained below are fulfilled.

Migrants eligible for subsidiary protection, meaning that the general situation in their country pose a threat<sup>203</sup> should be granted a temporary permit lasting 13 months, again not tied to a particular employer. Another temporary permit can then be granted lasting 2 years. They can also apply for a permanent permit after 3 years if the following criteria are fulfilled.

Firstly, to get a permanent residence permit as a refugee and a person eligible for subsidiary protection, a requirement is imposed to be able to support oneself at a certain level of income based on employment or one's own business.<sup>204</sup> In order to support oneself it is necessary, after taxes and payment for the rent, to have left 5,717 SEK for the month (or approximately £434).<sup>205</sup> The employment must be either permanent or, if fixed term, last at least 18 months.<sup>206</sup>

It is nowadays in general a requirement for Swedish permanent residence to be able to support oneself through work. The main exception applies to so-called 'UNHCR-refugees', who are resettled to Sweden through a specific UNHCR mechanism. Sweden previously admitted about 5,000 UNHCR-refugees each year. The new government has proposed to decrease the number to 900 for 2023. They are entitled to immediate permanent residence.<sup>207</sup> The maintenance requirement is also relevant to family reunification. If the application for family

<sup>202</sup>Article 1 A 2. 1951 Refugee Convention. See the Qualification Directive (recast) Directive 2011/95/EU, article 2(d).

<sup>203</sup>See the Qualification Directive (recast) Directive 2011/95/EU, article 2(f).

<sup>204</sup>Legislative Bill 2020/2021:191, 68–9.

<sup>205</sup><https://www.migrationsverket.se/Privatpersoner/Skydd-och-asyl-i-Sverige/Forlanga-tillstand/Sarskilda-krav-for-permanent-uppehallstillstand.html>.

<sup>206</sup>Ibid.

<sup>207</sup><https://www.migrationsverket.se/English/About-the-Migration-Agency/Our-mission/The-Swedish-resettlement-programme.html>.



reunification is done more than 3 months after the sponsor has been granted a residence permit, the sponsor must be able to support himself or herself and the family through work and to provide a decent housing for the family.<sup>208</sup> From 1 December 2023, the 3-month rule is abolished for migrants provided with subsidiary protection and the maintenance requirement will as a main rule apply from day one.<sup>209</sup> It has been questioned whether such strict provision is compatible with Article 8 of the ECHR. An answer to that question is expected from the ECtHR in the pending case, *Dabo v Sweden*.<sup>210</sup>

As in the UK, it is a criminal offence for third-country nationals to stay or to work in Sweden without the necessary permits, and a criminal offence to employ a foreigner without the necessary permits.<sup>211</sup> The sanctions for working or entering without the necessary permit are usually fines.<sup>212</sup> Niklas Selberg has convincingly been arguing for the elimination of the particular crime, illegal work, on principled grounds.<sup>213</sup> Nevertheless, it is quite rare that irregular workers get prosecuted on this basis. The major risk for irregular workers is expulsion.<sup>214</sup> If entering illegally, a prison sentence up to 12 months is only available if the foreigner is entering in breach of a deportation order including a prohibition to re-enter,<sup>215</sup> or if illegally entering outer Schengen borders.<sup>216</sup>

The penalty for intentionally or negligently employing an irregular worker can be a fine or, if there are aggravating circumstances, imprisonment for a maximum of 1 year.<sup>217</sup> Negligent behaviour could be at stake when the employer does not check whether the foreign worker has the necessary permits for work.<sup>218</sup> Aggravating circumstances apply when there is a profit-making purpose behind the employment of the irregular worker, or when the employer operates on a large scale, meaning that they employ a large number of irregular workers.<sup>219</sup> Fines can be imposed under administrative and/or criminal law.

<sup>208</sup> Legislative Bill 2020/20:91 Ändrade regler i utlänningslagen, 68–9, 168–9, 104 et seq. Government's communication 2020/21:412.

<sup>209</sup> <https://www.migrationsverket.se/Om-Migrationsverket/Pressrum/Nyhetsarkiv/Nyhetsarkiv-2023/2023-11-10-Skarpta-villkor-for-anhoriginvandring.html>.

<sup>210</sup> App. No. 12510/18 *Dabo v Sweden*, lodged on 6 March 2018.

<sup>211</sup> Aliens Act (2005:716) ch 20 ss 1, 3 and 5.

<sup>212</sup> Aliens Act (2005:716) ch 20 ss 1 and 3.

<sup>213</sup> Niklas Selberg 'Om kriminalisering av papperslösas arbete och argumenten för att avskaffa den' in Calleman and Herzfeld Olsson n.173, 364.

<sup>214</sup> Aliens Act (2005:716) ch 8 s 6.

<sup>215</sup> Aliens Act (2005:716) ch 20 s 2.

<sup>216</sup> Aliens Act (2005:716) ch 20 s 4.

<sup>217</sup> Aliens Act (2005:716) ch 20 s 5.

<sup>218</sup> Legislative Bill 2003/04:34, 84.

<sup>219</sup> Legislative Bill 1975/76:18, 145 and the Appeal Court Judgment *Svea HovR RH* (2013) No 7.

Work has thereby become the entry ticket to Swedish society, for labour migrants on a temporary basis and for refugees and asylum seekers eventually on a more permanent basis. This may be preferable to the UK situation where asylum seekers have been prevented from gaining access to employment. However, it means that there are many people with either temporary residence in Sweden with no option than to take any work available if they wish to stay on a longer term basis, as long as this gets them over the bare income threshold needed. Or, if their application for asylum is rejected, they must find a route to official residence through working in any case, which involves finding sponsorship by an employer. Should these migrants lose their jobs, they may be forced into irregular working to stay in the country, which may make them more vulnerable. This makes imperative corrective measures by the Swedish state to prevent labour exploitation in relation to asylum seekers and other migrants.<sup>220</sup> This issue has also been the subject of a recent Commission of Inquiry.<sup>221</sup>

However, with the recent change of Government, the aim is less to prevent exploitation of refugees and asylum seekers, as well as other migrant workers, and instead to block their access to Sweden and the Swedish labour market, an aim that already to some extent was shared and pursued by the previous government.<sup>222</sup> It was the previous government that appointed an inquiry with the task to propose how to reintroduce labour market tests and remove the possibility to change track.<sup>223</sup> So far it has been decided to increase the wage threshold for labour migrants from £988 (13,000 SEK) to £2,019 (27,360 SEK, 80% of the Swedish median wage).<sup>224</sup> This is the first step to direct the labour migration system to highly qualified labour migration.

<sup>220</sup>The basis for such protection is the Swedish Aliens Act: Legislative Bill 2007/08:147, 27. Aliens ordinance (2006:97) ch 6 s 6a; and note the significance of the EU Sanctions Directive n.160 above. See Government Inquiry Report, SOU 2010:63, 107; Legislative Bill 2012/13:125, 41–2. Note also the role played by the Migration Agency.

<sup>221</sup>Instructions Dir. 2020:8 for a Commission of Inquiry on measures to attract international competence and discourage exploitation of labour migrants.

<sup>222</sup>Government inquiries have been given the task to propose how to stop the possibility to change track, Dir 2022:90 En behovsprövad arbetskraftsinvandring; the Government has promised to investigate possibilities to decrease asylum seekers' right to work, Tidöavtalet n.15. The government has decided to increase the wage threshold for labour migrants to restrict the possibility for low skilled labour migrants to enter: Government Memorandum: *Promemoria Ett höjt försörjningskrav för arbetskraftsinvandrare*, 2023-05-04.

<sup>223</sup>Instruction to government inquiry — Dir 2022:90 En behovsprövad arbetskraftsinvandring

<sup>224</sup>Government Memo: *Promemoria Ett höjt försörjningskrav för arbetskraftsinvandrare*, 2023-05-04, The new wage threshold entered into force 1 November 2023, <https://www.regeringen.se/pressmeddelanden/2023/09/forsorjningskravet-for-arbetskraftsinvandrare-hojs/>.

## 4. CONCLUSION

Page 39 of 40

shape in the UK and Sweden. Historically, these countries of the Global North have adopted policies which, in their own distinctive ways, cannot be wholly construed as welcoming.

The UK has sought to deter large numbers of asylum seekers by barring them from gainful employment, leading to irregular forms of precarious employment, criminalising those who work without permission. Sweden has not so much banned work as moved towards an instrumental economic expectation of labour market productivity, including from refugees, asylum seekers and other 'protected persons'. Their capacity to settle in Sweden is thereby linked to their capacity to work. That policy stance did have to be reinforced with certain protections against labour exploitation of migrant workers, which we would consider superior to the UK situation where irregular or 'illegal' work leaves asylum seekers without 'decent work' or equal labour rights.

However, there is now a dangerous alignment between Swedish and UK policy which we have observed. The current UK government is seeking to block access to refugee status (and thereby access to the UK labour market) for any asylum seeker entering the country 'illegally'. In Sweden, a new government is seeking to block any access to work for asylum seekers including the right to change track from the asylum process to the labour migration route and to focus labour migration on highly skilled workers. A once permissive but market-oriented approach to inclusion of asylum seekers in the labour market seems to be coming to an end, even if EU law will hinder a total abolition of access to work.

We recognise that, formally speaking, the migration laws relating to refugees and labour migrants are conceptually distinct. There does remain a comprehensive international legal framework, which governs the right to seek asylum when crossing borders for political reasons, which is not the case when crossing the border for purely economic reasons. There do remain good reasons for prioritising humanitarian care alongside access to work for those needing to seek asylum.

We are concerned that, in a climate when high income countries have decided to restrict the entry of refugees to a minimum, prevent irregular migration, prioritise highly qualified labour migrants and find ways to combine these interests, the humanitarian perspective is continuously losing ground and new vulnerabilities are created. When the national economic interest governs the measures taken and work becomes the key to entry and stay also for those in need of protection, new risks for exploitation must not be ignored.