

Migrant Work, Gender and the Hostile Environment: A Human Rights Analysis

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ABSTRACT

This article addresses work-related and gendered harms of the ‘hostile environment’, a set of measures implemented through the Immigration Acts of 2014 and 2016, which aims to make life in the UK impossible for irregular migrants. The hostile environment criminalises work without legal status, facilitates data sharing between public bodies and immigration enforcement, and restricts access services and benefits. The article examines factors that can make women susceptible to irregularity and exposure to hostile environment measures, and distinctive forms of gendered harm such as workplace sexual harassment. It argues that the detrimental impacts of the hostile environment contravene international and regional human rights obligations. Barring certain migrants from access to the labour market may violate the socio-economic right to work and/ or the right to private and family life, while a lack of access to legal remedy or labour inspection fuelled can violate migrants’ right to decent work and undermine protections against forced labour. The UK’s recent ratification of the Council of Europe’s ‘Istanbul Convention’ and ILO Convention 190 on violence and harassment at work signifies a renewed commitment to safeguarding women regardless of migration status, but the universalistic potential of these instruments is undermined by the hostile environment’s continued operation.

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1. INTRODUCTION

In a now infamous 2012 interview, Home Secretary Theresa May declared her intention to create a ‘really hostile environment’ for ‘illegal’ migrants in the UK, in order to avoid ‘a situation where people think they can come here and overstay because they’re able to access everything they need’.¹ This signalled a move to increasingly draconian restrictions on the ability to live, work and access services and benefits for individuals who could not prove their legal status in the UK, pejoratively referred to as ‘illegal migrants’ in official discourse. After the 2018 Windrush scandal, these restrictions were rebranded as the ‘compliant environment’ but remained largely intact, continuing to impact access to work, private renting, public funds, health services, banking and driving.² Since the rebranding of policies as the ‘compliant environment’ did not amount to a change of substance,³ this article uses the term ‘hostile environment’.

Many have rightly noted the pronounced impact of the hostile environment on ethnic minority communities and individuals, including those beyond the purported target of irregular migrants.⁴ Another crucial area of enquiry that has received less attention is its gendered implications.

¹James Kirkup and Robert Winnett, ‘Theresa May Interview’ *The Telegraph* (25 May 2012) <<https://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Weregoing-to-give-illegal-migrants-a-really-hostile-reception.html>> accessed 7 November 2022.

²Franck Düvell, Myriam Cherti and Irina Lapshyna, ‘Does Immigration Enforcement Matter (DIEM)? - Irregular Immigrants and Control Policies in the UK’ (COMPAS, University of Oxford 2018) 8; Home Office, ‘A Review of External Evidence of the Compliant Environment: Literature Synthesis of External Evidence and Best Use of International Examples’ (GOV.UK, 9 February 2023) <[https://www.gov.uk/government/publications/a-review-of-external-evidence-of-the-compliant-environment-literature-synthesis-of-external-evidence-and-best-use-of-international-examples](https://www.gov.uk/government/publications/a-review-of-external-evidence-of-the-compliant-environment-literature-synthesis-of-external-evidence-and-best-use-of-international-examples/a-review-of-external-evidence-of-the-compliant-environment-literature-synthesis-of-external-evidence-and-best-use-of-international-examples)> accessed 24 July 2023.

³House of Commons Home Affairs Committee, ‘The Windrush Generation - Sixth Report of Session 2017–19’ (House of Commons 2018) HC 990 [85]; RAMFEL, ‘The Hostile Environment Remains in Place - A Study of How Thousands of Lawfully Resident Migrants Are Wrongly Deprived of Their Rights Each Year: (The Refugee and Migrant Forum of Essex and London (RAMFEL) 2022) 5. See also section 2(a).

⁴E Tendayi Achiume, ‘Visit to the United Kingdom of Great Britain and Northern Ireland - Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance’ (UN Human Rights Council 2019) A/HRC/41/54/Add.2 [57]; Wendy Williams, ‘Windrush Lessons Learned Review’ (House of Commons 2020) HC 93; Shreya Atrey, ‘Structural Racism and Race Discrimination’ (2021) 74 *Current Legal Problems* 1, 15.

While valuable studies on women and the hostile environment exist,⁵ they are limited in number and are not focused primarily on work-related matters. This article thus makes a distinctive contribution through a focus on work-related and gendered harms of the hostile environment and their human rights implications, drawing on legislation, grey literature including government-commissioned and NGO reports, and academic studies. It examines factors that can make women susceptible to becoming irregular and therefore subjected to hostile environment measures, as well as specific forms of gendered harm and violence in and related to the workplace. It argues that the hostile environment has significant detrimental impacts on migrant workers, especially those with irregular status, with particular areas of vulnerability for women, and that these impacts and failings in protection contravene international and regional human rights obligations.

The article's next section outlines the main provisions of the post-2012 'hostile environment', and problematises the assumption that these measures affect only a discrete group of irregular or 'illegal' migrants. It explores how workplace related measures like criminalising work without status, and data sharing between labour inspection and immigration enforcement agencies, damage migrant workers' protection and fuel susceptibility to exploitation. Section three examines gendered factors that interact with the hostile environment and work, including visa statuses and labour market positioning that can make women more susceptible to irregularity and to workplace violations, as well as specific forms of harm such as sexual harassment.

The final section analyses the identified impacts of the hostile environment against the UK's regional and international human rights obligations. It addresses how barring certain migrants from access to the labour market may violate the socio-economic right to work and/ or the right to a private and family life and considers how poor working conditions, and a lack of access to legal remedy or labour inspection, can breach migrants' right to decent work and undermine protections against forced labour. It also

⁵See Cathy McIlwaine, Lucila Granada and Illary Valenzuela-Oblitas, 'The Right to Be Believed: Migrant Women Facing Violence Against Women and Girls (VAWG) in the "hostile Immigration Environment" in London' (King's College London and the Latin American Women's Rights Service 2019); Adrienne Yong and Sabrina Germain, 'Ethnic Minority and Migrant Women's Struggles in Accessing Healthcare during COVID-19: An Intersectional Analysis' (2022) 26 *Journal for Cultural Research* 65; Zrinka Bralo, 'Migrant and Refugee Women in the Hostile Environment Immigration System: Deliberately Silenced and Preferably Unheard' (2022) 93 *Political Quarterly* 69; Monish Bhatia, 'Reproductive Injustice in Britain: Punishing Illegalized Migrant Women from the Global South and Separating Families' (2022) 30 *Cultural Studies in Culture and Power* 471.

analyses human rights provisions on gender-based violence and harassment, with a focus on two specialist instruments recently ratified by the UK on violence against women (The Istanbul Convention)⁶ and violence and harassment at work (ILO Convention 190).⁷ While these ratifications signify a renewed commitment to protecting women from violence in the workplace and beyond, the article argues that this is undermined by the ongoing operation of the hostile environment.

2. THE 'HOSTILE ENVIRONMENT', IRREGULAR STATUS AND WORK

A. Understanding the Hostile Environment and Irregular Migration

The hostile environment comprises measures implemented through the Immigration Acts of 2014 and 2016, secondary legislation, guidance documents and operational measures, seeking to make it impossible for irregular migrants to live, work and access services and benefits in the UK, while placing the burden of proving legal status on the individual.⁸ The idea of making life inhospitable for irregular migrants, including through penalties against their employers, is not a new development.⁹ Yet the post-2012 hostile environment is distinctive for the explicit nature of the government's intentions to produce this impact,¹⁰ and the escalation of strategies to pursue it, with an extension of bordering functions beyond employers to other agencies including banks, the Drivers and Vehicle Licensing Agency and private landlords.¹¹ These measures can be understood as a 'deputisation' of

⁶Council of Europe, 'Convention on Preventing and Combating Violence against Women and Domestic Violence ("Istanbul Convention")' - CETS No. 210, 2011.

⁷ILO, 'C190 - Violence and Harassment Convention, 2019 (No. 190)' (108th ILO Session 2019).

⁸Frances Webber, 'On the Creation of the UK's "Hostile Environment"' (2019) 60 *Race & Class* 76, 77; Williams (n 4) 170; Christopher Rowe, 'Falling into Line? The Hostile Environment and the Legend of the "Judges" Revolt' (2022) 85 *Modern Law Review* 105, 110.

⁹Bernard Ryan, 'The Evolving Legal Regime on Unauthorized Work by Migrants in Britain' (2005) 27 *Comparative Labor Law & Policy Journal* 27, 35–43; Hannah Lewis, Louise Waite and Stuart N Hodkinson, 'Hostile' UK Immigration Policy and Asylum Seekers' Susceptibility to Forced Labour' in Francesco Vecchio and Alison Gerard (eds), *Entrapping Asylum Seekers: Social, Legal and Economic Precariousness* (Basingstoke: Palgrave Macmillan, 2017) 189; Nira Yuval-Davis, Georgie Wemyss and Kathryn Cassidy, 'Everyday Bordering, Belonging and the Reorientation of British Immigration Legislation' (2018) 52 *Sociology* 228, 233.

¹⁰Louise Waite, 'Asylum Seekers and the Labour Market: Spaces of Discomfort and Hostility' (2017) 16 *Social Policy and Society* 669, 673.

¹¹Nira Yuval-Davis, Georgie Wemyss and Kathryn Cassidy, *Bordering* (Cambridge: Polity Press, 2019) 103.

border control—co-opting an array of public and private bodies into immigration functions that would otherwise be the border force’s responsibility.¹² Borders become part of the domestic life of ordinary citizens, fuelling surveillance and demands for documentation to pursue even day-to-day activities,¹³ with ‘wide ranging and potentially extreme’ human impacts including lost income and accommodation, homelessness, irregular work and deterrence from seeking healthcare or reporting crimes.¹⁴

The hostile environment is ostensibly directed against ‘illegal’ or irregular migrants, namely those who enter, remain and/ or work in a country without the correct authorisation.¹⁵ However, it has also had a significant impact beyond this, including on migrants with a lawful status and some ethnic minority British citizens.¹⁶ The ‘Windrush scandal’ culminating in 2018 saw black UK residents who arrived as British subjects from colonial or commonwealth countries suffer extreme consequences, including loss of homes and jobs, detention and deportation, owing to a lack of documentation to prove their status.¹⁷ Following the scandal, the Home Office took certain remedial measures through the Windrush Taskforce, including issuing new documentation, but failed to meet recommendations to reform the hostile environment made in the independent review of the scandal.¹⁸ Indeed, in 2023 it announced the abandonment of these measures before dismantling the responsible unit.¹⁹ The compensation scheme

¹²Don Flynn, ‘Frontier Anxiety: Living with the Stress of the Every-Day Border’ (2015) 61 Soundings 62, 69; Melanie Griffiths and Colin Yeo, ‘The UK’s Hostile Environment: Deputising Immigration Control’ [2021] *Critical Social Policy* 521, 525.

¹³Hannah Jones and others, *Go Home? The Politics of Immigration Controversies* (Manchester: Manchester University Press, 2017) 6.

¹⁴Griffiths and Yeo (n 12) 11.

¹⁵UN High Commissioner for Human Rights, ‘The Economic, Social and Cultural Rights of Migrants in an Irregular Situation’ (2014) 4; UN High Commissioner for Human Rights, ‘Behind Closed Doors - Protecting and Promoting the Human Rights of Migrant Domestic Workers in an Irregular Situation - Report No HR/PUB/15/4’ (2015) 1.

¹⁶Griffiths and Yeo (n 12) 10, 13; Rowe (n 8) 110.

¹⁷Amreen Quereshi, Marley Morris and Lucy Mort, ‘Access Denied: The Human Impact of the Hostile Environment’ (*IPPR*, 3 September 2020) 16–18; Williams (n 4) 15; Griffiths and Yeo (n 12) 15–17.

¹⁸Williams (n 4) 15; Wendy Williams, ‘Windrush Lessons Learned Review - Progress Update’ (House of Commons 2022) 25–28, 52–3.

¹⁹Patrick Daly, ‘Home Secretary Confirms She Is Rowing Back on Windrush Reforms’ *The Independent* (26 January 2023) <<https://www.independent.co.uk/news/uk/suella-braverman-williams-home-secretary-windrush-home-office-b2269688.html>> accessed 31 January 2023; Amelia Gentleman, ‘Unit Tasked with Reforming Home Office after Windrush Scandal Being Disbanded’ *The Guardian* (19 June 2023) <<https://www.theguardian.com/politics/2023/jun/19/unit-reforming-home-office-windrush-scandal-being-disbanded>> accessed 5 July 2023.

has also been criticised for replicating a ‘heavy evidential burden and culture of disbelief’.²⁰

The government sought to portray the Windrush generation as outside the hostile environment’s targets and their plight as an aberration rather than a consequence of its policies.²¹ However, the independent review of the scandal contradicts that account, noting a failure to heed warnings about the inherent risks of the government’s approach.²² Far from representing a misapplication of the hostile environment, the Windrush scandal exemplifies the dangers of an assumption that lacking clear documentation to prove lawful status equates to being in the country unlawfully.²³ There are other examples where individuals with a right to remain and/ or work in the UK lack documentary proof. This includes persons on ‘3C leave’, who are entitled to reside and work while waiting for the Home Office to renew their visa but not given adequate documentation to prove this.²⁴

Furthermore, the status of irregularity is more complex than often assumed, with numerous paths to irregular residence and/ or work apart from clandestine entry.²⁵ Many migrants enter a country regularly and later lose their status, for example as a result of a visa expiry.²⁶ This can arise from the prohibitive and excessive cost of applications and extensions, complicated and lengthy processes, problems with the decision making and a lack of access to quality legal advice.²⁷ Certain visas cannot be renewed beyond six months at all, meaning workers remaining beyond that period become irregular: the Overseas Domestic Worker visa since changes in 2012,²⁸ and

²⁰ Shaila Pal, ‘Windrush Compensation Scheme: How the UK Government Is Failing Its Citizens with This “belittling and Horrible” Process’ (*The Conversation*, 2 June 2023) <<http://theconversation.com/windrush-compensation-scheme-how-the-uk-government-is-failing-its-citizens-with-this-belittling-and-horrible-process-204840>> accessed 5 July 2023.

²¹ Rowe (n 8) 110.

²² Williams (n 4) 12, 61–115.

²³ Quereshi, Morris and Mort (n 17) 16–18; Griffiths and Yeo (n 12) 15–17.

²⁴ RAMFEL (n 3) 19.

²⁵ Anna Triandafyllidou and Laura Bartolini, ‘Irregular Migration and Irregular Work: A Chicken and Egg Dilemma’ in Sarah Spencer and Anna Triandafyllidou (eds), *Migrants with Irregular Status in Europe: Evolving Conceptual and Policy Challenges* (Frankfurt: Springer International Publishing, 2020).

²⁶ UN High Commissioner for Human Rights (n 15) 3–4.

²⁷ ECSR, ‘Conclusions XXII-1 (2020) - the United Kingdom’ (2021) 33; FLEX, IWGB and UVW, ‘No Viable Alternatives: Social (in)Security and Risk of Labour Exploitation during Covid-19’ (Focus on Labour Exploitation 2021) 52–53; Bhatia (n 5) 6.

²⁸ See section 3(b).

the Seasonal Worker Visa scheme for agriculture since 2019.²⁹ These visas also restrict work to the specified sector and make it difficult to change employers in practice. ‘Skilled worker’ visas used primarily in higher-paid jobs have the advantage of renewability, but still contain other restrictions such as a requirement for employer sponsorship and to update the visa if moving to a new role, creating a risk of falling into irregularity if not complied with.³⁰

There are also categories of migrants that have a right to remain but are prohibited from working, such that any labour they perform would be classed as irregular. This includes asylum seekers, with limited exceptions after twelve months waiting for a decision, who must survive on a small allowance (currently £47.39 per week) that leaves many in poverty.³¹ Likewise, most persons in the National Referral Mechanism to determine status as a victim of ‘modern slavery’³²—a process that takes a median period of 543 days³³—are barred from working. Other categories of migrants have permission to work limited to a certain number of hours, as with student visas that only allow for 20 hours per week in term time, meaning work in excess can be classed as illegal.³⁴

²⁹CJ McKinney, Sarah Coe and Iona Stewart, ‘Seasonal Worker Visas and UK Agriculture - 2023 Version’ (2023) House of Commons Library Briefing Paper 9665 4. There is an exception to non-renewability for Ukrainian nationals following the Russian invasion—ibid 28.

³⁰Mimi Zou, ‘Employer Demand for “Skilled” Migrant Workers—Regulating Admission Under the United Kingdom’s Tier 2 (General) Visa’ in Joanna Howe and Rosemary J Owens (eds), *Temporary Labour Migration in the Global Era: the regulatory challenges* (Oxford: Hart, 2016); University of Nottingham Rights Lab and others, ‘The Vulnerability of Paid Migrant Live-in Care Workers in London to Modern Slavery’ (University of Nottingham Rights Lab 2022) 39; Meri Åhlberg and Lucila Granada, ‘The Making of Irregular Migration: Post-Brexit Immigration Policy and Risk of Labour Exploitation’ (2022) 30 *Journal of Poverty and Social Justice* 120, 124.

³¹Nuria Targarona Rifa and Giorgia Doná, ‘Forced Unemployment or Undocumented Work: The Burden of the Prohibition to Work for Asylum Seekers in the UK’ (2021) 34 *Journal of Refugee Studies* 2052, 2052–5; Bhatia (n 5) 5.

³²An umbrella term encompassing slavery, servitude, trafficking and forced labour—Nicole Siller, ‘“Modern Slavery” Does International Law Distinguish between Slavery, Enslavement and Trafficking?’ [2016] *Journal of International Criminal Justice* 405, 405–7.

³³Home Office, ‘Modern Slavery: National Referral Mechanism and Duty to Notify Statistics UK, End of Year Summary 2022’ (GOV.UK, 2 March 2023) <<https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2022/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2022>> accessed 24 July 2023.

³⁴Vera Pavlou, *Migrant Domestic Workers in Europe: Law and the Construction of Vulnerability* (Oxford: Hart, 2021) 24; Åhlberg and Granada (n 30) 6.

All these factors undermine the understanding of irregular migrants as a blameworthy group that can be distinguished from the rest of society. Rather than resulting from a conscious decision to evade migration laws, statuses of legality and ‘semi-legality’ are sometimes created and sustained by the law itself, for example by strict constraints on visa schemes and a lack of extension opportunity.³⁵ Harsh migration control policies contribute to a broader climate of suspicion that makes doubts about legality of status more likely to be resolved against migrants. As the state has directed increasingly draconian measures against ‘irregular migrants’, its other reforms have made regular status progressively more difficult to obtain, keep and evidence, in turn exposing an increasing pool of individuals to the hostile environment.³⁶ While space does not permit a discussion of the recently passed Nationality and Borders Act 2022 and the Illegal Migration Act 2023, they stand to further increase numbers of irregular migrants and the severity of their treatment.³⁷

B. The Punitive Treatment of (Irregular) Migrants at Work

The hostile environment has seen an intensification of measures directed against irregular migrant workers. This includes direct criminalisation of their work through the 2016 ‘illegal working’ offence, where an individual works while disqualified as a result of their immigration status, either knowing or having reasonable cause to believe they are disqualified.³⁸ This exposes the worker to up to six months’ imprisonment or a fine, and allows a prosecutor to seek confiscation of irregular migrants’ earnings as ‘proceeds of crime’.³⁹ Although previously work without permission could have been criminalised based on immigration law breaches or fraudulent document

³⁵Bridget Anderson, ‘Migration, Immigration Controls and the Fashioning of Precarious Workers’ (2010) 24 *Work, Employment and Society* 300, 312; Agnieszka Kubal, ‘Conceptualizing Semi-Legality in Migration Research’ (2013) 47 *Law & Society Review* 555; Sheona York, ‘The “Hostile Environment”: How Home Office Immigration Policies and Practices Create and Perpetuate Illegality’ (2018) 32 *Journal of Immigration, Asylum and Nationality Law*.

³⁶Williams (n 4) 61, 98–102.

³⁷Siobhán Mullally and others, ‘Special Rapporteurs’ Letter to the UK Government—Nationality and Borders Bill’ (5 November 2021) <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26788>> accessed 25 July 2023; UN OCHR, ‘UN Experts Urge UK to Halt Implementation of Illegal Immigration Bill’ (*OHCHR*, 20 July 2023) <<https://www.ohchr.org/en/press-releases/2023/07/un-experts-urge-uk-halt-implementation-illegal-immigration-bill>> accessed 25 July 2023.

³⁸Immigration Act 2016, s34.

³⁹ACL Davies, ‘The Immigration Act 2016’ (2016) 45 *Industrial Law Journal* 431, 438.

use,⁴⁰ the new offence is significant for creating an offence relating to the work itself. The concept of ‘work’ is defined much more expansively than in legislation giving rise to employment protections, to include, informal arrangements and contracts for services.⁴¹ The 2016 Act has also increased the role of employers in enforcing immigration law, making the mental element of the offence of employing an irregular migrant easier to satisfy and increasing the maximum penalty from two to five years.⁴² The threat of penalties can lead employers to be excessively cautious about employing workers, demanding documentation beyond what is required and sometimes refusing work to those with permission.⁴³

Additionally, the hostile environment has expanded data sharing with immigration enforcement to include most public authorities and those acting on their behalf.⁴⁴ Labour inspection bodies now share substantial immigration data through a combination of incidental identification in the course of other activities and work actively looking to find irregularities.⁴⁵ A notable example is the Gangmasters and Labour Abuse Authority (GLAA), the successor to the Gangmasters Licensing Authority, whose remit is to protect vulnerable and exploited workers and to investigate labour exploitation,⁴⁶ with expanded powers of investigation since the 2016 Act.⁴⁷ The GLAA regularly sends immigration enforcement reports—a total of 144 between 2015 and 2020.⁴⁸ Other labour inspection bodies—the Employment Agency Standards Inspectorate, the Health and Safety Executive and HMRC National Minimum Wage team—share information less often, but have all reported migrant workers to immigration enforcement at least once since 2016, and (except the HSE) conducted joint inspections between 2017 and 2019.⁴⁹

⁴⁰Ryan (n 9) 32–34.

⁴¹Davies (n 39) 438; Judy Fudge, ‘Illegal Working, Migrants and Labour Exploitation in the UK’ (2018) 38 *Oxford Journal of Legal Studies* 557, 573.

⁴²Immigration Act 2016, s35—Davies (n 39) 438–9.

⁴³Yuval-Davis, Wemyss and Cassidy (n 11) 110–11; RAMFEL (n 3) 10.

⁴⁴Alison Harvey and Zoe Harper, *A Guide to the Immigration Act 2016* (London: Bloomsbury Professional, 2017) 275–6.

⁴⁵Labour Exploitation Advisory Group, ‘Opportunity Knocks: Improving Responses to Labour Exploitation with Secure Reporting’ (Focus on Labour Exploitation 2020) 25.

⁴⁶GLAA, ‘What We Do’ <<https://www.gla.gov.uk/who-we-are/what-we-do/>> accessed 5 July 2023.

⁴⁷Davies (n 39) 433–5; Bernard Ryan, ‘From Labour Migration to Employment Law Reform: A Comparative Interpretation’ in Bernard Ryan and Rebecca Zahn (eds), *Migrant Labour and the Reshaping of Employment Law* (Oxford: Hart, 2023) 24–25.

⁴⁸Labour Exploitation Advisory Group (n 45) 36.

⁴⁹ibid 28–44.

These measures are damaging for migrant workers' protection and fuel susceptibility to exploitation. Rather than stopping those without permission from working, they direct many into less visible and regulated sectors of the labour market such as domestic work, cleaning, care, takeaway restaurants and the 'gig economy', where abuses are widespread.⁵⁰ For example, irregular migrants may find work via digital platforms, circumventing any right to work checks by acting as a substitute for another independent contractor or by renting someone else's account, which makes them particularly susceptible to mistreatment in a sector where labour rights are already lacking.⁵¹ Employers can take advantage of irregular migrants' weakened position through violations like underpayment, withholding wages, allocating excessive hours and onerous tasks and declining to guarantee safe working conditions, in the knowledge that workers made precarious by their immigration position are unlikely to be able to hold them to account.⁵² Some employers interviewed in a 2014-2018 study admitted such practices, for example as a response to economic pressures preventing small business owners being able to pay high wages.⁵³ The ban on irregular migrants opening bank accounts⁵⁴ heightens the potential for exploitation, including through having to use another person's account and consequently losing control over their own wages,⁵⁵ or being restricted to unregulated 'cash-in-hand' work.

The 'illegal working' offence creates another obstacle for irregular migrants in recovering pay. It is likely to affect the consideration of factors

⁵⁰ibid 6; Caitlin Boswell, '“We Also Want to Be Safe”—Undocumented Migrants Facing COVID in a Hostile Environment' (Joint Council for the Welfare of Immigrants 2022) 17 <<https://www.jcwi.org.uk/we-also-want-to-be-safe-report>> accessed 19 January 2022; Brian Bell and others, 'MAC Annual Report December 2022' (Migration Advisory Committee 2022) 13.

⁵¹Focus on Labour Exploitation, 'The Gig Is up: Participatory Research with Couriers in the UK App-Based Delivery Sector - Participatory Research Working Paper 3' (2021) 39–41; Valerio De Stefano and others, 'Exclusion by Default: Platform Workers' Quest for Labour Protections' in Valerio De Stefano and others (eds), *A Research Agenda for the Gig Economy and Society* (Cheltenham: Edward Elgar, 2022).

⁵²Labour Exploitation Advisory Group (n 45) 11; Stuart N Hodgkinson and others, 'Fighting or Fuelling Forced Labour? The Modern Slavery Act 2015, Irregular Migrants and the Vulnerabilising Role of the UK's Hostile Environment' (2021) 41 *Critical Social Policy* 68, 78; Boswell (n 50) 17.

⁵³Düvell, Cherti and Lapshyna (n 2) 28.

⁵⁴Immigration Act 2014, s40.

⁵⁵Lewis, Waite and Hodgkinson (n 9) 201; Hannah Lewis and Louise Waite, 'Migrant Illegality, Slavery and Exploitative Work' in Gary Craig and others (eds), *The Modern Slavery Agenda: Policy, politics and practice* (Bristol: Policy Press, 2019) 231.

Measures like data sharing and joint inspections make workers with irregular or insecure status (that is, those whose are at risk of losing their status, or whose status is unclear) less confident reporting issues of abuse and exploitation to labour inspection bodies, owing to legitimate fears that this could lead to enforcement action against them.⁶² The measures create a barrier to justice and allow exploitative employers to instrumentalise threats of immigration control where workers seek to challenge inadequate working conditions, including through unionisation.⁶³ This takes place against a background where labour inspection is generally under-resourced and proactive inspections are very rare, despite being crucial for marginalised workers

⁶³ Davies (n 39) 441; David Bolt, 'An Inspection of the Home Office's Approach to Illegal Working—August—December 2018' (Independent Chief Inspector of Borders and Immigration 2019) [10.20–10.24]; Lewis and Waite (n 55) 231; Group of Experts on Action against Trafficking in Human Beings, 'Evaluation Report: United Kingdom - Third Evaluation Round - Access to Justice and Effective Remedies for Victims of Trafficking in Human Beings' (Council of Europe 2021) [46, 121].

who will often be reluctant to raise complaints.⁶⁴ The lack of routine inspection relates to a prevailing view of labour exploitation as mainly an exceptional phenomenon stemming from ‘organised criminals exploiting migrant workers’, which militates against more systematic and extensive regulation of the labour market and in favour of individualised enforcement where criminality is already suspected.⁶⁵

Since 2012, a wider range of migrants have also been subjected to the ‘No Recourse to Public Funds’ Condition (NRPF), which prevents access to mainstream welfare benefits.⁶⁶ An inability to access welfare support can pressure migrant workers to remain in exploitative situations, which some abusive employers are aware of and use as a means to exercise power.⁶⁷ During the pandemic, migrants in low-paid and insecure roles such as domestic work, cleaning and security were frequently unable to refuse work that would have been deemed non-essential because of a fear of losing a position and the lack of a safety net.⁶⁸ Irregular migrants faced increased barriers to applying for NRPF to be lifted, since this would bring them to the authorities’ attention and thus potentially lead to their deportation.⁶⁹ In contrast, where access to social security was provided, such as through the EU settlement scheme and the Covid-related ‘Everybody In’ campaign to tackle homelessness, individuals were empowered to leave exploitative situations.⁷⁰ NRPF therefore combines with data sharing and criminalisation of work to prevent migrants from enforcing their rights, fuelling susceptibility to exploitation.

⁶⁴Focus on Labour Exploitation, ‘Risky Business: Tackling Exploitation in the UK Labour Market’ (Focus on Labour Exploitation 2017) 16, 24; Fudge (n 41) 578.

⁶⁵Virginia Mantouvalou, ‘The UK Modern Slavery Act 2015 Three Years On’ (2018) 81 *Modern Law Review* 1017, 1036; Fudge (n 41) 571; Ryan (n 47) 24–5.

⁶⁶This stems from the Immigration and Asylum Act 1999, s115. See Agnes Woolley, ‘Access Denied: The Cost of the “No Recourse to Public Funds” Policy’ (The Unity Project 2019) 19; Colin Yeo, ‘What Is the No Recourse to Public Funds Condition?’ (*Free Movement*, 5 August 2019) <<https://www.freemovement.org.uk/what-is-the-no-recourse-to-public-funds-condition/>> accessed 25 November 2022; Marley Morris and Amreen Quereshi, ‘Locked out of a Livelihood - The Case for Reforming “No Recourse to Public Funds”’ (IPPR 2021).

⁶⁷FLEX, IWGB and UVW (n 27) 55–57; Bell and others (n 50) 17.

⁶⁸Giorgia Donà, ‘Race, Immigration and Health: The Hostile Environment and Public Health Responses to Covid-19’ (2021) 44 *Ethnic and Racial Studies* 906, 911; Morris and Quereshi (n 66) 4.

⁶⁹FLEX, IWGB and UVW (n 27) 52.

⁷⁰*ibid* 56–7.

3. GENDER AND THE HOSTILE ENVIRONMENT

This section considers how the impacts of the hostile environment discussed above interact with gendered factors. It addresses both gendered *susceptibility* to the hostile environment—factors that push women towards unfavourable migration statuses that are dependent on others and increase the risk of falling into irregularity and into precarious parts of the labour market—and the gendered *impact* of hostile environment measures on migrant women, such as workplace sexual harassment.

A. Domestic abuse and dependency

The role of law in heightening the risk of irregularity has gendered impacts because women disproportionately migrate as partners on a family visa, which puts them in a dependent situation, in which they are at risk of losing their status if their partner conceals information or writes to the Home Office indicating that the relationship has ended during their first five years in the UK.⁷¹ Domestic abuse can therefore have consequences for women's migration status and survivors are often fearful of reporting to police or elsewhere because of the potential impact of their right to remain in the UK.⁷² Reporting can also lead to immigration enforcement against the complainant. In 2020–22 at least 2,546 victims of crimes including domestic violence, child abuse, trafficking and slavery were referred for possible deportation after calling the police.⁷³ The sector supporting domestic abuse survivors has raised longstanding concerns that police data sharing with the Home Office deters those with insecure status from reporting crime, potentially creating impunity for the perpetrator.⁷⁴ Yet the Home Office has declined to introduce a bar on data sharing, leading to concerns the problem will

⁷¹McIlwaine, Granada and Valenzuela-Oblitas (n 5) 6–8; Catherine Briddick, 'Precarious Workers and Probationary Wives: How Immigration Law Discriminates against Women' (2020) 29 *Social & Legal Studies* 201, 209–210; Åhlberg and Granada (n 30) 125.

⁷²Nicole Edwards, 'Safety Before Status - Improving Pathways to Support for Migrant Victims of Domestic Abuse' (Domestic Abuse Commissioner 2021) 9.

⁷³Nicole Jacobs, 'Letter from Domestic Abuse Commissioner to Immigration Minister' (8 July 2023) 4 <https://domesticabusecommissioner.uk/wp-content/uploads/2023/07/Domestic-Abuse-Commissioner-to-the-Minister-for-Immigration_-_The-Governments-response-to-Safety-Before-Status-The-Solutions_-_8th-July-2023.pdf> accessed 24 July 2023.

⁷⁴McIlwaine, Granada and Valenzuela-Oblitas (n 5).

be perpetuated.⁷⁵ This intensifies the vulnerable position of migrant women and dovetails with issues arising from data sharing by labour inspection bodies discussed above.

There is evidence that perpetrators of abuse weaponise insecure immigration status, making threats of deportation and denunciation to authorities,⁷⁶ with the Home Office recognising the risk of perpetrators exploiting such situations.⁷⁷ Women whose status is controlled by a partner may be compelled to remain in an abusive relationship to retain a regular status, or alternatively pushed towards irregularity.⁷⁸ The NRPF condition also prevents many migrant women from accessing domestic abuse services, creating further dependency on partners.⁷⁹ Survivors who lack a safety net are often forced to work exploitative cash-in-hand jobs to support themselves and their children; where they are unable to do so, this may be used against them in family proceedings.⁸⁰

Although there are some exceptions to these exclusionary measures, they only apply to certain groups of migrant women. ‘The DV rule’ allows survivors who can prove their relationship broke down permanently because of domestic abuse to apply for indefinite leave to remain, but only if they arrived as dependent partners of a British citizen or of a person with indefinite leave to remain, refugee status, or pre-settled status under the EU Settlement Scheme.⁸¹ Those applying under the DV rule may be granted three months’ temporary leave and the right to work and access limited benefits and housing under the Destitution Domestic Violence Concession

⁷⁵ Kalayaan, ‘Government Review into Data Sharing Practices for Migrant Victims of Crime Is a Missed Opportunity - 15 December 2021’ <<http://www.kalayaan.org.uk/wp-content/uploads/2021/12/Press-release-15-12-2021.pdf>> accessed 26 October 2022; Jacobs (n 73) 3–4.

⁷⁶ Bralo (n 5) 7; Edwards (n 72) 21–23; Nicole Edwards, ‘Safety Before Status: The Solutions’ (Domestic Abuse Commissioner 2022) 3.

⁷⁷ Home Office, ‘Controlling or Coercive Behaviour in an Intimate or Family Relationship - Statutory Guidance Framework’ (Home Office 2023) 16, 32, 56.

⁷⁸ Woolley (n 66) 16; Sabrina Germain and Adrienne Yong, ‘COVID-19 Highlighting Inequalities in Access to Healthcare in England: A Case Study of Ethnic Minority and Migrant Women’ (2020) 28 *Feminist Legal Studies* 301; Åhlberg and Granada (n 30) 125.

⁷⁹ Woolley (n 66) 27; Edwards (n 72) 5–9.

⁸⁰ Edwards (n 76) 3–4.

⁸¹ Home Office, ‘Immigration Rules Appendix FM: Family Members - Updated 13 April 2023’ <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-fm-family-members>> accessed 16 May 2023, Sections DVILR and E-DVILR; *R (on the application of SWP) v Secretary of State for the Home Department* [2023] EWCA Civ 439 [4].

B. Gender, Labour Market Position and Visa Schemes

⁸⁹Woolley (n 66) 31–35.

of NRPF, around 85% of applications to lift the condition are made by women.⁹⁰

Furthermore, migrant women are often on unfavourable visa statuses that put them at risk of irregularity. Analyses in 2020 noted that a majority of migrants on relatively advantageous ‘Skilled Worker’ visas were men, whereas women were concentrated into less favourable migration statuses in terms of length of stay and opportunities to renew, bring family members and access social rights, and which produce dependency on others.⁹¹ There has been a shift since 2019 with the introduction of the Seasonal Worker Visa for agriculture (an unfavourable visa not primarily granted to women) and the extension of a type of Skilled Worker visa to care work, a feminised sector.⁹² Nonetheless, this does not appear to undermine the overall pattern of less favourable statuses for women, with most migrants constructed as ‘low-skilled’ remaining excluded,⁹³ and the care work extension relying on a relaxation of the ordinary salary requirements for a Skilled Worker visa.⁹⁴

A key example of a restrictive scheme in a feminised sector is the Overseas Domestic Worker (ODW) visa, which was amended in 2012 to prevent workers changing employers and limited to a non-renewable six-month period. This change arose from categorising domestic workers as ‘low-skilled’ and not performing work of economic value,⁹⁵ which is premised on a gendered devaluation of domestic work and its conflation with women’s unpaid labour in the family.⁹⁶ Although subsequent changes in 2016 nominally allowed workers to change employer, this is only possible within the initial six-month period, and the visa lacks a route to settlement

⁹⁰ *ibid* 27.

⁹¹ Briddick (n 71) 202–12; Germain and Yong (n 78) 301.

⁹² Migration Advisory Committee, ‘Adult Social Care and Immigration: A Report from the Migration Advisory Committee’ (MAC 2022) CP 665.

⁹³ Manoj Dias-Abey, ‘Determining the Impact of Migration on Labour Markets: The Mediating Role of Legal Institutions’ (2021) 50 *Industrial Law Journal* 532, 556.

⁹⁴ Migration Advisory Committee (n 92) 11.

⁹⁵ Mullally and Murphy (n 57) 411; Bridget Anderson, ‘Nations, Migration and Domestic Labor: The Case of the UK’ (2014) 46 *Women’s Studies International Forum* 5, 11; Virginia Mantouvalou, ‘“Am I Free Now?” Overseas Domestic Workers in Slavery’ (2015) 42 *Journal of Law and Society* 329, 336.

⁹⁶ Rosie Cox, ‘Gendered Work and Migration Regimes’ in Liam Leonard (ed), *Transnational Migration, Gender and Rights* (Leeds: Emerald, 2012) 45–6; Silvia Federici, *Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle* (Binghampton, NY: PM Press, 2012) 16; LJB Hayes, *Stories of Care: A Labour of Law: Gender and Class at Work* (Basingstoke: Palgrave, Macmillan Education, 2017) 52.

C. Gendered Harm and Sexual Harassment

⁹⁷Natalie Sedacca, 'Migrant Domestic Workers and the Right to a Private and Family Life' (2019) 37 *Netherlands Quarterly of Human Rights* 288, 295; Kalayaan and others, 'Why the UK Must Reinstate the Original Overseas Domestic Worker Visa - Briefing for Report Stage of the Nationality and Borders Bill in the House of Lords - 1 March 2022' <<http://www.kalayaan.org.uk/wp-content/uploads/2022/03/Briefing-Report-Stage-House-of-Lords-1-March-2022-v2.pdf>> accessed 25 October 2022.

⁹⁸Under Health and Safety at Work Act 1974, s51 and Working Time Regulations—SI 1998/1833, reg 19—Mullally and Murphy (n 57) 415–6.

⁹⁹Mantouvalou, 'Am I Free Now?' (n 95).

¹⁰⁰Kalayaan and others (n 97).

¹⁰¹ILO, 'Report V(1) - Ending Violence and Harassment against Women and Men in the World of Work - 107th Session of the International Labour Conference' (2018) 11.

¹⁰² Trades Union Congress, 'Still Just a Bit of Banter? Sexual Harassment in the Workplace in 2016' (2016) 15; ILO, 'Experiences of Violence and Harassment at Work: A Global First Survey' (International Labour Office, 2022) 24-25.

¹⁰³ Jane Pillinger, Robin R Runge and Chidi King, *Stopping Gender Based Violence and Harassment at Work: The Campaign for an ILO Convention* (Newcastle-upon-Tyne: Agenda Publishing, 2022) 18; Focus on Labour Exploitation, 'Position Paper: Tackling Sexual Harassment in Low Paid and Insecure Work' (Focus on Labour Exploitation 2022) 5.

seek redress for abuse. Research shows a high prevalence of sexual harassment in cleaning, hospitality and app-based deliveries,¹⁰⁴ and in hospitality, where it appears ‘endemic’ and ‘intricately linked to unequal power relationships’.¹⁰⁵ There are also specific risks in domestic work, where susceptibility to abuse and harassment is fuelled by the concealed nature of the work within a private home and the lack of labour inspection,¹⁰⁶ alongside the restrictive visa scheme and the resulting dependency on employers discussed above.

During the Covid-19 pandemic, the negative impact for precarious workers intensified as managers were able to manipulate fears of losing work by those who would become destitute without it.¹⁰⁷ As expressed by the Chair of the IWGB union’s Cleaners and Facilities Branch:

[Sexual harassment] has doubled, tripled during the pandemic because supervisors and managers threaten workers with firing them ... They are demanding sexual favours in particular from female workers, taking advantage of the crisis, in exchange for not firing her or reducing her hours, or for providing a better working environment.¹⁰⁸

With the hostile environment severely restricting options for finding alternative employment, and NRPF removing a safety net, it is much more difficult to seek redress for violations.¹⁰⁹ Irregular migrant women are in a particularly vulnerable position regarding harassment and abuse, with legitimate fears that reporting abuse or engaging with agencies will lead to immigration enforcement against them.¹¹⁰ Dovetailing with the domestic abuse issues discussed above, some perpetrators take advantage of these

¹⁰⁴Focus on Labour Exploitation, ‘Position Paper: Tackling Sexual Harassment in Low Paid and Insecure Work’ (n 103) 10.

¹⁰⁵Focus on Labour Exploitation, ‘To Help Workers, I Would Tell the Government To ... Participatory Research with Workers in the UK Hospitality Sector. Participatory Research Working Paper 2’ (FLEX 2021) 31–42.

¹⁰⁶Maria da Conceição Figueiredo, Fátima Suleman and Maria do Carmo Botelho, ‘Workplace Abuse and Harassment: The Vulnerability of Informal and Migrant Domestic Workers in Portugal’ (2018) 17 *Social Policy and Society* 65, 65, 79; Laura Addati and others, ‘Care Work and Care Jobs for the Future of Decent Work’ (ILO 2018) 171–2, 192; Pillinger, Runge and King (n 103) 18.

¹⁰⁷FLEX, IWGB and UVW (n 27) 35.

¹⁰⁸*ibid.*

¹⁰⁹Focus on Labour Exploitation, ‘Position Paper: Tackling Sexual Harassment in Low Paid and Insecure Work’ (n 103) 16–17.

¹¹⁰Addati and others (n 106) 201; Bolt (n 63) 49; ILO, ‘Making Decent Work a Reality for Domestic Workers - Progress and Prospects Ten Years after the Adoption of the Domestic Workers Convention, 2011 (No. 189)’ (International Labour Office 2021) 182.

vulnerabilities knowing that their targets are unlikely to seek redress.¹¹¹ One bartender described such a situation:

[H]e also sexually abused female staff members... And a lot of the people there just couldn't escape the job... I know a couple of them were there illegally, and they had to stay in the job because they couldn't get anywhere else.¹¹²

Similar issues have been noted in other jurisdictions. One study showed migrants with precarious status in Canada were deterred from legal action or complaints over sexual harassment for fear of deportation, while being less able to move jobs,¹¹³ while another in Spain found that irregular migrant women felt pressure to retain their jobs even after experiencing harassment.¹¹⁴ This underscores how vital it is to ensure the protection of migrant women from abuse and harassment regardless of migration status.¹¹⁵ Yet the hostile environment does the opposite, heightening migrant women's exposure to sexual harassment by segmenting them into precarious and exploitative sectors and increasing the vulnerabilities caused by their immigration status. It appears that these policies only create a protection gap, but also facilitate abuses by creating a workforce without accessible rights or labour mobility.

4. HUMAN RIGHTS IMPLICATIONS OF THE HOSTILE ENVIRONMENT

This section analyses the human rights implications of the of the hostile environment's impacts that were highlighted above. After outlining the applicability of human rights protections to irregular migrants, it moves to consider specific violations flowing from restrictions on labour market access, denial of wages, a lack of labour inspection and sexual harassment.

¹¹¹Focus on Labour Exploitation, 'Position Paper: Tackling Sexual Harassment in Low Paid and Insecure Work' (n 103) 17.

¹¹²*ibid.*

¹¹³Paloma E Villegas, "'I Made Myself Small like a Cat and Ran Away': Workplace Sexual Harassment, Precarious Immigration Status and Legal Violence' (2019) 28 *Journal of Gender Studies* 674, 678–683.

¹¹⁴Pilar Rodríguez-Martínez and Cristina Cuenca-Piqueras, 'Interactions Between Direct and Structural Violence in Sexual Harassment Against Spanish and Unauthorized Migrant Women' (2019) 48 *Archives of Sexual Behavior* 577, 583–4.

¹¹⁵ILO, 'Making Decent Work a Reality' (n 110) 182.

A. The Applicability of Human Rights to Irregular Migrants

A central normative feature of human rights is their universality — that rights are held by all persons by virtue of being human,¹¹⁶ rather than conditional on attributes like the correct migration status. Although the UK has not ratified the specialist international instrument on migrant workers' rights,¹¹⁷ this should not detract from its obligations owed to migrants under other ratified human rights instruments.¹¹⁸ The International Covenant on Economic, Social and Cultural Rights¹¹⁹ (ICESCR) and the International Covenant on Civil and Political Rights¹²⁰ (ICCPR) both view rights as deriving 'from the inherent dignity of the human person' and contain non-discrimination provisions at Article 2(1) and 2(2) respectively. 'Migration status' is not explicitly listed as a protected ground but can fall within the category of 'other status'. UNCESCR, the UN Committee responsible for interpreting ICESCR, has stated that 'Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation'.¹²¹ The UN Committee on the Elimination of Racial Discrimination has also taken a universalistic position, holding that, while State parties may refuse to offer jobs to non-citizens without a work permit, once an employment relationship is stated all persons are entitled to enjoy labour and employment rights, including freedom of assembly and association,¹²² as has the

¹¹⁶Jack Donnelly, *Universal Human Rights in Theory and Practice* 3rd ed. (Ithaca, NY: Cornell University Press, 2013) 10; Virginia Mantouvalou, 'Workers without Rights as Citizens at the Margins' (2013) 16 *Critical Review of International Social and Political Philosophy* 366, 378; Steven LB Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (Cambridge: CUP, 2016) 13.

¹¹⁷UN General Assembly, 'International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, A/RES/45/158'.

¹¹⁸Margaret L Satterthwaite, 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers' (2005) 8 *Yale Human Rights & Development Law Journal* 1, 2; Alan Desmond, 'From Complementarity to Convergence: The UN Global Compact for Migration and the UN Migrant Workers Convention' (2022) 55 *World Comparative Law* 83, 227.

¹¹⁹United Nations, 'International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), UN Doc. A/6316 (1966)'.

¹²⁰United Nations, 'International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/21/2200 (16/12/1966)'.

¹²¹UNCESCR, 'General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights (Art 2, Para 2 of the Covenant), 2 July 2009, E/C.12/GC/20' [30]. Emphasis added.

¹²²UNCERD, 'General Comment No. 30 - Discrimination against Non-Citizens - CERD/C/64/Misc.11/Rev.3-2004' [35]. This mirrors an advisory opinion of the Inter-American Court of Human Rights one year earlier — *Juridical Condition and Rights of the Undocumented Migrants*, *Advisory Opinion OC-18/03* IACtHR 17 September 2003, Ser A No. 18 [135-6].

UN Committee on the Convention on the Elimination of All Forms of Discrimination against Women (‘the CEDAW Committee’) in its recommendation on women migrant workers.¹²³

Generalist European human rights instruments have not always offered comprehensive protection to irregular migrants. Many rights in the economic and social rights instrument, the European Social Charter (‘ESC’), are stated as applying only to those who are ‘lawfully resident or working regularly’ within their territories,¹²⁴ implying a lack of protection for irregular migrants. However, the European Committee of Social Rights (‘ECSR’), which interprets the ESC and provides a valuable explanation of the scope of human rights obligations,¹²⁵ has moved towards a more open approach to the position of irregular migrants when dignity, vulnerability and/ or fundamental rights are at stake.¹²⁶ For example, in *DCI v Belgium* it indicated that restrictions should not deprive irregular migrants of the protection of basic or fundamental rights such as the right to life, physical integrity or human dignity, bearing in mind the ESC’s central purpose of promoting dignity, equality and solidarity.¹²⁷ This is relevant for the consideration of hostile environment measures that deprive migrants of fundamental rights. Recent conclusions on the UK have raised concerns that the illegal working offence encouraged unequal treatment of migrant workers and did not appear to be in conformity with ESC Article 1(2) prohibiting discrimination in employment.¹²⁸

Under the European Convention of Human Rights¹²⁹ (ECHR), Article 14 prohibits discrimination in relation to the enjoyment of other convention rights on a range of grounds including national origin and ‘other status’—which can encompass migration status. In *Gaygusuz v Austria* the European Court of Human Rights (ECtHR) held that distinct treatment

¹²³UN Committee for the Elimination of Discrimination against Women, ‘General Recommendation No. 26 (2008) on Women Migrant Workers - CEDAW/C/2009/WP.1/R’ [4].

¹²⁴Council of Europe, ‘European Social Charter, 18 October 1961, ETS 35’, Art 19, Appendix.

¹²⁵Virginia Mantouvalou, *Structural Injustice and Workers’ Rights* (OUP 2023) 173.

¹²⁶Dorothy Estrada-Tanck, ‘Undocumented Migrant Women in Europe: A Human Rights Perspective from Public International Law’ (2016) 12 *Croatian Yearbook of European Law and Policy* 119, 136; Alexandre de le Court, ‘Regulation of the Access of Undocumented Migrants to Social Protection - Exploring the Boundaries of Solidarity’ in Julia López López (ed), *Inscribing Solidarity: Debates in Labor Law and Beyond* (Cambridge: CUP, 2022) 131–5.

¹²⁷ECSR, ‘Complaint No 69/2011 - Defence for Children International (DCI) v Belgium - Decision on the Merits of 20 November 2012’ [28–30].

¹²⁸ECSR (n 27) 6–8.

¹²⁹Council of Europe, ‘European Convention on Human Rights - Convention for the Protection of Human Rights and Fundamental Freedoms - Rome, 4.XI.1950 (ECHR)’.

of non-nationals is not permitted where justification is lacking.¹³⁰ The applicant in that case had regular status, and other ECtHR judgments have demonstrated a more limited equality framework for certain categories of migrants.¹³¹ Nonetheless, the court has recognised the vulnerability of irregular migrants as an issue giving rise to protective obligations. In *Siliadin v France*, the treatment of a migrant domestic worker who had come to France aged 15 was found to amount to forced labour and servitude.¹³² Central to this finding was her irregular status, which left her at the mercy of her employers who had promised and failed to regularise it, and the vulnerable situation and fear of arrest this gave rise to.¹³³ In another domestic servitude case, *CN v UK*, the court was concerned about a lack of attention to the applicant's allegations of threats of reporting her immigration status and confiscation of her passport.¹³⁴ In sum, irregular status does not automatically exclude an individual from human rights protection.

B. Labour Market Access and the Right to Work

ICESCR Article 6 provides for 'the right of everyone to the opportunity to gain his living by work he freely chooses or accepts', with similar provisions in ESC Article 1. UNCESCR's General Comment on Article 6 indicates that the labour market must be accessible to everyone under a state's jurisdiction, prohibiting discriminatory denial or limitation of access to decent work for disadvantaged and marginalised individuals or groups, including migrant workers.¹³⁵ This is contravened by barring certain groups such as asylum seekers and potential trafficking victims from working despite being entitled to remain. Such restrictions may also infringe Article 8 ECHR, the right to private and family life, since the concept of private life includes 'the possibility to seek employment and the right not to be arbitrarily deprived

¹³⁰ *Gaygusuz v Austria* (1997) 23 EHRR 364.

¹³¹ *Bah v United Kingdom* (Application no 56328/07) 8 January 2013 (ECtHR); de le Court (n 126) 125–6.

¹³² *Siliadin v France* (2006) 43 EHRR 16 [94–149].

¹³³ *ibid* [117–8, 126].

¹³⁴ *CN v United Kingdom* (2013) 56 EHRR 24 [73–80]. Further cases examined in section 2c recognise irregular status alongside poor conditions of groups of workers as a potential issue of forced labour.

¹³⁵ UNCESCR, 'General Comment No. 18 on the Right to Work (Art. 6 of the Covenant)', 6 February 2006, E/C.12/GC/18' [12b, 18, 23].

of employment opportunities.¹³⁶ In *Sidabras and Dziautas v Lithuania*, challenging restrictions on work available to former KGB agents, the ECtHR held that ‘private life’ was a broad term that could not be exhaustively defined, which was affected by comprehensive bars on employment in the private sector.¹³⁷ Similarly, in *Campagnano v Italy* it found that restricting a bankrupt individual from some occupations was clearly within the sphere of her private life.¹³⁸ Although not involving migrants, these cases demonstrate that restrictions on labour market access need to meet proportionality criteria under Article 8 ECHR. This requires demonstrating that the interference serves one of the ‘legitimate aims’ set out in Article 8(2), is ‘in accordance with the law’ and ‘necessary in a democratic society’, including corresponding to a ‘pressing social need’.¹³⁹

These points were reflected in a 2020 domestic judgment, *R (LJ (Kosovo))*, on the denial of work to an asylum seeker who was also awaiting a trafficking decision.¹⁴⁰ The Claimant argued that the decision and the framework it was made under discriminated against her contrary to Article 14 in relation to rights under Article 4 and/ or 8 ECHR, by failing to treat her differently from asylum seekers who were not also trafficking survivors.¹⁴¹ Referring to *Sidabras*, the court held that the case fell within the ambit of Articles 4 and 8, and that the guidance did not provide for caseworkers to exercise adequate discretion about particular circumstances.¹⁴² Although that case is about a delineated category of migrants, its acknowledgement of the link between access to work and human rights has broader significance.

It is argued that other restrictions on access to work should similarly be assessed according to proportionality criteria under Article 8, and that hostile environment measures are unlikely to fulfil these criteria. The ban on asylum seekers working is purportedly justified as a way to prevent people being drawn to the UK, but Home Office research concludes that economic

¹³⁶ Rory O’Connell, ‘The Right to Work in the ECHR’ [2012] *European Human Rights Law Review* 176, 188. See also Colm O’Cinneide, ‘The Right to Work in International Human Rights Law’ in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Oxford: Hart, 2014).

¹³⁷ *Sidabras and Dziautas v Lithuania* [2004] ECHR 395 [34-47].

¹³⁸ *Campagnano v Italy* (2005) 48 EHRR 43 [54].

¹³⁹ *Pretty v United Kingdom* (2002) 35 EHRR 1 [68-70].

¹⁴⁰ *R (on the Application of LJ (Kosovo)) v Secretary of State for the Home Department* [2020] EWHC 3487 (Admin) [1].

¹⁴¹ *ibid* [79-80].

¹⁴² *ibid* [87-93, 106].

rights like permission to work do not act as a pull factor.¹⁴³ Asylum seekers are generally unaware of the ban on working before arrival, and choice of destination is influenced by other factors such as language, the presence of friends and family and colonial ties.¹⁴⁴ Even if evidence of a work-related ‘pull factor’ existed, it would still be questionable whether the significant harm caused by subjecting asylum seekers to the hostile environment could be assessed as proportionate. More broadly, several reports have noted that the Home Office is unable to demonstrate a link between hostile environment policies and the stated aim of encouraging voluntary returns,¹⁴⁵ with its own research summary conceding that any deterrent effect is unclear.¹⁴⁶ To the extent that the hostile environment has other aims such as preventing exploitation of migrant workers, these are undermined by its punitive aspects.¹⁴⁷

Contrastingly, access to regular work gives an individual a degree of protection against falling into conditions of destitution that can amount to inhuman or degrading treatment, contrary to Article 3 ECHR,¹⁴⁸ and against conditions of forced labour contrary to Article 4. In *Limbuela* case, the House of Lords recognised that asylum seekers’ conditions of extreme destitution could violate Article 3.¹⁴⁹ Restrictions on the right to work encourage dependency on employers and constrain exit from exploitative

¹⁴³ Home Office Analysis and Insight, ‘Sovereign Borders: International Asylum Comparisons Report - Section 1: Drivers and Impact on Asylum Migration Journeys’ (Home Office 2020) 24; Colin Yeo, ‘Home Office Research Report on Why Asylum Seekers Come to the UK’ (*Free Movement*, 25 November 2022) <<https://freemovement.org.uk/home-office-research-report-on-why-asylum-seekers-come-to-the-uk/>> accessed 30 January 2023.

¹⁴⁴ Lucy Mayblin and Poppy James, ‘Labour Market Access for Asylum Seekers - Policy Briefing: 03/16.2’ (2016) 3–4 <<https://asylumwelfarework.files.wordpress.com/2015/03/is-access-to-the-labour-market-a-pull-factor-for-asylum-seekers-long.pdf>> accessed 18 July 2023.

¹⁴⁵ David Bolt, ‘An Inspection of the “Hostile Environment” Measures Relating to Driving Licences and Bank Accounts - January to July 2016’ (Independent Chief Inspector of Borders and Immigration 2016) [7.7, 7.22–7.25]; National Audit Office, ‘Report by the Comptroller and Auditor General - Home Office Immigration Enforcement - HC 110 Session’ (2020) [2.9]; Colin Yeo, ‘Has Sunak’s Bank Account Closure Plan Killed off the Windrush Lessons Learned Review?’ (*Free Movement*, 16 December 2022) <<https://freemovement.org.uk/has-sunaks-bank-account-closure-plan-killed-off-the-windrush-lessons-learned-review/>> accessed 30 January 2023.

¹⁴⁶ Home Office, ‘External Evidence of the Compliant Environment’ (n 2).

¹⁴⁷ Bogg (n 61) 224–5.

¹⁴⁸ O’Connell (n 136) 188.

¹⁴⁹ *R (on the application of Limbuela, Tesema and Adam) v Secretary of State for the Home Department* [2005] UKHL 66; Cathryn Costello, ‘Migrants and Forced Labour: A Labour Law Response’ in Alan Bogg and others (eds), *The autonomy of labour law* (Oxford: Hart, 2015) 219.

C. Working Conditions and the Right to Decent Work

Measures that obstruct irregular migrants from claiming wages and even allow wages to be treated as proceeds of crime may also violate the entitlement to peaceful enjoyment of possessions in ECHR Protocol 1, Article 1.¹⁵⁴ In *Paulet v United Kingdom*, an applicant who had used a fake passport to apply for jobs and pleaded guilty to dishonestly obtaining pecuniary advantage by deception challenged a confiscation order of earnings.¹⁵⁵ The ECtHR concluded that the scope of review carried out by national courts was too narrow to meet the standard of seeking a 'fair balance' as required by Article 1 Protocol 1.¹⁵⁶ The government's argument that restrictions on entitlement to work in the UK were in the general or public interest because otherwise people who had applied through the visa system would be aggrieved that

¹⁵⁶ibid [65, 68].

others could ‘skip the queue’,¹⁵⁷ relies on an idea of individuals gratuitously violating an accessible immigration system, which contrasts with the situation of many migrants working without permission.

The right to decent work also requires effective enforcement. UNCESCR’s General Comment 23 stipulates that States should establish ‘a functioning system of labour inspectorates ... to monitor all aspects of the right to just and favourable conditions of work for all workers’ including those in informal, domestic and agricultural work, which should be independent, adequately resourced and entitled to enter workplaces freely without prior permission.¹⁵⁸ Likewise, the ILO’s Protocol to the Forced Labour Convention, ratified in 2016, recognises the specific vulnerability of migrants and calls for effective preventative measures including coverage of employment legislation, strengthening labour inspection and ensuring access to remedy for all victims regardless of legal status.¹⁵⁹ Furthermore, effective enforcement requires a focus on workers’ rights rather than other purposes such as checking migration status.¹⁶⁰ These provisions support the need for a ‘firewall’ separating public bodies including labour inspectorates from immigration enforcement. Firewalls make rights and services more accessible in practice for insecure migrant workers, by reducing fears that this will lead to action against them.¹⁶¹ By contrast, the hostile environment creates barriers to migrants with irregular or insecure status enforcing their rights. This is a particular concern for migrant women as their segregation into isolated areas with low pay and unfavourable conditions intensify the need for effective inspection.

Exit from work can be constrained where a migrant fears deportation, detention, or loss of status. This was recognised in *Chowdhury and others v Greece*, which concerned the exploitation of irregular Bangladeshi migrants working on strawberry fields.¹⁶² The ECtHR referred to the workers’ fear of arrest, detention, deportation and non-payment of wages arising from

¹⁵⁷ibid [60].

¹⁵⁸UNCESCR, ‘General Comment No. 23 on the Right to Just and Favourable Conditions of Work (Art. 7 of the Covenant), 27 April 2016, E/C.12/GC/23’ [54].

¹⁵⁹ILO, ‘P029 - Protocol of 2014 to the Forced Labour Convention, 1930’ (103rd ILC Session 2014), preamble, Arts 1, 2, 4.

¹⁶⁰UNCESCR, ‘General Comment 23’ (n 158) [54]; see also ILO, ‘C081- Labour Inspection Convention’ (30th ILC Session 1947), Art 3.

¹⁶¹François Crépeau and Bethany Hastie, ‘The Case for “Firewall” Protections for Irregular Migrants’ (2015) 17 *European Journal of Migration and Law* 157, 158, 165; Linus Hermansson and others, ‘Firewalls: A Necessary Tool to Enable Social Rights for Undocumented Migrants in Social Work’ [2020] *International Social Work* 2; Desmond (n 118) 95–6.

¹⁶²*Chowdhury and Others v Greece—Application No 21884/15* ECtHR 30 March 2017.

Failings in enforcement and access to remedy undermine protections against forced labour under Article 4 ECHR, defined as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.¹⁶⁵ The ECSR’s 2020 conclusions on the UK highlight the importance of proactive measures in deterring forced labour,¹⁶⁶ while a Council of Europe’s expert body on trafficking noted that obstacles in identifying victims of trafficking who are irregular migrants is exacerbated by the lack of secure reporting and complaints mechanisms.¹⁶⁷ The need to amend frameworks that facilitate violations of rights is made clear in *Rantsev v Cyprus and Russia*, a case about sexual exploitation arising under ‘artiste’ visas obtained by business owners on behalf of workers.¹⁶⁸ The ECtHR held that states must ‘put in place adequate measures regulating businesses often used as a cover for human trafficking’ as well as addressing concerns through immigration rules,¹⁶⁹ demonstrating the state’s obligations to carry out ‘proactive action to prevent, stop and remedy human rights abuses’ and to protect victims,¹⁷⁰ in direct contrast to the hostile environment.

Just as the conditions in *Rantsev* fuelled exposure to sexual exploitation, hostile environment measures increase susceptibility to gendered forms of

¹⁷⁰Valentina Milano, 'Human Trafficking by Regional Human Rights Courts: An Analysis in Light of Hacienda Brasil Verde, the First Inter-American Court's Ruling in This Area' [2018] *Revista Electrónica de Estudios Internacionales (REEI)* 12–13. This discusses an IACtHR case that recognises the requirement for inspection as a preventative measure, *Workers of the Hacienda Verde Brasil Verde v Brazil* IACtHR 20 October 2016, Ser C No. 337.

harm including sexual harassment at work and undermine prospects of exiting domestic abuse.¹⁷¹ The ECtHR has recognised state failings in responding to domestic violence as violating rights including Article 3 and 8.¹⁷² In the workplace context, it has found violations of Article 8 in a failure to address severe workplace bullying because of an excessively prescriptive approach,¹⁷³ and through shortcomings in investigating sexual harassment,¹⁷⁴ and of Article 3 through the lack of an adequate criminal investigation into a workplace accident causing injury.¹⁷⁵ By analogy, where migrants suffer workplace abuses such as sexual harassment but are unable to access legal remedies because their status bars this or creates a chilling effect, this is also likely to violate Article 8, and Article 3 in severe cases.

The CEDAW committee has also found that gender-based violence amounts to discrimination and violates multiple human rights, with states bearing responsibility if they fail to act with due diligence to prevent, investigate and punish such acts.¹⁷⁶ Due diligence obligations are heightened in the case of irregular migrant women, given their particular vulnerability, according to the UN Special Rapporteur on Violence against Women.¹⁷⁷ States' obligations do not only entail access to justice and services, but also require them to address issues of prevention by attacking structural causes that fuel violence.¹⁷⁸ Contrary to this requirement, hostile environment measures perpetuate and deepen such structural causes by deterring reporting of harassment or abuse and giving perpetrators in the workplace and the family an additional means of control via fears about immigration position.

Two recently ratified specialist instruments fortify the UK's obligations to protect universally against gendered harm, regardless of migration status. The 'Istanbul Convention' is a Council of Europe instrument on violence against women and domestic violence,¹⁷⁹ for which UK ratification came into force on 1 November 2022. It requires 'the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and private sphere', and

¹⁷¹Section 3.

¹⁷²E.g., *Bevacqua and S v Bulgaria* [2008] ECHR 498; *Opuz v Turkey* [2009] ECHR 870.

¹⁷³*Špadijer v Montenegro* [2021] ECHR 921.

¹⁷⁴*C v Romania—Application No 47358/20* 30 August 2022 (ECtHR).

¹⁷⁵*Mažukna v Lithuania—Application No 72092/12* ECtHR 11 April 2017.

¹⁷⁶CEDAW, 'General Recommendation No. 19: Violence against Women - U.N. Doc. A/47/38 (1992)' [7, 9, 24].

¹⁷⁷Rashida Manjoo, 'Report of the UN Special Rapporteur on Violence against Women, Rashida Manjoo - UN General Assembly Resolution A/66/215' (2011) [46].

¹⁷⁸*ibid* [49].

¹⁷⁹Council of Europe, 'Istanbul Convention' (n 6).

states explicitly within its text that its provisions are to be secured without discrimination on any ground, including ‘migrant or refugee status’.¹⁸⁰ It also provides for victims whose residence status depends on a spouse or partner to be granted autonomous residence permits where the relationship ends and there are particularly difficult circumstances (Article 59), reflecting an understanding of the importance of secure status in reducing vulnerability. While the UK entered a reservation to Article 59 when ratifying the Istanbul Convention, suggesting a prioritisation of migration control over women’s safety, the remainder of the Convention remains significant in requiring protection for all migrant women.

Universalist protection against sexual harassment in the workplace is also mandated by the ILO’s 2019 Convention on Violence and Harassment (C-190),¹⁸¹ for which UK ratification entered into force on 7 March 2023. Designed to protect those in the world of work regardless of contractual status or formality (Article 2), C-190 mandates an inclusive and gender-sensitive approach, including requiring that states implement effective means of inspection and investigation in cases of violence and harassment (Article 4), contrary to the limitations seen in the UK context. Furthermore, C-190 requires member states to address violence and harassment in the world of work in relevant national policies, including those concerning migration (Article 11), while its accompanying recommendation stipulates the need to protect women migrant workers regardless of migration status.¹⁸² This fortifies the call for measures to protect all migrant women, including those with irregular status, through an end to hostile environment policies that create vulnerability to violence and harassment. As with other human rights obligations, the current domestic legal framework is far from adequate to fulfil international obligations.

5. CONCLUSION

The hostile environment is ostensibly directed against ‘illegal’ migrants as a distinct and blameworthy group, seeking to make life in the UK unsustainable through data sharing, criminalisation and restriction of access to necessities. In reality, these measures have an impact on people who are not

¹⁸⁰ *ibid*, Article 4.1, 4.3.

¹⁸¹ ILO, ‘C-190’ (n 7).

¹⁸² ILO, ‘R206 - Violence and Harassment Recommendation, 2019 (No. 206)’ (108th ILC Session 2019) [10].

irregular migrants, and/or whose irregular status is created and sustained by the immigration system through factors like inability to renew a visa or denial of permission to work while awaiting the determination of an asylum or trafficking claim. The measures the hostile environment directs against migrants at work concentrate migrants into precarious, low-paid and unregulated sectors of the labour market and make it more difficult to access justice, enforce rights at work, or exit exploitative situations.

For migrant women, this exacerbates an otherwise precarious situation in the labour market, including a concentration into feminised and hidden sectors such as care and domestic work, and constrained dependency created by restrictive visa schemes, while hostile environment measures and the need to retain status deter the reporting of gendered crimes such as domestic abuse. Even for women with permission to work, the denial of welfare benefits and resulting lack of access to affordable childcare severely constrains employment options. As well as fuelling labour abuses and exploitation, these factors increase migrant women's vulnerability to gendered harms including workplace sexual harassment.

The article has argued that these impacts contravene human rights obligations, which largely remain applicable to migrants even where they have irregular status. As well as clearly universalistic standards in UN monitoring bodies and the Istanbul Convention, decisions of the ECSR and the ECtHR have recognised the need to protect irregular migrants against violations of fundamental rights. Denying access to the labour market for those entitled to remain interferes with the right to work and the right to a private and family life, and the proportionality of justifications is highly questionable since neither the hostile environment nor the ban on asylum seekers working have been shown to meet their stated aims. By pushing work underground and reducing access to labour inspections or remedies for violations, the hostile environment interferes with the right to decent work, which requires fair and equal remuneration, safe conditions and effective enforcement of labour rights. In the interests of decent work and the prevention of forced labour, inspection should be clearly separated from immigration enforcement as well as being better resourced and applicable to all sectors.

Measures that facilitate gendered harm such as sexual harassment and undermine prospects of existing domestic abuse are contrary to human rights obligations prohibiting inhuman and degrading treatment and protecting the right to a private and family life. They also violate duties in the Istanbul Convention and ILO C-190 on the need for effective and universal protection against violence in the public and private sphere. The UK's

recent ratification of these conventions is a valuable signifier of the importance placed on safeguarding women from violence and harassment. Yet while the hostile environment remains in effect, with protection attainable only for those with a sufficiently secure position and migration status, their universalistic promise is unlikely to be realised.