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The Legacy of EU Citizenship Status in the EU Settlement Scheme: Women in Atypical Work

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Abstract

In November 2020, the UK government admitted that the European Union (EU) Settlement Scheme (EUSS) is likely to discriminate against some groups protected by the Equality Act 2010, concluding that any discriminatory effects are justifiable, and published its official assessment in a Policy Equality Statement. This article will scrutinise a specific group of individuals discriminated not for their single-axis characteristics, but at the intersection of multiple identities. We focus specifically on the intersection of gender, migrant status and lower socio-economic status to claim that the EUSS disproportionately affects migrant women of a lower socio-economic status, who are more likely to interrupt full-time employment to assume carer roles. Hence, our focus is on migrant women in atypical work, and we argue that they are at risk of greater gendered susceptibility to discrimination under the EUSS given the scheme's reliance on automatic data checks of a continuous employment footprint. By using UK labour market data and analysing the Policy Equality Statement, we show that the EUSS fails to account for the intersection of multiple identities that render these women more vulnerable. We also argue that the disadvantages faced by migrant women in atypical work derive from the legacy of EU law and the legal framework of EU citizenship and its related rights.

Keywords: EU Settlement Scheme; gender; intersectionality; market citizenship; migrant status

Introduction

Several years have now passed since the European Union (EU) Settlement Scheme (hereafter, EUSS) officially closed for applications in the summer of 2021 and even longer since the United Kingdom entered its post-Brexit era of economic and political turmoil. In the discussions around the time of the EUSS's closure, there were concerns about EU+ citizens¹ who would legitimately miss what was perceived to be a hard deadline or who had been earmarked as being at risk of missing the deadline (O'Brien, 2021). There was significantly less scrutiny and concern around individuals whose protection and rights under the EUSS would have been made much more difficult throughout the entire Brexit process or even excluded altogether from protection (Yong, 2023). This article thus seeks to highlight a situation faced by a hidden population that continues to be forgotten long after the deadline for the EUSS has passed – vulnerable migrant women² in atypical work. It argues that these women are more likely to be discriminated against under the EUSS because of the scheme's design, which focuses on continuity of employment.

¹This includes EU, Norwegian, Icelandic, Liechtenstein and Swiss nationals.

²We refer to women as meaning cisgendered women, as the experience of transgender women or non-binary individuals brings their own unique vulnerabilities to an intersectional analysis and is outside the scope of this article.

Our analysis challenges the general messaging about how successful the EUSS has been and how the Home Office has, in particular, attempted to argue that it has fulfilled its public sector duties under the UK's Equality Act 2010. We will consider the Policy Equality Statement (PES) on the EUSS, published in November 2020 (Home Office, 2020). Under s149 of the Equality Act 2010, the Home Office is subject to a public sector equality duty, which requires it to have due regard to its objectives of eliminating discrimination, advancing equality and fostering good relations. In the PES, the Home Office admitted that there was discrimination against women in several different situations but justified much of the discrimination by arguing that it was proportionate and in pursuit of a legitimate aim. We reject the Home Office's justification of discrimination against women, to argue that the EUSS, and consequently, the Home Office itself has failed to fully appreciate the discriminatory experiences of those at the intersection of gender and socio-economic status. In particular, we argue that there is greater gendered susceptibility to discrimination under the EUSS (Sedacca, 2024) for migrant women if they are in atypical work, because of the excessive focus on streamlined processes to the detriment of those who already experience disadvantage at the intersection of multiple identities.

We also argue that this legacy of migrant women in atypical work being disadvantaged in a post-Brexit Britain actually derives from the situation that these women faced under EU law, in particular, within the legal framework of EU citizenship and its related rights as transposed by the Immigration and Social Security Coordination (EU Withdrawal) Act, 2020 (hereafter, the Withdrawal Agreement). This is known as the market citizenship paradigm, a concept that has long been debated in the literature by scholars as EU citizenship developed between the early 1990s and the late 2010s (Juverdeanu, 2022; Nic Shuibhne, 2010; O'Brien, 2013, 2017; Wollenschläger, 2011). Over time, it became more apparent that the market citizenship model saw the Court of Justice of the EU adopting a traditional view of work that carried a gendered bias in its assessments of rights afforded to individuals under the EU citizenship regime. This, we argue, has been carried over into the UK immigration regime applicable to EU+ citizens after Brexit, even though we also note that the EUSS has been more generous than the provisions set out under the Withdrawal Agreement. By analysing the legacy of EU+ citizens in a post-Brexit Britain – particularly, migrant women in atypical work – through application of the EUSS, we challenge the justifications put forward in the PES legitimising discrimination against women.

The article is structured as follows. We first outline the puzzle of the EUSS. This provides background and context to the EUSS itself and how it operated in practice. Second, we introduce the theoretical framework of intersectionality and highlight the greater susceptibility to discrimination of women at the intersection of gender, migrant status and socio-economic status. We draw on UK labour market data concerning women and migrant women and explore the overlapping disadvantages of being a woman and of being a migrant. Third, we analyse the PES from an intersectional lens to argue how and where migrant women of a lower socio-economic status are particularly disadvantaged and how justifications put forward by the Home Office act to increase gendered susceptibility to discrimination. Finally, we evaluate our claims through the lens of the legacy left behind by the EU's market citizenship model. The article takes a case study approach, using secondary data on women on the UK labour market to explore the vulnerability of migrant women in atypical work. It proceeds to analyse a key policy document, the PES, where the Home Office admits gender discrimination but disregards the amplified effects of

intersectional discrimination. The PES has not been analysed before from this lens, and our chosen example contributes to the debate by uncovering a hidden category constituting a prime example of intersectional discrimination.

I. The Puzzle of the EU Settlement Scheme

The EUSS was codified by the EU Withdrawal Agreement in order to protect the rights of EU+ citizens and their family members and allow them to reside in the United Kingdom if they had established residence in the country before the cut-off date of 31 December 2020. After a series of pilot phases, the Scheme opened to the general public in March 2019 and officially remained open until June 2021, with late applications permitted under exceptional circumstances to this day. The original application process consists of two phases: first, an initial automated phase, during which automated checks are performed on the applicant's identity and residence to ascertain their eligibility to the Scheme, and second, on criminality under the heading of suitability. Data were extracted from His Majesty's Revenue and Customs (HMRC) and the Department for Work and Pensions (DWP), two employment and benefit-related databases.

Our aim in this article is not to critique automated algorithmic decision-making more generally, but rather to highlight how it can impact on migrant women in atypical work. However, reliance on employment data is linked to the legacy of what is often branded as 'resilient' market citizenship (Nic Shuibhne, 2010) under EU law. Market citizenship comes from the idea that citizens in the EU are recognised and granted rights on the basis of their economic activity, as was the original approach to the free movement of persons in the EU's internal market prior to EU citizenship rights' introduction in 1993, and its expansion in scope in the early 2000s. We argue that the principles underpinning market citizenship have been replicated and somewhat endorsed by the United Kingdom in its post-Brexit immigration landscape under the EUSS. It is why so many migrant women in atypical work have found themselves at risk of greater susceptibility to discrimination (Sedacca, 2024). Conditions linked to employment for conferral of rights under EU free movement law have long been a point of discussion in the literature (Ackers, 1994; Dougan, 2006; Mantu, 2022; O'Leary, 1999; Spaventa, 2008), and we now consider this in the EUSS context to elucidate the disadvantage suffered by migrant women in atypical work.

The EUSS offers two types of statuses to applicants, as per Immigration Rules Appendix EU (Home Office 2016) – settled and pre-settled statuses. Settled status is equivalent to permanent residence, and holders of this status must prove 5-year continuous residence in the United Kingdom, amongst other criteria, before the aforementioned cut-off date.³ Pre-settled status is a 'lesser' status due to it only offering a temporary leave to remain for those who have failed to satisfy the full 5-year continuous residence and is convertible

³This is subject to some exceptions. A 'continuous qualifying period', as defined in *Immigration Rules Appendix EU*, is described as having no absences longer than 6 months in a 12-month period, with some exceptions for absences for pregnancy, childbirth, serious illness, study, vocational training, an overseas posting or because of COVID-19. If you were granted pre-settled status before the cut-off date of 31 December 2020, then you would be eligible after the deadline to apply for settled status once 5 years in total had passed. Family members joining holders of settled or pre-settled status also have a different deadline for application.

to settled status once the 5-year residence period has been completed. We consider it a lesser status because whilst pre-settled status does provide a right to stay in the United Kingdom, it excludes various rights including ‘the right to access social assistance, unless an additional right to reside can be demonstrated’ (Welsh, 2022, p. 134). We also argue that the evidential burden of proving continuous residence, initially through automated data checks, can often lead to a higher likelihood of discrimination and granting of pre-settled status for some categories of workers that tend to be women. It is mostly linked to the way in which the automated checks have been designed to search for a continuous residence footprint based on employment and benefit-related databases (Juverdeanu, 2024, 2025).

The reason we argue that there is a gendered element in the automated checks is because women’s work history ‘is more likely to be disrupted by informal care’ (Welsh, 2022, p. 134). The heavy reliance on the HMRC and DWP databases for the automated checks puts women in atypical work at a particular disadvantage because of inconsistent and potentially unreliable data from these employment and benefits-related databases. For example, those in receipt of social security and assistance payments would be picked up by these checks, but the nature of the payments means their residence is only counted for a few months at a time, despite payments being received for far longer. When the automated checks prove insufficient or inaccurate, a second phase of checks requires an applicant to provide additional evidence. It is one of the primary examples of problems under the EUSS that we elaborate on later, though critiques of automated decision-making are outside the scope of this article. We highlight instead how obstacles to proving residence for already marginalised individuals fall heavier on migrant women of a lower socio-economic status.

It is within this context of recognised disadvantage that we also seek to read and analyse the PES. Both direct and indirect discrimination will be considered. Direct discrimination refers to explicit discrimination on a protected characteristic; indirect discrimination appears to be neutral but has a disproportionate negative impact on a particular group often having at least one of the protected characteristics. The protected characteristics of marriage and civil partnership, pregnancy and maternity and sex are the specific considerations in the PES of relevance to our analysis in this article. There is also a further section on the impact on protected characteristics under the Equality Act 2010 in areas not covered under the initial assessment of direct and indirect discrimination and other general assessments such as of the online-only immigration status. Throughout, the Home Office recognises and admits that the EUSS’s processes can disadvantage women in various ways. However, after each acknowledgement of discrimination, it often states that ‘such an approach is justified as it is a proportionate means of achieving a legitimate aim’ (Home Office, 2020). Identifying a legitimate aim can justify instances of indirect discrimination. In many cases, the legitimate aims are efficiency and streamlining of the EUSS process for the majority of other applicants; other times, it is highlighting the ‘range of mitigating measures that were being deployed’ (Tomlinson and Somers-Joce, 2022, p. 15) for those who face barriers.

We thus evaluate the PES’s justifications and argue against its conclusions of there being a proportionate legitimate aim by emphasising the significance of the disproportionate impact on migrant women in atypical work and their increased susceptibility to discrimination at the intersection of gender, migrant status and lower socio-economic status. We

argue that this group is already disadvantaged in many ways due to the EUSS processes and are now made more invisible by the PES's assessment of the discrimination they are subject to. In the EU itself, an emerging body of scholarship had explicitly sought to analyse EU law from a feminist perspective in the early 2000s. Shaw (2000) provided a comprehensive overview of such feminist interventions to the law, particularly within EU law and European studies. Feminist critiques of the EU and the case law from the Court of Justice of the EU exist (Ackers, 1996; Hervey, 1995; McGlynn, 2001; Shutes and Walker, 2018) but fewer focus on intersectional aspects. We have chosen to adopt an intersectionality framework focusing on gender, migrant status and socio-economic status to demonstrate how the EUSS in its legal framework has made this particular group of vulnerable women more susceptible to discrimination.

II. Susceptibility to Discrimination at the Intersection of Gender, Migrant Status and Socio-Economic Status

Intersectionality is a term first used officially by legal scholar Kimberlé Crenshaw (1989, 1991) to highlight how the experiences of Black women plaintiffs in the United States were not adequately understood by the courts, due to a failure to acknowledge and understand the existence of multiple axes of discrimination. Intersectionality is now widely employed in the social sciences in various forms – as a theory, tool or lens – to provide a deeper, more nuanced understanding of the experiences of individuals who are disadvantaged by multiple intersecting social identities (Collins and Bilge, 2020). We use intersectionality in this article to understand how the EUSS discriminates against migrant women in atypical work, more likely to be of a lower class in terms of their socio-economic status for reasons outlined later. Intersectionality highlights why it is important to shine a spotlight on what might otherwise be invisible regarding these women's experiences. It is overshadowed in the EUSS context by justifications related to efficacy as per the Home Office. We argue that these women's higher susceptibility to intersectional discrimination is therefore not adequately acknowledged by the UK Government, especially in light of the Home Office's own admission of discrimination in the PES.

A significant amount of focus in intersectionality early on was put on gender, race and class, following Crenshaw's (1989) original paper. In more recent years, more feminist scholarship encompassing intersectional elements has emerged in EU law especially, with intersectional analyses related to those affected by the EUSS carried out already in the context of gender and race (Solanke, 2020, 2022) and gender and migrant status (Yong, 2023). They argue that there is more to be done in terms of addressing how the law seeks to protect those impacted by intersectional identities, as it currently acts to disadvantage their positions under the law now applicable to them in a post-Brexit Britain. We expand on the existing literature by also considering gender and migrant status, recognising existing work on race and gender in Europe (Emejulu and Sobande, 2023; Rajan-Rankin, 2017) whilst widening its analytical scope to consider socio-economic status as an additional intersection as illustrated by our case study. This allows for a nuanced understanding of migrant women who are disadvantaged by being in low-paid and atypical work sectors to be given specific deserved attention.

As Sedacca (2024) argues, there is a distinction between *susceptibility* to discrimination as compared to the *impact* of discrimination. We argue that migrant women in

atypical work are more susceptible to discrimination but acknowledge that the impact of discrimination cannot be conclusively assessed here because of the lack of reliable data on the EUSS and gender, detailed below. Gender is not a characteristic that the Home Office regularly publishes or collects data on under the EUSS. The Independent Chief Inspector of Borders and Immigration (ICIBI) called for a more comprehensive collection and publication of data especially on vulnerability and protected characteristics for the purposes of ‘inform[ing] evaluation against strategies and the Policy Equality Statement’ with data on sex mentioned explicitly (Neal, 2019, p. 11). The absence of disaggregated data on gender has been widely noted (Home Office, 2020), though Barnard (2021) and Costello (2022) have obtained data on the gender breakdown of paper applications to the EUSS through freedom of information (FOI) requests. When we ourselves inquired about the reasons for not reporting such data, the Home Office responded that gender is a non-mandatory field in the EUSS application and not determinative in the grant of settlement. Therefore, any data collected on gender would be limited and not reported on due to potential inaccuracy (Migration Stats Enquiries, 2023). The Home Office has also categorically rejected the ICIBI’s recommendation to, ‘[a]s a matter of urgency begin collecting, collating and utilising data about vulnerability and protected characteristics from all sources’ (Neal, 2019, p. 11), and instead repeatedly emphasised the importance of ensuring that the process remains simple and streamlined, collecting only what they deemed as ‘necessary’ amounts of data.⁴ However, Tomlinson and Somers-Joce (2022, p. 18) criticise this, as the choice not to collect such systemic data ‘violates the principles of public law pertaining to the duty of inquiry’ and renders the experiences of certain vulnerable groups invisible.

In terms of migrant status, there is plentiful statistical data on the nationalities of those applying to the EUSS (Home Office, 2024a) in contrast to the lack of accurate data on gender. However, purely focusing on nationality does not adequately capture one’s degree of vulnerability. It is a good example of how considering an individual as a function of a single-axis identity is insufficient to understand their experience of discrimination. By considering the impact of other axes of discrimination, more vulnerabilities are uncovered. Whilst migrant status is inherent to the analysis here, it is important to avoid homogenising what is nonetheless a diverse group of migrants. We consider the law applicable to migrants who are women under the EUSS but narrow our scope further by considering a specific class of migrant women of a lower socio-economic status. We do so by using secondary data on the employment and earnings of women in the United Kingdom, followed by figures on migrants’ integration on the UK labour market.

We have also chosen to focus on migrant women who are of a lower socio-economic status because of their non-linear career trajectories, and often being in atypical work. It aims to capture women who undertake part-time employment or unpaid care work and thus by the very nature of what is considered more precarious work are likely to be of a lower socio-economic status. In general, this is widely accepted to be the norm in terms of the gendered division of labour (Maestriperi, 2023; Pech et al., 2021; Sedacca, 2024). Cederberg (2017, p. 151) has noted that ‘class is generally less of a focus in migration

⁴This includes a failed legal challenge brought by the Joint Council for the Welfare of Immigrants to ask the Home Office to collect more data so as to put into place more safeguards for the most vulnerable upon the applicant deadline passing (Public Law Project, 2021), as well as the Court of Appeal’s approval of the assessment done in the Home Office’s PES as regards to equality duties (Home Office, 2021).

studies in recent years' and has been underplayed in favour of other social identities such as ethnicity. However, considering socio-economic status in this way alongside migrant status allows us to understand 'who is able to move and who cannot' (Van Hear, 2014, p. S117) beyond narrow considerations of economic factors widely associated with skilled or unskilled migration. This approach also allows us to gauge the effects of a particular legal regime on migrant women disadvantaged by the economic factors recognised and rewarded under the EUSS itself.

By looking more granularly at this group of migrant women who are more likely to be in a position of economic disadvantage, there is a clearer case to be made for the disproportionate impact of the simple and streamlined EUSS. The particular intersection of gender, migrant status and socio-economic status is a place of mutual reinforcement in terms of various axes of discrimination, with each social characteristic itself encompassing multiple forms of identity. The specific class of women that this article seeks to consider exists as a function of their gender, in terms of the societal norms and expectations leading to women historically belonging in the private rather than public sphere (Fineman, 2008). This choice is often involuntary and can leave them excluded from civil and political society, which encompasses workplaces. We thus make our overarching argument that migrant women are at a higher risk of falling outside the scope of the EUSS's protection because of the way its algorithm assesses eligibility. The inequalities faced especially by migrant women of a lower socio-economic status have been masked by the messaging of the EUSS and the PES as to the supposed success of their 'one size fits all' approach.

III. Women and Migrants' Susceptibility to Discrimination on the UK Labour Market

This section provides the background to make the case that migrant women are more susceptible to vulnerability on the UK labour market. We use a case study approach to analyse data in the UK context. The case study of migrant women in atypical work is unique in its challenge of the PES and its display of intersectional discrimination. Empirically, the analysis adds to the EUSS literature uncovering the vulnerabilities of a forgotten and hidden group. Theoretically, its value consists of demonstrating the workings of intersectional discrimination firsthand where discrimination is admitted and justified, as the Home Office has done. It is based on secondary data on the UK labour market with a focus on women and migrant women in employment. It draws on employment and earnings data from the Office for National Statistics, disaggregated by gender, and on a comprehensive analysis of these figures compiled by Frances-Devine and Hutton (2024). Subsequently, it narrows the focus to migrants in the United Kingdom and draws on UK migration data on migrants' labour market integration based on analysis by Fernández-Reino and Brindle (2024). We also made several attempts to obtain EUSS-specific data through FOI requests, but these were not satisfied due to lack of available data or exceeding the appropriate cost limit (FOI Responses, 2024). Instead, the official data on women and migrants on the UK labour market serves as groundwork for explicating the vulnerability of these migrant women, highlighting the impact of being at the intersection of gender, migrant status and lower socio-economic status in this context.

The literature has long debated the extent to which women have in general a real choice to work part-time (Maestriperi, 2023) or are pushed to do so by the uneven

distribution of unpaid work (Ginn et al., 1996). Expectations that women undertake the brunt of the unpaid work in the private sphere permeates the public sphere too, and Maestripieri (2023, p. 225) observes that ‘part-time work might become a flexibilization strategy that women are subjected to unwillingly by employers and the only alternative to unemployment’. The argument that women are much more likely to be part-time is even more compelling when considering that they represent the majority of people working part-time involuntarily (Maestripieri, 2023; Pech et al., 2021). Pech et al. (2021) observe that this is consistent with the women’s economic devaluation, often attributed to occupational segregation, with many women in more vulnerable and lower paid positions.

Data from the United Kingdom echo trends reported by the literature. At the end of 2023, on the UK labour market, more men than women were in full-time employment, with men’s employment rate at 78.1% and women at 72.1%. There is a very relevant distinction to be made as to why certain socio-demographic groups are not in employment. At face value, the overall unemployment rate for women at the end of 2023 was lower than for men, at 3.5% compared to 4.1%, respectively (Frances-Devine and Hutton, 2024, p. 15). However, this figure includes those seeking employment, whereas a more relevant figure is the number of people economically inactive and neither looking nor available for work. It transpires that more than a quarter (25.3%) of women between 16 and 64 were economically inactive in 2023, amounting to 5.44 million women. This figure stands in stark contrast with only 18% of men being economically inactive, a proportion amounting to 3.84 million men (Frances-Devine and Hutton, 2024, p. 15).

There were two other significant differences in the numbers pertaining to men and women that showcase the disadvantage of women on the labour market, connected to the earlier discussion on the type of work women do. At the end of 2023, 37.4% of women in employment were working part-time, in comparison to 14% of men (Frances-Devine and Hutton, 2024, p. 4). The Office for National Statistics (2023) employee earnings survey for 2023 also showed that women in full-time work earned almost £100 a week less than men. The salary gap is persistent in the United Kingdom, more so in gendered professions. For instance, in precarious sectors such as health and social care, 77% of jobs are held by women (Frances-Devine and Hutton, 2024, p. 4; King-Dejardin, 2019; Poole and Isaacs, 1997). Furthermore, the data fail to capture women who leave the labour market or have never been on the formal labour market due to undertaking unpaid care work. This relegates women to the private sphere, rendering them invisible for statistical purposes simply because of their ‘atypical’ work.

There are also generational differences in the gender pay gap, with women in their 30s and 40s seeing more marked differences than younger generations, given that being out of the labour market for childcare is more frequent at these ages. The ‘child penalties’ are reflected in earnings, with women’s earnings falling sharply after childbirth, but also in the time spent at work, with mothers leaving employment for a time and many switching from full-time to part-time work (Frances-Devine and Hutton, 2024, p. 26). Lending support to this idea, a report by Andrew et al. (2021) explored how gender gaps in employment, working hours and wages become more pronounced when workers have children. The gap between mothers and fathers widens right after the birth of a child and the impact of having children on professional careers continues to grow. Andrew et al. (2021) observe that ‘after the arrival of children, the employment of mothers falls sharply and immediately, from over 90% in the years before childbirth to 75% in the year after the birth’,

whilst having a negligible impact for fathers. Moreover, directly relevant to atypical work, 'women who do continue to do paid work after the birth of a child often switch to part-time hours' (Andrew et al., 2021, p. 4). This is not mirrored by changes for fathers, the latter being negligible. The gender gap in worked hours and pay is thus significant and immediate, whilst also having long lasting effects.

Relatedly, the data for migrants, already different compared to the rest of the population, do not apply to all migrants equally, especially when also considering the intersection of gender. In 2022, 71% of working-age migrant women were in employment, in comparison to 73% of UK-born women (Fernández-Reino and Brindle, 2024, p. 5). These figures should not be taken at face value either, however, as not all migrant women fall within the same employment and unemployment rates. As Fernández-Reino and Brindle's (2024) analysis of the Annual Population Survey for 2022 noted, as a whole, EU-born women had an unusually high employment rate, standing at 80%. This can be linked to the legacy of EU market citizenship and the fact that under the free movement of persons, rights are granted to workers. However, there are differences between the different EU member states here too, known as the EU14, EU8 and EU2.⁵ At a 2% difference, the gender employment gap is the smallest in the EU14, more significant in the EU8 at an 8% difference and even more significant in the EU2 at a 13% difference.

The differences between newer accession countries in the EU2 and EU8 and older accession countries in the EU14 persist when it comes to level of skills and wage. Fernández-Reino and Brindle (2024, p. 12) note that amongst EU2 and EU8, fewer than one in five workers were working in high-skill jobs in 2022. Migrants from these countries were 'most likely to work in low-skill occupations, including cleaners, waiters, and packers' (Fernández-Reino and Brindle, 2024, p. 12). The difference is reflected in yearly earnings, with EU2 and EU8 citizens' earnings ranking the lowest in comparison to other migrants to the United Kingdom and to the UK-born population. The intersectional vulnerability of immigrant EU women emerges at this junction. The workers from the newest member states, EU2 and EU8, are those most likely to be in an underprivileged position, working in lower-skill sectors at the bottom of the pay scale. Additionally, because women tend to be in employment less than men on the UK labour market, it is these migrant women who face the greatest socio-economic disadvantage.

Not only do the data show that the women from the EU2 and EU8 are more likely to be of a lower socio-economic status, it also confirms that individuals from the newest EU member states are amongst the main applicants to the EUSS. Topping the count of applications received are those from the EU2 and EU8. Romania, one of the EU2, is the member state with the highest numbers of applications, at close to 1.8 million received by September 2024. This is followed by Poland, one of the EU8, with 1.25 million applications for the same timeframe (Home Office, 2024b). The strong likelihood of many women from these member states being of a lower socio-economic status and these nationals being the main applicants to the EUSS exacerbates the risk and extent of gendered susceptibility to discrimination.

⁵The ONS (2017) defines the three groups: 'EU14: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Republic of Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden; EU8: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia; EU2: Bulgaria, Romania'.

Furthermore, as discussed below, EU citizens are also more unlikely to apply for unemployment benefits, which affects their footprint for eligibility to the EUSS under its automated checks. For 2022, Fernández-Reino and Brindle (2024, p. 8) noted that only 14% of unemployed EU migrants claimed benefits, compared to 24% of non-EU workers and 31% of UK-born workers. We made a FOI request to the Home Office inquiring how many of the 7.9 million EUSS applications received by 30 June 2024 had a footprint detected by the automated checks and how many required additional evidence. The Home Office responded they ‘do not hold this level of detail within their database’, and even if there were plans to include it, there was no timescale for this (FOI Responses, 2024). Our attempts to establish a gender breakdown of the number of EUSS applications that did not have a detectable footprint and involved additional requests for evidence were thus left unanswered.

Nonetheless, the above analysis of data for both women and EU+ citizens on the UK labour market shows that migrant women from the EU face intersectional discrimination, in terms of the gendered disadvantages in regard to employment, alongside problems experienced as a migrant, particularly from the EU2 and EU8. There is thus value in focusing on this intersection of gender, migrant status and lower socio-economic status because such intersectional vulnerability is borne out of the data. We now turn to reflect on how the PES considers that the Home Office is adhering to its public sector equality duties, primarily from the perspective of discrimination on the grounds of gender. With the data in mind as to the significant difficulties that EU+ migrant women of lower socio-economic status face, it becomes more evident how the EUSS exacerbates susceptibility to discrimination.

IV. Evaluating the PES

The Equality Act 2010 requires public authorities to ‘have due regard’ to eliminating discrimination, advancing equality and fostering good relations in the exercise of their public functions under s149(1). The PES, published in November 2020, outlined how the Home Office sought to ensure compliance with this public sector equality duty in the EUSS. As mentioned, it explicitly deals with discrimination that specifically affects women, amongst other forms of discrimination. In this section, we argue that the justification put forward in the PES for the resultant discrimination, direct or indirect, is unconvincing. To make this claim, we first analyse the multiple occasions in the PES where the Home Office refers directly to specific areas in which it determines there is a risk of gendered discrimination for various reasons under several headings of protected characteristics. Then, we will assess various criteria and policy elements of the EUSS that more generally and indirectly increase gendered susceptibility to discrimination against migrant women of lower socio-economic statuses, such as through the digital-only immigration status and rules on administrative review. Our aim is to bring these important considerations back to light and argue that the PES disregards intersectional discrimination.

First, direct and indirect discrimination are recognised in the PES itself. It noted that the automated checks prejudice women, in particular, those who are likely to receive certain state payments (para 266). It also highlighted difficulties for those who are pregnant or on maternity leave, because of gaps in employment data due to absences from work (para 268). It recognised that ‘married women (and women generally) are less likely to

be employed outside the home', which could also impact their detectable employment footprint (para 339). It even noted that married women, who are most likely to change their names,⁶ would also face difficulties under the automated checks because of the system's inability to match one name to the other (para 324). The aforementioned state payments – Working Tax Credit, Child Benefit and Child Tax Credit – are those which women in atypical work are most likely to receive. By the very nature of not obtaining a full-time salary and needing such payments, we infer that these women are also likely to be of a lower socio-economic status. Yet, because of the reduced burden for an already privileged majority of applicants who easily satisfy the eligibility conditions, these checks remain. This choice exacerbates the gendered susceptibility of women of a lower socio-economic status, undermining their visibility within the experience of the so-called 'normal' majority of (mostly) working men (Ackers, 1994; O'Brien, 2013).

Under the general heading of 'sex' in the PES, further gendered susceptibility also comes to the fore. This section in the PES mainly speaks of women who are vulnerable because of their risk or experience of domestic abuse, which is a compound disadvantage due to the way the law itself operates to discriminate against them (Briddick, 2022). The impact of women at risk of or experiencing domestic abuse in the context of the EUSS has been discussed (Yong, 2023); therefore, it is the justifications in the PES that are of relevance here. Whilst the Home Office undoubtedly identifies cases at clear risk of gender discrimination, its response and the support provided is arguably inadequate when considering the sheer levels of vulnerability that the intersection of migrant status, gender and other characteristics like socio-economic status brings. The EUSS' vulnerability strategy includes providing grants for 72 organisations supporting vulnerable EU+ citizens and its aim is to help those in need of support to apply to the EUSS (para 350). However, this funding has proven insufficient and is overall a disproportionate response to the gendered susceptibility of migrant women of a lower socio-economic status (Juverdeanu, 2025; Sumption and Fernández-Reino, 2020; Yong, 2023). Again, the effect of such intersectional discrimination is left unconsidered by the PES.

Second, the more general processes that indirectly discriminate against migrant women of a lower socio-economic status further demonstrate the extent of their increased gendered susceptibility to discrimination. Tomlinson (2019, p. 33) noted that the DWP data 'is of lesser quality than HMRC data' and that, given the content of the databases, more vulnerable individuals are expected to rely on the DWP. For our purposes, it is worth mentioning that some of the benefits women are more likely to receive are based on DWP data, such as Jobseekers Employment Support Allowance, Carer's Allowance and Maternity Allowance. These allowances are more likely to be received by women because of the higher numbers of women out of full-time work as outlined by the above data (Frances-Devine and Hutton, 2024). Moreover, women are disproportionately affected by some data not being shared. Tomlinson (2019, p. 34) observed that data 'from working tax credit, child tax credit, and child benefit records, all managed by HMRC, is not being shared' because the Home Office has deemed they do not provide reliable evidence of residence and cannot be detected by the automated data checks. These payments are more likely to concern women, as admitted by the Home Office, and support our argument

⁶The issues for those who change their identity primarily refer to transgender individuals, which is outside the scope of this article as this intersection has its very own vulnerabilities that deserve greater specific attention.

about greater gendered susceptibility and disadvantage under the EUSS for those of a lower socio-economic status.

The PES also considers the effect of a digital-only immigration status, identifying women as one of the groups at risk of particular disadvantage because of the fact that the digital-only status is more onerous for those considered to be vulnerable (para 309). The digital-only immigration status has been the subject of discussion for some time, as it prejudices a great number of those who have already been identified as at-risk or vulnerable, and not just limited to women (Juverdeanu, 2025; Meers et al., 2024; Sumption and Fernández-Reino, 2020; Tomlinson et al., 2022). These discussions are outside the scope of this article but emphasise the overall underlying argument of a general gendered susceptibility for already disadvantaged migrant women under the EUSS. We argue here that the relevant intersections have the effect of compounding vulnerability. It is important to note that the Home Office has indirectly acknowledged this in the PES but still maintains its justifications to discriminate against them. By arguing for simplification of the overall system, it ignored the effect these decisions had on those who were already disproportionately affected.

Administrative review fees are a final example of procedural discrimination hidden by justifications which disregard intersectionality. These are fees payable to review a decision made by the Home Office where the applicant considers an administrative mistake has been made, such as being granted pre-settled instead of settled status. Fees are disadvantageous to those of a lower socio-economic status, such as women (para 318), but are argued to be 'a legitimate means of ensuring that the extra administration involved in reconsidering an application is borne by the Home Office only where the original decision was in error'. However, by applying an intersectional lens to this justification, we contribute an important perspective missing in the PES as to gendered susceptibility to discrimination. The risk of being granted pre-settled instead of settled status is higher for women in atypical work, especially when it is already recognised that they are likely to have absences in their employment that affect their eligibility under the automated checks. Given the widely accepted view that pre-settled status is the lesser of the two statuses available under the EUSS, a fee to fix such errors would deter many from even seeking administrative review to begin with. This puts many more women at a greater disadvantage, undermining administrative justice (Thomas and Tomlinson, 2023) and is a situation entirely unconsidered by the PES.

As such, it is clear that a marked feature of the PES is that the disproportionate negative effects on women are noted and acknowledged as being discriminatory in many different situations throughout the report. In this regard, the public sector duty under the Equality Act 2010 has, in fact, led to a recognition of the discrimination that public authorities are creating, particularly in regard to discrimination on the grounds of gender. Given the legal requirement for the Home Office to have 'due regard' to the need to eliminate discrimination and advance equality of opportunity, it is notable that the PES acknowledges such discrimination; it could thus be argued that the Home Office has satisfied its public sector duty. However, we take issue with the fact that whilst due regard may be paid to some forms of gender discrimination, the justifications pertaining to reduction in the administration burden and being proportionate to achieving this legitimate aim do not account for the increased susceptibility of women who are already disadvantaged at

the intersection of their gender, migrant status and lower socio-economic status due to a higher likelihood of being in atypical work.

Consistent with its duty to have ‘due regard’ to discrimination, whilst the PES has sought to consider the overall disadvantages that the EUSS and its processes present to women, we have outlined several areas where migrant women of a lower socio-economic status in atypical work would be unduly burdened for reasons disregarded by the PES. We also highlighted how the justifications put forward by the Home Office for their discriminatory practices operate to conceal the enhanced vulnerability of already vulnerable individuals. These seem to be acceptable in favour of providing more advantage to an already privileged group, which we argue does not give due regard to the gendered susceptibility of migrant women in atypical work. Instead, it acts to mask and deepen their discrimination even more. Having outlined what the situation in the United Kingdom is as to the rights of these women in a post-Brexit Britain, we now turn to consider how the legacy of EU law and the market citizenship fits into the puzzle.

V. The Legacy of Market Citizenship in a Post-Brexit Britain

In this section, we seek to explain the legal basis in EU law for the criteria applied under the EUSS to applicants, in order to consider the impact of the legacy of EU law in a post-Brexit Britain. We argue that this legacy derives primarily from rights under EU citizenship status and its market origins, which have often been linked to its contemporary weaknesses (Nic Shuibhne, 2010; O’Leary, 1999). Given that free movement came from the ‘desire to stimulate intra-EU labour mobility’ (Mantu, 2021, p. 11), many have been quick to observe how the core distinction between the economically active and economically inactive has been a hindrance to equal treatment. Following this, many inquired ‘whether EU citizenship is a gendered status’ (Mantu, 2022, p. 95) by looking at the intersection of gender and socio-economic status, as well as women’s ability to access welfare in the EU. As such, caution, or rather scepticism, is advised when considering the effectiveness of the general principle of non-discrimination in EU law, as well as the transposition of citizens’ rights into a post-Brexit Britain under the Withdrawal Agreement.

It has been a longstanding assumption for many years that in the EU women migrate mainly as family members joining a male breadwinner in a host EU member state (Ackers, 1996). In this regard, women have long been relegated to family dependent status in EU law, part of the rights under the EU internal market that facilitate the free movement of persons (McGlynn, 2001). Furthermore, ‘emphasising the link between activities that can be considered “work” and the market has exclusionary consequences for women’ (Mantu, 2022, p. 99) because of the blurring between the private and public spheres and the work done by women, for instance, in terms of childcare. McGlynn (2001, p. 341) argued that ‘[t]his privileging of the movement of male workers can also be demonstrated by the absence of any real measures being taken to facilitate women’s free movement’. This was most evident in the EU Citizenship Directive 2004/38, which simply refers to the fact that free movement rights should be implemented without any form of discrimination, including based on sex.

Indeed, problems arose with the way that women’s employment was viewed in the EU when it was also translated into laws regulating the family unit. Cook (1998, p. 267)

argued that by considering market citizenship as gendered citizenship, one can question ‘what barriers homeworkers and part-time workers experience in claiming employment rights, rather than simply assuming everyone has equal access to rights’. Dominated by the imposition of the traditional conception of motherhood, the EU is criticised for ‘reinforcing traditional assumptions about appropriate familial roles’ that has led to conferring rights exclusively for certain groups of individuals, namely, workers (McGlynn, 2001, p. 327). This is the narrative that also feeds into that of the market citizen. The market citizen model is criticised because of its focus on economic activity and rights based on contribution to the market, which is a vision maintained in the Withdrawal Agreement. As the data above showed, this choice risks perpetuating a gendered effect on women who are more likely to be unemployed or in atypical employment.

As Hughes (2015, p. 36) argues, the ‘gendered construction of the good citizen is exposed in rules governing family reunification’ and the ‘gendering of the policy architecture continues to have particularly negative impacts on women’. EU citizenship case law has seen the Court of Justice of the EU recognising forms of employment that affect women more than men, such as part-time work and lower remunerated work (C-53/81 *Levin*), but this is not a panacea for rights. As McGlynn (2001, p. 341) argues, ‘while the unpaid care work of women is encouraged under sex equality laws, via the dominant ideology of motherhood, this does not mean that such work is valued such that it attracts EU rights and entitlements’. Failing to attract rights is the crux of a problem that has been replicated under the Withdrawal Agreement in a post-Brexit Britain, though, notably, the EUSS has gone slightly further in terms of protection than the terms of the Withdrawal Agreement.

Under Part Two, rights for EU+ citizens under the Withdrawal Agreement are largely based on the aforementioned EU Citizenship Directive 2004/38 (Spaventa, 2020), which notably mostly protects rights on the basis of one’s economic activity or contribution to the market; the epitome of market citizenship. It does appear that the ‘gendered vision of labour mobility’ which takes ‘the EU citizen as a neutral subject of law who encounters a level playing field when exercising free movement right’ (Mantu, 2022, p. 98) has been carried over into the EUSS. The EUSS, however, has actually been more generous, and rather than only allowing right to reside to those who fall within the strict categories of the Directive, it premised its protection upon individuals’ proving residency – albeit on criteria that we have identified as often ignorant of intersectional vulnerabilities. Whilst the efforts made by the Home Office to expand eligibility under the EUSS must be acknowledged, choices made by the Home Office through the EUSS’s processes and criteria do still prejudice migrant women from lower socio-economic backgrounds.

Therefore, it is evident that a ‘market-based model of citizenship’ is thus not without ‘gendered implications with respect to access to state welfare provisions’ (Shutes, 2015, p. 61). This revisits the argument above regarding the state benefits that women are more likely to receive, which have failed to be picked up by the automated checks. It speaks to the idea that applying the market citizenship model of EU citizenship impacts what kind of state welfare may, in fact, be available to migrant women in a post-Brexit Britain. The defining idea that an EU+ citizen is deserving of protection for their economic contribution has evidently had long-lasting and potentially life changing effects in light of the United Kingdom’s withdrawal. Whilst the EUSS may be more generous than the Withdrawal Agreement, this pervasive underlying sentiment has still led to the current

situation of the EUSS and its disproportionate negative impact on EU+ migrant women of a lower socio-economic status.

Conclusions

At the outset of this article, our aim was to outline the reality facing a group of individuals whose plight, we argued, is otherwise hidden behind the mainstream messaging of the success of the regime applicable to EU+ citizens who seek rights to remain in the United Kingdom after its withdrawal from the EU. The focus was on EU+ migrant women in atypical work. By analysing their experiences at the intersection of gender, migrant status and socio-economic status, we argued that these women were at risk of greater susceptibility to intersectional gendered discrimination. Our case study on women in atypical work bore out this claim, as the figures for the United Kingdom are consistent with the theory around the gendered implications of rights on the labour market, showing that more women than men are out of the labour market, in part-time employment, or on interrupted career trajectories, and that many EU+ migrant women, especially from newer accession member states, tend to be in lower-skill and lower-wage employment.

Having clarified that there are indeed disadvantages to being at the intersection of gender, migrant status and lower socio-economic status, we turned to analyse the PES in greater detail. This was in light of its considerations that apparently justify discrimination against women in general that may occur from the EUSS process. We argued that examining women on the basis of just their gender fails to account for the intersectional vulnerability of the EU+ migrant women we highlighted. The Home Office's overarching justification that discrimination is proportionate and justified for achieving the legitimate aim of improving efficiency and streamlining the process for the majority of others is clearly ignorant of the increased gendered susceptibility to discrimination of these women.

We also noted the connection between enduring discrimination against EU+ migrant women and the discourse under EU citizenship law, in particular, considering the market citizenship model. Where the EU has historically rewarded those who undertake traditional work – often under a male breadwinner model – this has been translated into the law and carried over into a post-Brexit Britain. However, what the analysis also sought to highlight is how this has not been resolved by the PES's assessment of its duties under the Equality Act 2010, thereby further cementing discrimination against this group of already vulnerable individuals at the intersection of their gender, migrant status and lower socio-economic status. It is this, we argued, that is the piece of the puzzle that remains forgotten long after the EUSS has closed.

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Data Availability Statement

Data sharing is not applicable to this article as no new datasets were generated or analysed during the current study.

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