



## The UK Seasonal Worker Visa

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(Received 19 September 2022; accepted 20 September 2022)

### Abstract

This article discusses the United Kingdom (UK) 2019 Seasonal Worker Visa, which was adopted to address labour shortages in horticulture. It explains the challenges faced by workers in agriculture more broadly, and the particular issues raised by seasonal visas. It argues that the UK scheme contains significant restrictions on workers' rights. The article situates this scheme in a framework of 'state-mediated structures of injustice', namely instances where legal rules with an appearance of legitimacy create or increase vulnerability and are connected to widespread structures of exploitation. This theoretical framework focuses on the role and responsibility of the state for workers' exploitation. The authorities have political responsibility to change these rules, and may also have legal responsibility to do so under human rights law.

**Keywords:** labour law; immigration law; UK Seasonal Worker Visa; agriculture; exploitation

### 1. Introduction

There were several warnings in the United Kingdom (UK) that there would be labour shortages following Brexit and the end of free movement.<sup>1</sup> As a result, the Government adopted in 2019 a Seasonal Worker Pilot Visa to address labour shortages in horticulture. In this piece I first discuss the broader challenges of agricultural work and seasonal visas. I situate these visas in a framework of 'state-mediated structures of injustice',<sup>2</sup> namely instances where legal rules with an appearance of legitimacy create vulnerability that is systematically exploited. This framework helps focus on the political and legal responsibility of the state for workplace exploitation. In the second part, I turn to the detail of the UK scheme, which has been renewed, extended, and expanded to cover more sectors. I explain that the scheme is an example of state-mediated structures of injustice at work, as it contains several restrictions on workers' rights, placing them at risk of labour exploitation, including some of its most severe forms, and present existing evidence on its operation. The concluding part revisits the responsibility of the state for the exploitation experienced by migrant workers in this context. The UK Seasonal Worker Visa is presented as a legitimate and suitable way to address labour shortages while controlling immigration after Brexit. However, it increases

<sup>1</sup>See, for instance, Z Wood, 'UK Labour Shortages Reported as EU Worker Numbers Fall' *The Guardian* (2017) <<https://www.theguardian.com/politics/2017/feb/13/uk-labour-shortages-brexit-as-eu-worker-numbers-fall>> accessed 20 August 2022.

<sup>2</sup>I develop this further in V Mantouvalou, *Structural Injustice and Workers' Rights* (forthcoming, Oxford University Press 2023).

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vulnerability to exploitation that is inherent in the employment relation<sup>3</sup> and may also ground state responsibility under human rights law.

## 2. Agricultural work and seasonal visas: state-mediated structures of exploitation

Agricultural work is a low paid sector with high concentration of workers under temporary labour migration schemes. The ILO has described workers in agriculture as the ‘poorest of the rural poor’.<sup>4</sup> Work in this sector is challenging for several reasons.<sup>5</sup> It is typically seasonal work with the implication being that workers do not have a guaranteed income throughout the year.<sup>6</sup> This makes it an unattractive option for many people. Moreover, these workers may be reluctant to claim a pay rise or enforce their legal rights because the employer may not want to rehire them the season that follows. In addition, agricultural work is dangerous. According to estimates of the ILO, over 170,000 agricultural workers are killed each year at work around the world.<sup>7</sup> According to the Health and Safety Executive, the UK regulator on matters of health and safety at work, agriculture has the highest rate of fatal injury of workers if compared to all key sectors.<sup>8</sup> The same statistics indicate that during the last five years the annual average rate of fatal injury at work is around 21 times as high as the rate across all industries. Many are injured in industrial accidents with the machinery used, or poisoned by pesticides. As agricultural workers are often temporary workers, they are more likely to be involved in accidents because they are new to the work that they do.

Working in rural areas further means that the workers are isolated: they cannot easily access legal advice or be accessed by trade unions. The accommodation of agricultural workers can also constitute a challenge. It is frequently provided by the employer, as farms may be in remote locations and it is convenient to live close to work, and may be of substandard quality.<sup>9</sup> However, the fact that accommodation may be provided by the employer also means that if a worker leaves their job, they will lose this accommodation. For migrant workers, the implication of this may be that they become homeless. Finally, agricultural workers are often employed through agencies, a reality which creates further challenges because it is not always clear who is the employer: the agency or the farm business.<sup>10</sup>

<sup>3</sup>On the special features of the employment relation, see H Collins, ‘Is the Contract of Employment Illiberal?’ in H Collins, G Lester, and V Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) 48; G Davidov, *A Purposive Approach to Labour Law* (Oxford University Press 2016) Chapter 1.

<sup>4</sup>ILO, ‘Agricultural Wage Workers: The Poorest of the Rural Poor’ Press Release (23 September 1996) <[https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_008067/lang-en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_008067/lang-en/index.htm)> accessed 20 August 2022.

<sup>5</sup>As highlighted in ACL Davies, ‘Migrant Workers in Agriculture’ in C Costello and M Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2015) 79 at 80–1. See also V Bogoeski, ‘Harvesting Injustice: How the Legacy of Neoliberal Labour Market Regulation Helps Exclude Seasonal Migrant Workers from Social Security in Germany’ *VerfBlog* (2021) <<https://verfassungsblog.de/harvesting-injustice/>> accessed 20 August 2022. For an overview on farm work in several countries, including the United States (US), Mexico, Brazil, and various European countries, see P Martin, *The Prosperity Paradox: Fewer and More Vulnerable Farm Workers* (Oxford University Press 2020).

<sup>6</sup>On this point and further discussion of the key features of agricultural work, see, for instance, Peter Hurst in collaboration with P Termine and M Karl, *Agricultural Workers and their Contribution to Sustainable Agriculture and Rural Development* (International Labour Organization, Food and Agriculture Organization, International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco, and Allied Workers’ Associations, 2007) 23.

<sup>7</sup>ILO, ‘Agriculture: A Hazardous Work’ <[https://www.ilo.org/safework/areasofwork/hazardous-work/WCMS\\_110188/lang-en/index.htm](https://www.ilo.org/safework/areasofwork/hazardous-work/WCMS_110188/lang-en/index.htm)> accessed 20 August 2022.

<sup>8</sup>See Health and Safety Executive, ‘Fatal Injuries in Agriculture, Forestry and Fishing in Great Britain 2021/22’ <<https://www.hse.gov.uk/agriculture/resources/fatal.htm>> accessed 20 August 2022.

<sup>9</sup>See, for instance, The Voice Investigation on ‘Strawberry Slavery’ <<https://www.voice-online.co.uk/news/2021/10/10/strawberry-slavery/>> accessed 20 August 2022.

<sup>10</sup>The discussion of the challenges of the sector draws on Davies (n 5). On agency work, see ACL Davies, ‘The Implementation of the Directive on Temporary Agency Work in the UK: A Missed Opportunity’ 1 (2010) *European Labour Law Journal* 303. See also J Fudge and K Strauss (eds), *Temporary Work, Agencies and Unfree Labour – Insecurity in the New World of Work* (Routledge 2016).

Workers in agriculture are often recruited under temporary labour migration programmes, namely schemes whereby migrant workers arrive in a country to work, often without a route to permanent residence or citizenship. It is well known that migrant workers generally face increased challenges in comparison to a country's nationals because of language barriers, lack of support networks and other such factors. Yet legal rules that restrict these workers' rights exacerbate their vulnerability and fashion precarious work, as Anderson persuasively argued in 2010.<sup>11</sup> Temporary labour migration schemes typically contain a number of restrictions, exposing the workers affected to further vulnerabilities. They generally impose limitations in terms of the length of time that the migrant worker can stay in a country, but may also contain other restrictions, such as binding the worker to a particular employer, restrictions on the right to be accompanied by family members or to form relations with locals.<sup>12</sup> Some of these schemes are categorised as 'circular' migration, because workers can return regularly to the country but on a temporary basis each time. Temporary migrant workers also have no political rights.<sup>13</sup> Such regimes are used in many legal orders and there is no single legal definition of them.

The particular concern for me here is that especially restrictive schemes are linked to widespread patterns of exploitation that are state-mediated, in the sense that the state has a central role to play in creating and perpetuating the injustice in question.<sup>14</sup> Immigration rules, such as temporary work visas, may have an appearance of legitimacy: their aim is to meet the needs of the labour market and cover labour shortages, while also controlling immigration. These aims are typically viewed as a legitimate exercise of state sovereignty. However, we observe that they create special relations of dependency of the worker on the employer, in addition to the standard inequality of power that characterises the employment relation, and patterns of exploitation of particularly vulnerable workers. People may be exploited or abused, but they will be reluctant to question their treatment or leave their employer because they will then be deported or become undocumented and even more prone to exploitation.<sup>15</sup>

Examples of temporary labour migration schemes can be found across the world.<sup>16</sup> One of the most well-known systems for its negative effects on workers' rights is *kafala* in Gulf countries. There are different variations of *kafala* in different Gulf countries. The main characteristics of *kafala* are that a migrant needs a visa in order to enter a country and there has to be a sponsor for the visa; a visa is necessary to exit the country or change employer whereby the sponsor declares that they do not object to the worker leaving the country or changing sponsor; and sometimes there is also a requirement for a deposit, a sum of money paid by the sponsor for costs that involve the worker.<sup>17</sup> Another well-known temporary workers' scheme was the German scheme of

<sup>11</sup>See B Anderson, 'Immigration, Migration Controls, and the Fashioning of Precarious Work' 24 (2010) *Work Employment and Society* 300. See further C Costello and M Freedland, *Migrants at Work and the Division of Labour Law*, in C Costello and M Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2015).

<sup>12</sup>See, for instance, D Rajkumar, L Berkowitz, LF. Vosko, V Preston, and R Latham, 'At the Temporary-Permanent Divide: How Canada Produces Temporariness and Makes Citizens Through its Security, Work, and Settlement Policies' 16 (2012) *Citizenship Studies* 483.

<sup>13</sup>See the discussion in M Walzer, *Spheres of Justice* (Basic Books 1984) 56 ff and particularly 59.

<sup>14</sup>I develop the concept of state-mediated structures of exploitation further in V Mantouvalou, *Structural Injustice and Workers' Rights* (forthcoming, Oxford University Press 2023) Chapter 2.

<sup>15</sup>On challenges faced by undocumented workers in agriculture, see for instance the judgement of the European Court of Human Rights *Chowdury v Greece*, App No 21884/15, Judgement of 30 March 2017. See also R Kukreja, 'Visible Yet Invisible: The Disciplinary Mechanism of Self-Surveillance Among Undocumented South Asian Male Migrants in Rural Greece' 47 (2021) *Journal of Ethnic and Migration Studies* 3660.

<sup>16</sup>For a discussion of a few different examples, see PT Lenard and C Straehle, 'Temporary Labour Migration: Exploitation, Tool of Development, or Both?' 29 (2010) *Policy and Society* 283. See also J Howe and R Owens (eds), *Temporary Labour Migration in the Global Era* (Hart Publishing 2016).

<sup>17</sup>See OH AlShehabi, 'Policing Labour in Empire: The Modern Origins of the Kafala Sponsorship System in the Gulf Arab States' 48 (2021) *British Journal of Middle Eastern Studies* 291.

guestworkers which was initiated in the 1950s in order to support the country's economic growth after the war.<sup>18</sup> Israel also used to have very restrictive immigration rules for migrant workers.<sup>19</sup> In order to work in Israel, migrant workers used to require a visa that regulated the length of their stay and the name of the employer for whom they would work. The visa bound the worker to the specific employer, who was also responsible for the departure of the worker at the expiration of the visa. It also determined the length of stay. This visa was said to be linked to patterns of exploitation and abuse of migrant workers, facilitating employers who took advantage of the visa restrictions, as well as other legal exclusions from protective laws,<sup>20</sup> and was eventually abolished after a ruling of the Supreme Court of Israel.<sup>21</sup>

Temporary labour migration schemes are typically described as a 'triple win': it is said that they are beneficial for the country of nationality of the worker, the country of destination, and the workers themselves. However, the history of the programmes shows that they actually create 'perfect immigrants'<sup>22</sup> to the particular benefit of employers and the state, rather than the migrant workers. Host states do not have to plan their integration and social support, as they are only there temporarily.<sup>23</sup> Employers view them as 'an unqualified good' because it is a 'fully flexible and temporary workforce'.<sup>24</sup> The workers, in turn, accept jobs in sectors with substandard working conditions that others find back-breaking or repellent, because they need to send remittances to their dependents in their home country where the incomes are much lower.

Moreover, it has been argued that temporary labour migration programmes, are structurally exploitative not only for migrant workers but for all workers as a class.<sup>25</sup> This is because they help employers increase their profit by maintaining low salaries and bad working conditions that affect both migrant workers who accept the jobs and nationals of the host country, as the schemes are the reason why these working conditions are maintained. The UK Seasonal Worker Visa, to which I now turn, is a good example of how restrictive visa schemes create structures of exploitation of workers, while employers and the broader economy benefit from this situation.

### 3. The UK Seasonal Worker Visa

At EU level, with free movement rules in place, there was a relatively limited need for workers from outside the EU.<sup>26</sup> The UK had a Seasonal Worker Visa between 1945 and 2013 when it was discontinued.<sup>27</sup> However, the end of free movement, which followed Brexit, led to a new scheme that can serve to illustrate how restrictions on visa conditions create particularly serious challenges

<sup>18</sup>On this, see R Chin, *The Guest Worker Question in Postwar Germany* (Cambridge University Press 2007).

<sup>19</sup>Discussed in E Albin, 'The Sectoral Regulatory Regime: When Work Migration Controls and the Sectorally Differentiated Labour Market Meet' in C Costello and M Freedland (eds), *Migrants at Work* (Oxford University Press 2016) 134 at 141. See also M Niezna, 'Paper Chains: Tied Visas, Migration Policies, and Legal Coercion' 49 (2022) *Journal of Law and Society* 362.

<sup>20</sup>*Ibid.*, Albin, 142.

<sup>21</sup>For more recent developments in Israel, see Niezna (n 19).

<sup>22</sup>See C Hahamovitch, 'Creating Perfect Immigrants: Guestworkers of the World in Historical Perspective' 44 (2003) *Labor History* 69.

<sup>23</sup>*Ibid.*, 73.

<sup>24</sup>Chin (n 18) 45.

<sup>25</sup>L Ypi, 'Taking Workers as a Class – The Moral Dilemmas of Guestworker Programs' in S Fine and L Ypi (eds), *Migration in Political Theory – The Ethics of Movement and Membership* (Oxford University Press 2016) 151.

<sup>26</sup>There are still migrant workers from so-called third (non-EU) countries, though. See M-L Augere-Granier, 'Migrant Seasonal Workers in the European Agricultural Sector', European Parliament Briefing Note (2021) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689347/EPRS\\_BRI\(2021\)689347\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689347/EPRS_BRI(2021)689347_EN.pdf)> accessed 20 August 2022. There is a Seasonal Worker Directive: Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers. For critical analysis of the Directive, see F Bregiannis, 'An Analysis of the EU Seasonal Workers Directive in the Light of Two Similar Regimes: Three Dimensions of Regulated Inequality' 12 (2021) *European Labour Law Journal* 266.

<sup>27</sup>On the history of the scheme, see ACL Davies, 'Problems Continue in the Horticulture Sector: The Seasonal Workers Pilot Review 2019' 51 (2022) *Industrial Law Journal* 494.

for workers' rights.<sup>28</sup> From 2019, following the decision to leave the EU, the UK reintroduced a Pilot Seasonal Worker Visa, which it expanded in 2020.<sup>29</sup> The pilot involved 2,500 workers initially and was increased to 30,000 workers in 2021, while a further increase to 40,000 workers, including some on 8-week visas, was announced in 2022.<sup>30</sup> The scheme is no longer called Pilot, but has been renamed the Seasonal Worker Visa. The sectors where these workers are to be employed have also been amended. The visa would initially be used for recruitment in horticulture, but it was more recently announced that the sectors will be expanded to cover other fields, such as poultry.<sup>31</sup> The programme is a sponsored visa which is run by certain approved intermediaries, and not by the farms directly. There were two approved intermediaries originally, but these were increased to four intermediaries later on because of high demand for the scheme. These have to be endorsed by the Department for Environment, Food and Rural Affairs, and licensed by the Gangmasters and Labour Abuse Authority.<sup>32</sup> The intermediaries can issue certificates of sponsorship for workers and have to ensure that working conditions comply with the law on minimum wage, health and safety, and other labour rights. Further duties of the intermediaries include reporting duties, if for example a worker does not turn up to work for a period of ten days, record-keeping duties, and duties to comply with immigration law.

The visa contains a number of conditions, which restrict workers' freedom and are found in several temporary labour migration programmes. Its duration is up to six months for every 12-month period, and the workers are only permitted to work in the sector specified on their visa.<sup>33</sup> They cannot get a permanent job, be accompanied by family members, or have recourse to public funds, which include a range of social benefits that are available to people on a low income.<sup>34</sup> The temporary nature of the visa and the fact that workers cannot be accompanied by family members means that it will often be those who are younger and probably less experienced who use this migration route.<sup>35</sup> There is no English language requirement for the workers.

Crucially, the fact that intermediaries are involved creates additional dependency of the workers, not on the end user alone but also on the intermediaries themselves. The intermediaries are required by the scheme to make sure that workers are normally permitted to move to another employer. The official Guidance provides:

You must not *normally* refuse requests from participating workers to change employers. Participating workers can change employers if they wish and must *normally* be allowed

<sup>28</sup>For an overview, see M Gower, S Coe, and I Stewart, 'Recruitment Support for Agricultural Workers', *Commons Library Debate Pack* (2022) CDP 2022/0094.

<sup>29</sup>See the Immigration Rules Appendix Temporary Work – Seasonal Worker, (2016) <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-t5-temporary-worker-seasonal-worker>> accessed 20 August 2022. Other measures announced to address labour shortages include employing prisoners in apprenticeships. See 'Apprenticeships for Prisoners to Cut Crime' <<https://www.gov.uk/government/news/apprenticeships-for-prisoners-to-cut-crime>> accessed 20 August 2022.

<sup>30</sup>Answer to a parliamentary question tabled by D Poulter, MP, (2022) <<https://questions-statements.parliament.uk/written-questions/detail/2022-06-09/15228>> accessed 20 August 2022.

<sup>31</sup>See Department for Environment, Food and Rural Affairs (Government Food Strategy 2022) 10.

<sup>32</sup>See Guidance, Workers and Temporary Workers: Guidance for Sponsors: Sponsor a Seasonal Worker, SE 2.3 <<https://www.gov.uk/government/publications/workers-and-temporary-workers-guidance-for-sponsors-sponsor-a-seasonal-worker/workers-and-temporary-workers-guidance-for-sponsors-sponsor-a-seasonal-worker-accessible-version>> accessed 20 August 2022.

<sup>33</sup>Appendix, SAW 7.1 and SAW 7.2.

<sup>34</sup>SAW 7.2.

<sup>35</sup>See Written Evidence submitted by Focus on Labour Exploitation to the EFRA Committee Inquiry into Labour Shortages in the Food and Farming Industry, (2022) para 12 <<https://www.labourexploitation.org/publications/flex-written-submission-efra-committee-inquiry-labour-shortages-food-and-farming>> accessed 20 August 2022.

to do so, unless there are significant reasons not to permit this (for example, their visa will imminently expire and the duration of the necessary training requirements would make such a move impractical).<sup>36</sup>

Earlier guidance said that workers should be able to change employer ‘where possible’. In any case, there is no free and unconditional right to change employer. The only other existing temporary visa for low paid work in the UK is the Overseas Domestic Worker Visa, which has been particularly restrictive since 2012. Workers on that visa are tied to the employer with whom they arrived in the UK. For the first four years since the additional restrictions were introduced, workers on the Overseas Domestic Worker Visa did not have a legal right to change employer under any circumstances, and for this reason they were trapped in cycles of labour exploitation, including severe labour exploitation and abuse.<sup>37</sup> More recently the rules were amended, and workers can now change employer in very limited circumstances. Since 2016, even though domestic workers on this visa can change employer, they can only change within the initial six-month period, unless the worker is identified as a potential trafficking victim. This time limit means that, in reality, the right to change employer is not effective, because domestic workers will find it very difficult (or impossible) to obtain new employment with only months or even weeks remaining on the visa. The change has therefore been criticised for being ineffective: without an unconditional right to change employer, workers face serious risks.<sup>38</sup> This point is crucial for temporary worker visas. Evidence on the treatment of workers under the Overseas Domestic Worker Visa, as well as literature and reports analysing its problems that are due to its restrictive conditions, can be useful when assessing the visa conditions of workers under the new seasonal visa in agriculture.

The Government monitored the operation of the Agricultural Seasonal Worker Pilot and published in December 2021 the findings of a Review by the Home Office and the Department for Agriculture, Food, and Rural Affairs on the first year of its operation (2019–20).<sup>39</sup> The aim of this Review was to consider whether the workers under the pilot scheme experienced ‘modern slavery and other labour abuses’. This limited ambition, which focuses on extreme forms of exploitation, and not on decent working conditions more broadly, was disappointing<sup>40</sup> but not surprising, given that the UK Government’s priorities in recent years have focused on tackling ‘modern slavery’,<sup>41</sup> rather than promoting the protection of a range of workers’ rights. Even though the Government Review did not identify instances of extreme labour exploitation, it found a high percentage of workers alleging unfair treatment, uncovering concerning issues, such as lack of personal protective equipment for workers, poor living conditions and allegations of unfair treatment by the employers, including racism and other forms of discrimination.<sup>42</sup>

The organisation Focus on Labour Exploitation (FLEX), together with Fife Migrants Forum, produced research on the pilot scheme in Scotland, which showed that workers’ recruitment, working conditions, and living conditions exhibit elements of compulsion and duress, and that

<sup>36</sup>See ‘Workers and Temporary Workers: guidance for sponsors’ (2022) (emphasis added).

<sup>37</sup>On the visa and empirical evidence on its operation, see V Mantouvalou, ‘“Am I Free Now?” Overseas Domestic Workers in Slavery’ 42 (2015) *Journal of Law and Society* 329.

<sup>38</sup>See the Report of J Ewins QC, ‘Overseas Domestic Worker Visa – Independent Review’ (2015) <<https://www.gov.uk/government/publications/overseas-domestic-workers-visa-independent-review>> accessed 20 August 2022. The Ewins Report called for the right to apply for visa extensions of up to 12 months each, up to a maximum of 2 ½ years, in addition to the right to change employers, but this recommendation has not been implemented either.

<sup>39</sup>Home Office and DEFRA, *Seasonal Workers Pilot Review 2019* (2021) <<https://www.gov.uk/government/publications/seasonal-workers-pilot-review/seasonal-workers-pilot-review-2019>> accessed 20 August 2022.

<sup>40</sup>Davies (n 27) 497.

<sup>41</sup>See V Mantouvalou, ‘The UK Modern Slavery Act Three Years On’ 81 (2018) *Modern Law Review* 1017.

<sup>42</sup>For criticism of the methodology of the Government Review see Focus on Labour Exploitation Response to the Government’s Review of the First Year of the Seasonal Workers Pilot, 13 January 2022.

workers cannot leave their employer.<sup>43</sup> The fact that workers are not free to change employer, but are only permitted to change *normally* or *where possible*, was presented by FLEX as a factor that creates vulnerability, particularly because some workers incur debts in order to travel to the UK which means that they cannot easily leave the job and return to their home country.<sup>44</sup> Workers therefore stay with employers even if they are ill-treated, as they have debts to pay back, and they need to work until they are able to do so. A joint investigation of the *Bureau of Investigative Journalism* and *The Guardian* found that some workers who come to the UK under the Seasonal Worker Visa may pay extortionate recruitment fees to recruitment agents, and blamed this on the underfunding of labour enforcement agencies and the quick expansion of the Seasonal Worker Visa scheme.<sup>45</sup> It should also be highlighted that workers under this visa have to pay their own flight and visa cost, which is incompatible with ILO guidelines on fair recruitment.<sup>46</sup>

Many workers who were interviewed by FLEX said that they were unable to change employer. For instance, a worker said:

We even went to look for other farms. We found one, who wanted to accept us. There was a place, they needed workers. We wanted to go there, so we went straight there [to the employer] and we said that all wanted a transfer, she [the employer representative] said 'I can't let you go, understand us, we need workers, everything will be fine'.<sup>47</sup>

In a different study, workers explained that supervisors in the farm remind them that their visa is tied to the intermediary and can be withdrawn any time.<sup>48</sup> In this way, the intermediaries create fear in order to control workers.

Further restrictions faced by workers under the Seasonal Worker Visa, such as the prohibition of being accompanied by family members, are also problematic. This was accentuated following Russia's invasion of Ukraine, when Ukrainian farm workers in the UK were not permitted to bring in their family members seeking to escape war.<sup>49</sup> The highest number of workers under the Seasonal Worker Pilot in 2020/21 were from Ukraine (67 per cent and a total of 19,920 workers).<sup>50</sup> In response to severe criticisms of the problem faced by Ukrainian seasonal workers, the Government extended their rights to stay in the UK through the Ukraine Extension Scheme, which also confers on them an increased set of rights.<sup>51</sup> However, Ukrainian nationals arriving in the UK after 18 March 2022 as seasonal workers are not eligible to apply under the Ukraine Extension Scheme, and in parliamentary debates Kevin Foster MP suggested that these

<sup>43</sup>Focus on Labour Exploitation and Fife Migrants Forum, 'Assessment of the Risks of Human Trafficking for Forced Labour on the UK Seasonal Workers Pilot' (2021) (hereafter FLEX Report). See also Work Rights Centre, 'Weed Out Exploitation', Work Rights Centre, 2 March 2022; and Davies (n 27) 496 ff.

<sup>44</sup>FLEX Report, 58.

<sup>45</sup>E Mellino, R Pangen and P Pattison, 'Migrant Fruit Pickers Charged Thousands in Illegal Fees to Work in UK Farms', *The Bureau of Investigative Journalism* (2022) <<https://www.thebureauinvestigates.com/stories/2022-05-27/migrant-fruit-pickers-charged-thousands-in-illegal-fees-to-work-on-uk-farms>> accessed 20 August 2022.

<sup>46</sup>See ILO General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs, International Labour Office (2019) <[https://www.ilo.org/wcmsp5/groups/public/-ed\\_protect/-protrav/-migrant/documents/publication/wcms\\_536755.pdf](https://www.ilo.org/wcmsp5/groups/public/-ed_protect/-protrav/-migrant/documents/publication/wcms_536755.pdf)> accessed 20 August 2022.

<sup>47</sup>As above n 43, 59.

<sup>48</sup>Work Rights Centre (n 43) 4.

<sup>49</sup>D Taylor, "'Scandal in Plain Sight': Charities Call for Help for Ukrainian Seasonal Workers' *The Guardian* (2022).

<sup>50</sup>See National Statistics, 'Why Do People Come to the UK? To Work', updated (2022) <<https://www.gov.uk/government/statistics/immigration-statistics-year-ending-december-2021/why-do-people-come-to-the-uk-to-work>> accessed 20 August 2022.

<sup>51</sup>See Guidance, 'Apply to Stay in the UK under the Ukraine Extension Scheme' (2022) <<https://www.gov.uk/guidance/apply-to-stay-in-the-uk-under-the-ukraine-extension-scheme>> accessed 20 August 2022. On this, see FLEX, 'Filling the Gaps: Preventing Increased Risks of Exploitation for Ukrainian Workers on the Seasonal Worker Visa' (2022).

workers cannot extend their stay, but would have to return to Ukraine and re-apply to return under a different visa, such as a family member if eligible under the Ukraine Family Scheme.<sup>52</sup>

The vulnerability of workers in agriculture is not only due to immigration rules. It is also due to other rules that exclude them from protective laws, such as social security rights,<sup>53</sup> as well as other factors that have to do with the nature of the work and the fact that they are migrant workers. However, the restrictive immigration regime with which these seasonal workers arrive in the UK and elsewhere has to be seen as a major cause of injustice, and one which employers regularly exploit across the world. The complex web of immigration conditions, other legislative exclusions and further factors, such as the workers' physical isolation and the challenges in unionising them, places these workers in a position of severe disadvantage.

#### 4. State-mediated structures of exploitation and human rights

What I want to emphasise in this concluding section is that typically when considering severe labour exploitation, the UK Government focuses on unscrupulous employers.<sup>54</sup> Yet when analysing certain legal rules more closely, we observe that the state itself may have a major role to play in instances of ill-treatment at work because through rules with an appearance of legitimacy it sets up the background conditions for vulnerable workers to be exploited. It is crucial to scrutinise the authorities' political responsibility when we identify restrictive immigration rules that increase workers' vulnerability, while employers, consumers and national economies benefit from this situation.

State-mediated structures of exploitation of the kind that I discussed in this piece may also give rise to legal responsibility under human rights law.<sup>55</sup> Some of the restrictions of the UK Seasonal Worker Visa could be challenged under the European Convention on Human Rights, which still binds the country after Brexit. The European Court of Human Rights ruled in the past that the conditions of a very restrictive visa scheme (the Cypriot artiste visa) constituted a violation of Article 4 of the European Convention on Human Rights that prohibits slavery, servitude, forced, and compulsory labour.<sup>56</sup> The case involved sex trafficking and the Cypriot visa conditions in question were even more restrictive than the Seasonal Worker Visa, as the cabaret manager and artistic agent also had to pay a bank guarantee for the worker to cover possible future costs of the worker.<sup>57</sup> However, the vulnerability created by the Seasonal Worker Visa to the workers is very significant and compounds the disadvantage faced by those working in agriculture. Impossibility of leaving the employer has been viewed by the ILO as a key ingredient of forced labour too,<sup>58</sup> and findings of the ILO feed into decisions of the European Court of Human Rights on labour rights under the Convention.<sup>59</sup>

<sup>52</sup>See Seasonal Workers: Ukraine, Question for Home Office (2022) <<https://questions-statements.parliament.uk/written-questions/detail/2022-06-20/21175>> accessed 20 August 2022.

<sup>53</sup>See, for instance, Bogoeski (n 5).

<sup>54</sup>See Mantouvalou (n 41).

<sup>55</sup>I develop this further in V Mantouvalou, *Structural Injustice and Workers' Rights* (forthcoming, Oxford University Press 2023) Chapter 7.

<sup>56</sup>*Rantsev v Cyprus and Russia*, App No 25965/04, Judgement of 7 January 2010. For a successful case at national level, see *Kav-Laoved v Government of Israel*, HCJ 4542/02, 2006, [2006] (1) IsrLR 260, discussed in the literature in note 19 above.

<sup>57</sup>The Court described this as particularly troubling in *Rantsev*, para 292.

<sup>58</sup>See, ILO Special Action Programme to Combat Forced Labour (SAP-FL) International Programme on the Elimination of Child Labour (IPEC), 'Hard to See, Harder to Count – Survey Guidelines to Estimate Forced Labour of Adults and Children' (2011) 25.

<sup>59</sup>See K Ewing and J Hendy, 'The Dramatic Implications of *Demir and Baykara*' 39 (2010) *Industrial Law Journal* 2; V Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' 13 (2013) *Human Rights Law Review* 529; T Teklè, 'The Contribution of the ILO's International Labour Standards System to the European Court of Human Rights' Jurisprudence in the Field of Non-Discrimination' 49 (2020) *Industrial Law Journal* 86.



Trade unions and civil society organisations that support the rights of migrant workers campaign constantly for visa rules to be liberalised in order to recognise necessary safeguards, including rights to change employer and work sector, as well as a clear path to permanent residence.<sup>60</sup> However, there is political resistance to such rights for migrant workers, with anti-immigration sentiment being on the rise in many countries, including the UK. Advocacy, campaigning and strategic litigation can help destabilise the unjust structures that have been my focus in this piece.

The state-mediated structures of exploitation affecting vulnerable workers are not limited to substandard living and working conditions. It has been demonstrated that precarious work is a social determinant that affects workers' health.<sup>61</sup> Yet migrant workers in these schemes have limited social rights, as we saw in relation to the UK Seasonal Worker Visa. Employers benefit from the vulnerability of these workers, and so do national economies. This is not a triple win, though: people with limited alternatives find themselves trapped in structures of exploitation, and immigration rules have a major role to play in this situation.

**Competing interests.** The author has no conflicts of interest to declare.

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<sup>60</sup>As we saw earlier in this piece in the work of FLEX and other organisations.

<sup>61</sup>J Benach et al, 'Precarious Employment: Understanding an Emerging Social Determinant of Health' 35 (2014) Annual Review of Public Health 229.