

**Welcoming the New Arrivals?
A Critical Analysis of the Impact of 'Europe' on the UK's Welfare
Support Regime for Migrants and their Family Members**

[IMAGE]

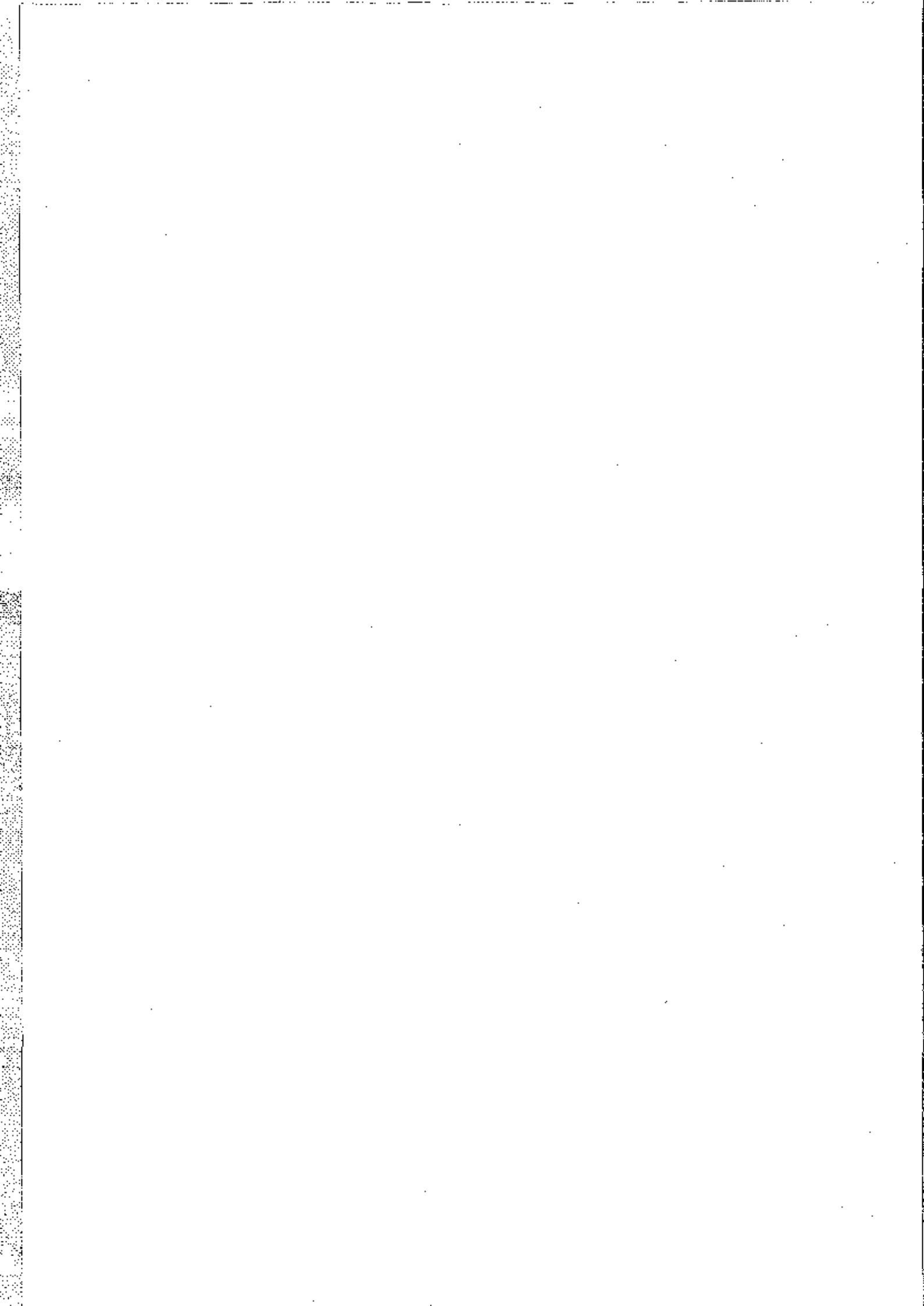
Romanian Family Fleeing Belfast after Attacks

A Thesis Submitted in Partial Fulfilment of the
Requirements of Staffordshire University for the Award of
Doctor of Philosophy Based upon Published Work

February 2012

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Cover Image
'Fleeing Belfast' 18th June 2009
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Abstract

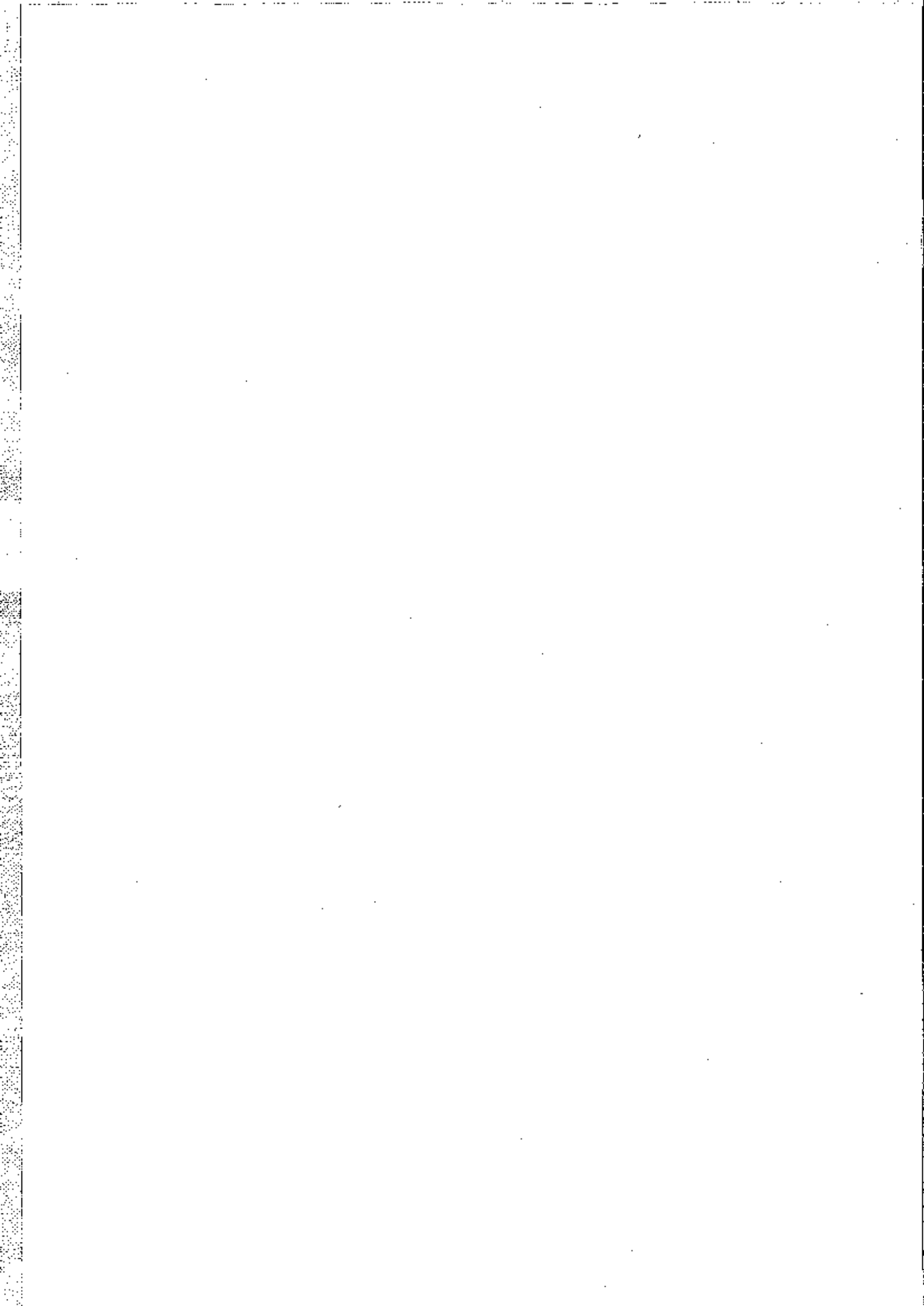
Against a back-drop of changes which since the 1980s have been making the UK's welfare support regime for migrants¹ progressively more restrictive, the research programme critically analysed the impact of European Law, namely EU Law and the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), on the regime. The enquiry was undertaken in the research period 2003-2011.

After considering historical and theoretical contexts, the factors informing reforms to the regime, and the impact of EU 'soft measures' at the start of the research period, the research examined the impact of Convention rights-based interventions following entry into operation of the UK's Human Rights Act 1998 (from October 2000). It sought to establish whether this could be said to amount to a 'safety-net' for claimants without a substantive right to welfare support, in some cases as a result of restrictions linked to immigration status.

Consideration was then given to EU Law aspects, including 'free movement' rights, and the rights under EU Law of new arrivals from other Member States. This analysed the impact of the UK's restrictions on support from 1st May 2004 affecting nationals from the A8 and A2 countries coming to the UK. This area of the programme included an analysis of the impact of expectations that claimants should 'reciprocate' for their support and 'contribute' by taking up employment opportunities and helping to meet the labour market's needs. Comparisons were made with approaches taken by the two other countries admitting such nations in 2004, Sweden and Ireland. The enquiry then focused on the UK's scheme of implementation of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely in the Member States. Much of the enquiry focused on distinctive features of the scheme such as the operation of the 'right to reside', including requirements that claimants must normally be 'economically active' or self-sufficient, and the courts' role in interpreting and applying the scheme, and dealing with challenges based on 'proportionality' and discrimination arguments.

Collectively, the works informed by the research provide a critical analysis of the UK support regime's development in the areas referred to. Conclusions are provided in the 'Research Conclusions' section of this Critical Appraisal.

¹ For the purposes of the research programme and this critical appraisal, the term 'migrant' encompasses those who are not British citizens. It includes asylum seekers, EEA nationals, and non-EEA nationals, and extends to migrants' family members.



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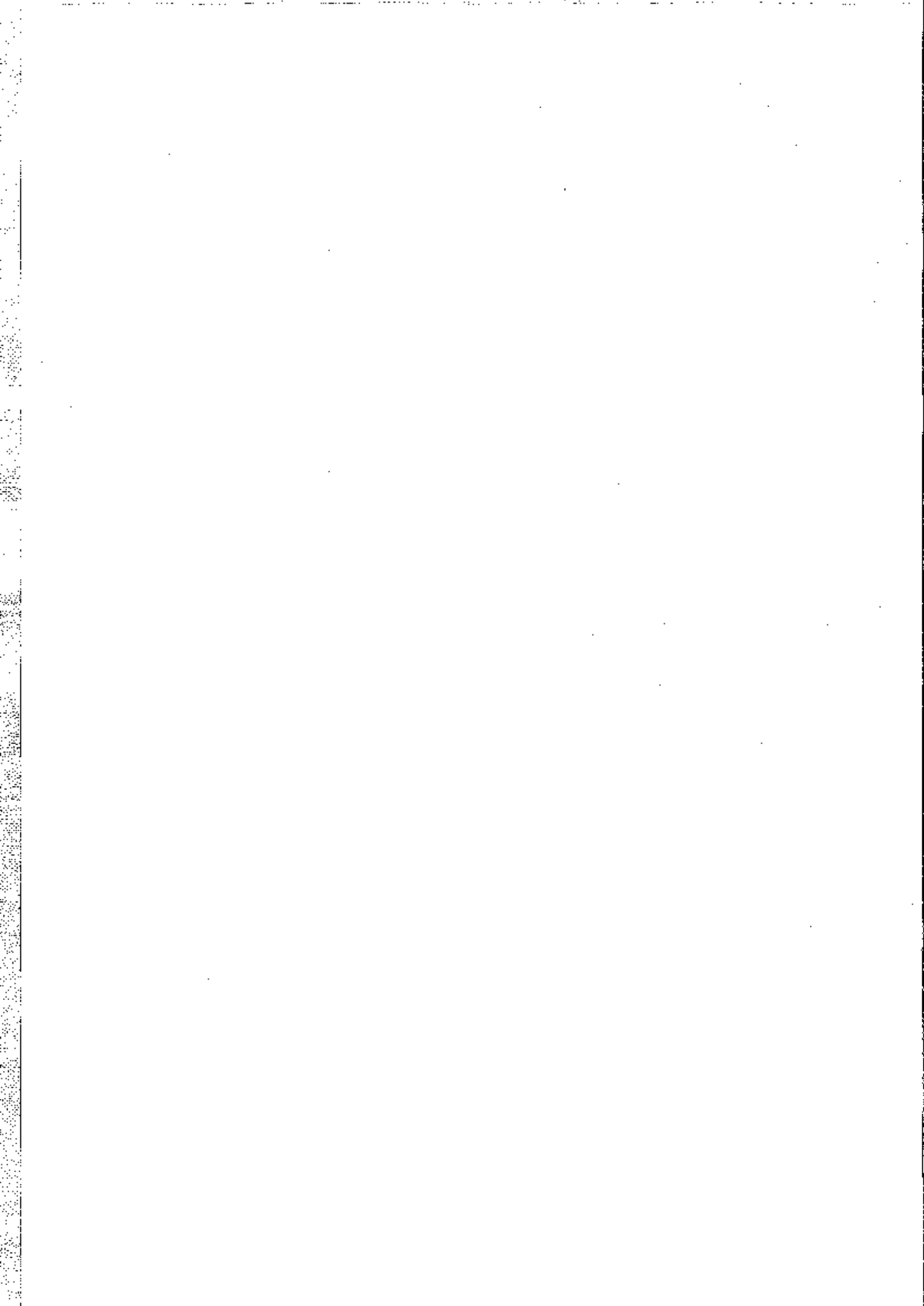
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Author's Published Works

These are the cited published works, and they are referenced as follows:

1. K. Puttick 'Towards a Just European Welfare System for Migrants?' in Shah, P (ed) *The Challenge of Asylum to Legal Systems*, London: Cavendish Routledge, 2005 ('Work 1')
2. K. Puttick 'Asylum Support and Limbuela: An End (Finally) to Section 55?', (2004) *Journal of Immigration, Asylum & Nationality Law* 18(3), 186-196 ('Work 2')
3. K. Puttick 'Strangers at the Welfare Gate: Asylum Seekers, 'Welfare' and Convention Rights after Adam', (2005) *Journal of Immigration, Asylum & Nationality Law* 19(4), 214-234 ('Work 3')
4. K. Puttick 'Welcoming the New Arrivals? Reception, Integration and Employment of A8, Bulgarian, and Romanian Migrants', (2006) *Journal of Immigration, Asylum & Nationality Law* 20(4), 238-254 ('Work 4')
5. K. Puttick 'Precarious Welfare: Access to Benefits & Support by EEA Nationals Residing in the UK', (2008) *The Adviser* 130, 6-10 ('Work 5')
6. K. Puttick 'Precarious Welfare: Family & Extended Family Members' 'Right to Reside', Support, and Work', (2009) *The Adviser* 131, 9-16 ('Work 6')
7. K. Puttick 'Recognition of Overseas Unilateral Divorce after K v K: The Implications for Divorced Spouses' and Child Dependants' Financial Support, State Welfare & Public Policy', (2008) *Welfare & Family: Law and Practice* Vol 15.3, 32-108 ('Work 7')
8. K. Puttick 'State Benefits' in Butterworths *Family Law* and *Scottish Family Law Service* (Ed J. Fotheringham), London: Lexis-Nexis, 2011 ('Work 8')
9. K. Puttick 'Discrimination, 'Integration', and the Right to Reside after Patmalniece', (2011) *The Adviser* 145, 8-13 ('Work 9')
10. K. Puttick 'Paying their Way? Contesting 'Residence', Self-sufficiency and Economic Inactivity Barriers to EEA Nationals' Social Benefits: Proportionality and Discrimination', (2011) *Journal of Immigration, Asylum & Nationality Law* 25(3), 280-292 ('Work 10')



Legislation: Primary & Secondary

Primary

Aliens Act 1905

Aliens Restriction (Amendment) Act 1919

Asylum and Immigration Act 1996

Asylum and Immigration Appeals Act 1993

Asylum and Immigration Act 2004

Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (the 'AIT 2004')

Borders, Citizenship and Immigration Act 2009

Children Act 1989

Child Poverty Act 2009

Children and Young Persons Act 2008

Employment Rights Act 1996

European Communities Act 1972

European Union (Accessions) Act 2003

Gangmasters (Licensing) Act 2004

Homelessness Act 2002

Housing Act 1996

Human Rights Act 1998 (the 'HRA 1998')

Immigration Act 1971

Immigration and Asylum Act 1999 (the 'IAA 1999')

Local Government Act 2000

Matrimonial and Family Proceedings Act 1984

Matrimonial Causes Act 1973

Ministry of Social Security Act 1966

Muslim Family Laws Ordinance of 1961 (Pakistan)

National Assistance Act 1948
National Health Service and Community Care Act 1989
National Insurance Act 1911
National Insurance Act 1946
National Minimum Wage Act 1998
Nationality, Immigration and Asylum Act 2002 (the 'NIA 2002')

Old Age Pensions Act 1908

Poor Law Act 1388
Poor Relief Act 1601
Poor Law Amendment (Scotland) Act 1845

Social Security Administration Act 1992
Social Security Contributions and Benefits Act 1992
State Pension Credit Act 2002

Tax Credits Act 2002

UK Borders Act 2007

Welfare Reform Act 2009
Widows, Orphans and Old Age Contributory Act 1925

Secondary Legislation/Law

Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219
Accession (Immigration and Worker Authorisation) Regulations 2006, SI 2006/3317
Accession (Immigration and Worker Registration) (Amendment) Regulations 2007, SI 2007/28
Accession (Immigration and Worker Registration) (Revocation, Savings and Consequential Provisions) Regulations 2011/544
Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006, SI 2006/1294
Asylum Seekers (Reception Conditions) Regulations 2005, SI 2005/7
Asylum Support Appeals (Procedure) Rules 2000, SI 2000/541
Asylum Support (Interim Provisions) Regulations 1999/3056

Asylum Support Regulations 2000, SI 2000/704

Health in Pregnancy Grant (Entitlement and Amount) Regulations 2008, SI 2008/3108

Housing Benefit Regulations 2006, SI 2006/213

Immigration (European Economic Area) Regulations 2006, SI 2006/1003

Immigration (Leave to Enter and Remain) Order 2000, SI 2000/1161

Income Related Benefits Schemes (Miscellaneous Amendments) (No 3) Regulations
1994, SI 1984/1807

Income Support (General) Regulations 1987, SI 1987/1967

Immigration and Asylum (Provision of Accommodation for Failed Asylum Seekers)
Regulations 2005, SI 2005/930

National Minimum Wage Regulations 1999, SI 1999/584

NHS (Charges to Overseas Visitors) Amendment Regulations 2004, SI 2004/614

Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI
2000/1551

Social Security (Habitual Residence) Amendment Regulations 2004, SI 2004/1232

Social Security (Persons from Abroad) Miscellaneous Amendments Regulations
1996, SI 1996/30

Social Security (Persons from Abroad) Amendment Regulations 2006, SI 2006/1026

Social Security (Persons from Abroad) Amendment (No 2) Regulations 2006, SI 2006/2528

State Pension Credit Regulations 2002, SI 2002/1792

Status of Aliens Act 1914

Supplementary Benefit (Aggregation, Requirements and Resources) Amendment
Regulations 1980, SI 1980 No 1774

Tax Credits (Immigration) Regs 2003, SI 2003/653

Tax Credits (Amendment) Regulations 2004, SI 2004/1243

Tax Credits (Polygamous Marriages) Regulations 2003, SI 2003/742

Withdrawal of Support (Travel Assistance and Temporary Accommodation)
Regulations 2002, SI 2002/3078

Working Time Regulations 1998, SI 1998/1833

Other Secondary Sources

The Statement of Immigration Rules (Consolidated Version) made under the authority of the Immigration Act 1971 ss.1(4) and 3(2) (the 'Immigration Rules'), and Parliamentary 'Statements of Changes'; see the UK Border Agency web-site, updated August 2011:

<http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/>

EU, ECHR & International Sources

EU Treaties

Treaty of Accession of the United Kingdom to the European Economic Community and the European Atomic Energy, Brussels 22nd January 1972

1992 Treaty on European Union (The Maastricht Treaty)

2001 Treaty of Nice

Treaty Establishing the European Community 2002 (Consolidated Version) ('TEC')

Act Concerning the Conditions of Accession of Bulgaria and Romania 2005

Treaty on the Functioning of the European Union (Consolidated) (2008/C 115/01),

OJ C115, 9 May 2008 (the 'TFEU')

EU Legislation & Sources

Regulations

Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community

Regulation (EEC) 1408/71 on the application of social security schemes to employed persons and their families moving within the Community

Regulation (EC) 574/72 on procedures from implementing Reg 1408/71

Regulation (EC) 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

Regulation (EU) No 439/2010 establishing a European Asylum Support Office

Directives

Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families

Directive 90/364 on the right of residence

Directive 90/365 on the right of residence for employees and self-employed persons
who have ceased occupational activity

Directive 2001/55 on minimum standards for giving temporary protection in the event of a
mass influx of displaced persons and on measures promoting a balance of efforts between
Member States in receiving such persons and bearing the consequences thereof

Directive 2003/9 on minimum reception conditions for asylum seekers Asylum

Directive 2003/86 on the right to family reunification

Directive 2003/109/EC concerning the status of third-country nationals

Directive 2003/109/EC concerning the status of third country-nationals who are long-
term residents

Directive 2004/38 on free movement for EU citizens and their families

Directive 2004/83 on the minimum standards for the qualification and status of third
country nationals or stateless persons as refugees or as persons who otherwise
need international protection and the content of the protection granted

Directive 2005/85 on minimum standards for granting and withdrawing refugee status

Other EU Sources & Communications

Act Concerning the Accession of Bulgaria and Romania, OJ 2005 L157/203

Active Ageing & Empowerment of Migrant Elders and the European Year for Active Ageing
2012: Proposal for a Decision of the European Parliament and Council on the Year
for Active Ageing (2012) COM (2010) 462 Final

Common Agenda for Integration: Framework for the Integration of Third-Country
Nationals in the EU (COM 2005 389 Final)

Communication from the Commission to the European Parliament and the Council on
Guidance for Better Transposition and Application of Directive 2004/38/EC on the Right of
Citizens of the Union and their Family Members to Move and Reside Freely within the
Territory of the Member States', Brussels 2.7.09 COM (2009) 313 Final

Convention relating to the Status of Refugees

EU Commission Notice IP/10/1418 *Free Movement of Workers: Commission Requests
UK to End Discrimination on other Nationals' Right to Reside as Workers* (Brussels:
28th October 2010).

European Pact on Immigration and Asylum, European Council, 16 October 2008

'Keeping the Right to Reside' in *The Right of Union Citizens & their Family Members to Move and Reside Freely within the Union: Handbook on Integration for Policy-Makers and Practitioners* (p.14) (EU Directorate General for Justice, Freedom & Security, 2007, 2nd ed)

Report from the Commission to the European Parliament and the Council on the Application of Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States', Brussels 10.12.09 COM (2008) 840 Final.

Schengen Agreement 14/15 June 1990

Treaty Concerning the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, signed at Athens 16th April 2003

'Working Together for Growth and Jobs: A New Start for the Lisbon Strategy' – European Council Feb 2005. Communication from President Barroso et al COM (2005) Final

European States' Legislation & Sources

Employment Protection Act 1982 (Sweden: SFS 1982: 80)

Employment Transitional Rules for All Concerned (Sweden: Holmberg-Karlsson Communication, 15 March 2004)

National Action Plan against Racism: An Plean Gníomhíocht Naisiunta In Aghaidh An Chiniochais (Dail Éireann, Republic of Ireland 2005-8)

Swedish Labor Market Policy FS6-Y (Stockholm: Swedish Institute, May 2005)

Security of Employment Act 1974 (Sweden: LAS 1974, revised 1982)

Measures to Counteract Ethnic Discrimination in Working Life Act 1999 (Sweden: SFS 1999: 130)

Prohibition of Discrimination Act 2003 (Sweden: 2003: 307)

European Human Rights Sources

Charter of Fundamental Rights of the European Union, Nice, December 7, 2000 OJ C364/1, 7 December 2000; approved by the European Parliament November 29, 2007; and adopted at Strasbourg, on December 12 2007 as part of the EU Treaties

European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'ECHR') (1950)

Public International Law Sources

Convention relating to the Status of Refugees (United Nations General Assembly Resolution 429, 14 Dec 1950; Convention adopted 28 July 1951 & in force 22 April 1954)

Convention & Protocol Relating to the Status of Refugees (United Nations, 1967)

Hague Convention on the Recognition of Divorces and Legal Separations (1970)

International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)

ILO Convention on the Prevention of Social Dumping (No. 94)

ILO Convention concerning Migration for Employment (No. 97)

ILO Recommendation concerning Migration for Employment (No. 86)

ILO Recommendation concerning Migrant Workers (No.151)

ILO Tripartite Meeting of Experts on the ILO Multilateral Framework on Labour Migration (Geneva, 31 October - 2 November 2005)

ILO Multilateral Framework on Labour Migration (2006)

ILO 'Towards a Fair Deal for Migrant Workers in the Global Economy' (2004)

United Nations Convention on the Protection of the Rights of All Migrant Workers and their Families (Adopted by Resolution 45/158, 18 Dec 1990; In Force 1 July 2003)

United Nations Convention on the Status of Refugees (1951) 189 UNTS 137

United Nations International Covenant on Civil and Political Rights, United Nations Treaty Series, vol.999, p.171 and vol.1057, p.407

United Nations Protocol Relating to the Status of Refugees (1967)

United Nations Convention on the Rights of the Child (1989), Resolution 44/25 of November 20, 1989; United Nations Treaty Series, vol.1577, p.3

Reported Cases

Abdirahman v Secretary of State for Work and Pensions [2007] 4 All ER 882 (also reported as R(IS) 8/07)

Anufrijeva v Southwark LBC [2004] 1 All ER 833, CA

Andrejeva v Latvia (2010) 51 EHRR 28

Amos v Secretary of State for the Home Department [2011] EWCA Civ 552, CA

AP (India) v Secretary of State for the Home Department [2007] UKAIT 48; [2007] Imm AR 692

Baumbast v Secretary of State for the Home Department (Case C-413/99) 3 CMLR 23, ECJ

Bibi v Chief Adjudication Officer [1998] 1 FLR 375

Bressol v Gouvernement de la Communaute Francaise (C-73/08) [2010] 3 CMLR 20

Brown v Chief Adjudication Officer [1997] IRLR 110

Campbell Catering Ltd/Aderonke Rasoq EEDO48 (Labour Court, Ireland)

Citibank/Massinde Ntoko EED045 (Labour Court, Ireland)

Colen v Cebrian (UK) Ltd [2004] IRLR 210, CA

Collins v Secretary of State for Work & Pensions (Case C-138/02) [2004] 2 CMLR 8, ECJ; [2006] 1 WLR 2391 (CA)

Commission v Belgium (Case C-408/03) [2006] 2 CMLR 41

Commission v Italy C-424/98, BAILII: [2000] EUECJ C-424/98

Commissioners' & Upper Tribunal Decisions (Reported)

R(IS) 12/98

R(IS) 8/07

R(IS) 6/08

R(IS) 4/09

Northern Ireland

[2006] NISSCSC C6/05-06 (IS) (Zalewska)

Commissioners' & Upper Tribunal Decisions (Unreported)

CIS/1067/1995 (82/95)

CH/2484/2005 Feb 1, 2006 (Tribunal of Commissioners)

CIS/408/2006 October 31, 2007
CIS/599/2007 December 7, 2007
CIS/1121/2007 November 21, 2007.
CIS/1545/2007
CIS/2100/2007 (13 May 2008)
CDLA/708/2007 (10 July 2008)
CIS/612/2008 (14 August 2008)
CIS/2258/2008 (17 September 2008)
CJSA/4559/1999
CPC/1072/2006 (11 June 2008)

Collins v Secretary of State for Work and Pensions (C138/02) [2005] QB 145, ECJ
Commission v Belgium (Case C-408/03) [2006] 2 CMLR 41

Dias v Secretary of State for Work and Pensions [2010] 1 CMLR, CA; Case C-325/09, 31 July 2011, CJEU

Diatta v Land Berlin (C-267/83) [1985] ECR 567

Din v National Assistance Board [1967] 2 QB 213, CA

El Fadl v El Fadl [2000] 1 FLR 175

Eweida v British Airways plc [2009] IRLR 78, EAT

Genç v Land Berlin (Case C-14/09) [2010] 2 CMLR 44

Gingi v Secretary of State for Work and Pensions [2002] 1 CMLR 587; [2002] Eu LR 37, CA

Goldberg v Kelly 397 US 254 (1970)

Grant v Lambeth LBC [2005] 1 FCR 1

Grzelczyk v Centre Public d'Aide Sociale d'Ottignies Louvain la Neuve (C-184/99) [2002] 1 CMLR 19, ECJ

Harrow LBC v Ibrahim [2009] HLR 2, CA; C-310/08 23 Feb 2010, ECJ Grand Chamber

Ismail v Barnet London Borough Council (First Secretary of State Intervening) [2006] 1 WLR 2771, CA

J v C (Child: Financial Provision) [1999] 1 FLR 152

Jeleniewicz v Secretary of State for Work and Pensions [2009] 1 CMLR 21, CA

J v C (Child: Financial Provision) [1999] 1 FLR 152
Jia v Migrationsverket (Case C-1/05) [2007] QB 545 (ECJ)
Johnstone v Bloomsbury Health Authority [1991] ICR 269

Kaczmarek v Secretary of State for Work and Pensions [2008] EWCA Civ 1310;
[2009] 2 CMLR 3, CA
Kaur v MG Rover Group [2005] IRLR 40; [2004] IRLR 279
Kempf v Staatssecretaris van Justitie (Case 139/85) [1987] 1 CMLR 764, ECJ
KG (Sri Lanka) v Secretary of State for the Home Department [2008] EWCA Civ 13;
[2008] Imm AR 343, CA
Kola v Secretary of State for Work and Pensions; Mirzajani v Secretary of State for
Work and Pensions [2007] UKHL 54; (2007) 151 SJLB 1566, HL

Lekpo-Bozua v Hackney London Borough Council [2010] HLR 46, CA

Mahad (Ethiopia) v Entry Clearance Officer [2010] 1 WLR 48
Martinez Sala v Freistaat Bayern (Case C-85/96) [1998] ECR I-2691
MR v HM Revenue & Customs [2011] UKUT 40 (AAC) 26 January 2011
Mattern v Ministre du Travail et de l'Emploi (C-10/05) [2006] E.C.R. I-3145 ECJ (1st
Chamber), ECJ
McCarthy v Secretary of State for the Home Department [2008] 3 CMLR 7, CA;
[2011] Case C-434/09, 5th May 2011; [2011] 3 CMLR 10, CJEU
Mehmet t/a Rose Hotel Group v Aduma (Employment Appeal Tribunal) 30 May 2007:
Appeal Nos. UKEAT/0573/06/CEA & UKEAT/0574/06/CEA
Metock and Others v Minister for Justice, Equality and Law Reform, Ireland [2008]
Case C-127/08, ECJ, Grand Chamber
Miskovic v Secretary of State for Work and Pensions [2011] 2 CMLR 20, CA
Murua v Croydon London Borough Council [2002] 5 CCLRep 51

Nessa v Chief Adjudication Officer [1999] 1 WLR 1937; [2001] 1 CMLR 20, HL
Nour Eddline El-Yassini v Secretary of State for the Home Department (Case C-
416/96) [1999] ECR I-1209; [1999] 2 CMLR 32, ECJ

Oxfordshire County Council v R (Khan) and Office of the Deputy Prime Minister
[2004] HLR 41, CA

Patmaliece v Secretary of State for Work and Pensions [2011] UKSC 11; [2011] 1
 WLR 783, Supreme Court
 Pedro v Secretary of State for Work and Pensions [2009] EWCA Civ 1358
 Pretty v United Kingdom [2002] 35 EHRR 1, ECtHR

R v Immigration Appeal Tribunal Ex parte Antonissen [1989] 2 CMLR 957; [1991]
 ECR I-745, ECJ
 Raulin v Minister van Onderwijs en Wetenschappen (1992) ECR 1027, ECJ
 R (Bidar) v Ealing London Borough Council (C-209/03) [2005] QB 812
 R (Clue) v Birmingham City Council [2010] 4 All ER 423
 R (EW, Eritrea) v Secretary of State for the Home Department [2009] EWHC 2957
 (Admin)
 R (Gezer) v Secretary of State for the Home Department [2005] Imm AR 131;
 [2005] HLR 16
 R (H and D) v Secretary of State for Work and Pensions [2004] 3 CMLR 11,
 Administrative Court
 R (M) v Slough BC [2008] 4 All ER 831, HL
 R (S) v Secretary of State for the Home Department [2010] EWHC 705 (Admin)
 R (Z) v Hillingdon LBC [2009] EWCA Civ 1529, CA
 R v Inhabitants of Eastbourne (1803) 4 East 103; 102 ER 769
 R v Secretary of State for the Home Department, ex parte Sandhu (Amirjit Singh)
 [1983] 3 CMLR 131, HL
 R v Wandsworth London Borough Council, ex parte O [2000] 1 WLR 2539, CA
 Saini v All Saints Haque Centre [2009] IRLR 74, EAT
 Secretary of State for Work and Pensions v Ahmed [2005] EWCA Civ 535, CA
 Secretary of State for Work and Pensions v Miah [2004] 4 All ER 702
 St Giles Parish v St Margaret's Parish E2 Geo 1, 1 Sess Cas 97
 Swaddling v Adjudication Officer [1999] ECR I-1075; 1999] 2 FLR 184, ECJ

Teixeira v Lambeth LBC [2009] HLR 9, CA; *Teixeira v Lambeth London Borough
 Council (Secretary of State for the Home Department Intervening)* (Case C-
 480/08) [2010] 2 CMLR 50 Case C-480/08, ECJ (Grand Chamber).
 Trojani v Centre Public d'Aide Sociale de Bruxelles C-456/02 [2004] ECR I-7573;
 [2004] All ER (EC) 1065, ECJ

Vakante v Governing Body of Addey & Stanhope School (No 2) [2005] ICR 231, CA

Vatsouras v Arbeitsgemeinschaft (ARGE) Nurnberg 900 (Case C-22/08) [2009] ECR-1-4585, ECJ

W (China) and X (China) v Secretary of State for the Home Department [2007] 1 WLR 1514, CA

Westminster City Council v National Asylum Support Service [2002] 4 All ER 654

Wheeler v Quality Dee Ltd (t/a Thai Royale Restaurant) [2005] ICR 265, CA

Zalewska v Northern Ireland Department for Social Development (Child Poverty Action Group and Public Law Project Intervening); [2007] NICA 17;

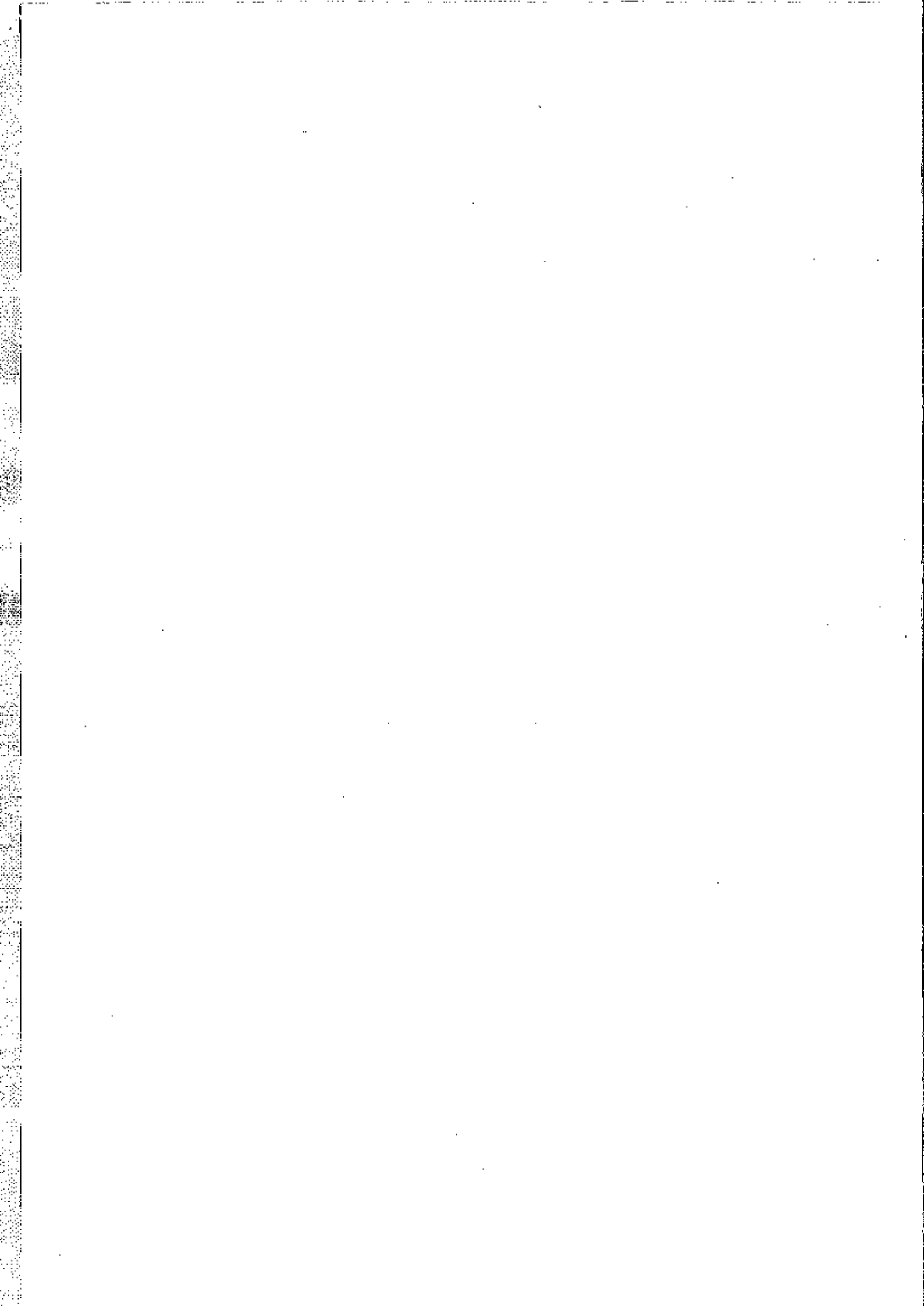
[2008] UKHL 67; [2008] 1 WLR 2602, HL

Zambrano v Office National de 'Emploi (OneM) [2011] All ER (D) 199 (Case C-34/09), European Court (Grand Chamber)

Glossary of Terms

Abbreviation	Term
A2 States	Bulgaria and Romania
A8 States	Poland, Hungary, Slovakia, Slovenia, Lithuania, Latvia, Estonia, Czech Republic
A10 States	Poland, Hungary, Slovakia, Slovenia, Lithuania, Latvia, Estonia, Czech Republic, Malta and Cyprus
AIT 2004	Asylum & Immigration (Treatment of Claimants) 2004
CA	Court of Appeal
CAB	Citizens Advice Bureau
Ch	Law Reports, Chancery Division
CJEU	Court of Justice of the European Union (formerly ECJ)
CTC	Child Tax Credit
DLA	Disability Living Allowance
DMG	Decision Makers Guide (DWP)
DWP	Department of Work and Pensions
ECtHR	European Court on Human Rights and Fundamental Freedoms

ECJ	European Court of Justice
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EEA	European Economic Area
ESC	European Social Charter
EU	European Union
HB	Housing Benefit
HL	House of Lords
HMSO	Her Majesty's Stationery Office (now the Stationery Office)
HRA	Human Rights Act 1998
IAA 1999	Immigration and Asylum Act 1999
ILO	International Labour Organisation
Immigration Rules	Statement of Immigration Rules HC 395 (Consolidated Version) made under Immigration Act 1971 ss.1(4), 3(2)
IS	Income Support
NHS	National Health Service
NIA 2002	Nationality Immigration and Asylum Act 2002
SB	Supplementary Benefit
SBC	Supplementary Benefits Commission
Schengen	Schengen Agreement (Acquis) 14 June 1985 & 19 June 1990
SSAA	Social Security Administration Act
SSAC	Social Security Advisory Committee
SSCBA	Social Security Contributions and Benefits Act
TEU	Treaty on European Union
TEUC	Treaty Establishing the European Community
TFEU	Treaty on the Founding of the European Union
UKSC	United Kingdom Supreme Court
WRS	Worker Registration Scheme
WTC	Working Tax Credit



The Research Context

The Research Context

Introduction Until the mid-1970s, the UK welfare system enabled migrants to access social security with considerably less regulation or restriction than the current system. In the case of contributory benefits no specific restrictions were imposed. It was assumed that most foreign visitors and newly arrived migrants would lack the necessary National Insurance (NI) contributions record to qualify for this type of assistance². Restrictions would in any case probably breach a claimant's Convention rights³ - a factor that continues to inform the exclusion of contributory benefits from the definition of 'public funds' for the purpose of imposing conditions on the grant of limited leave under the Immigration Act 1971 s.3⁴. In the case of non-contributory benefits, the principal requirement was claimants' need to satisfy 'presence' and 'residence' requirements⁵. Means-tested benefits for those unable to satisfy National Insurance contributions requirements were available, and the main source of assistance after 1966 was Supplementary Benefit (today's Income Support). Again, the main eligibility criterion was 'presence'⁶. As with contributory and non-contributory benefits, nationality or migration status was not a barrier to eligibility, at least at this stage of the welfare regime's development. The ability of nationals from overseas to access National Assistance and then Supplementary Benefit (SB) as a 'safety net' was described by Lady Justice Hale (now Baroness Hale of the Supreme Court) in the Court of Appeal in the *O* case⁷. She observed:

The safety net for those who were not covered by social insurance was national assistance, a means tested non-contributory cash benefit, under the 1948 Act, later to become supplementary benefit and later still income support. Eligibility depended upon

² The National Insurance Act 1946 s.1(1) introduced 'residence' requirements, but in the scheme operating under the Social Security Contributions and Benefits Act 1992 the main requirement is that the claimant has participated in the NI scheme for the requisite period for the particular benefit. However, as noted by N. Wikeley et al (2002) *The Law of Social Security*, pp.224-232, claimants may be disqualified if they are 'absent' from Great Britain. Disqualification for such absence is provided for by the SSCBA s.113(1).

³ K. Puttick (2006) *Welfare Benefits and Tax Credits: Law & Practice*, 9th ed, pp.7, 224. Contributions-based benefits are a form of accrued 'possession' protected by Article 1 of Protocol 1 of the ECHR, either in conjunction with art 8 or art 14; see J. Bowers QC and J. Lewis 'Article 1 of Protocol 1, ECHR - The Peaceful Enjoyment of Property', *Welfare Benefits Law & Practice* 7.6, 17; *Gaygusuz v Austria* (1997) 23 EHRR 364; and, more recently, *Andrejeva v Latvia* (2010) 51 EHRR 28. In some cases withholding non-contributory benefits, particularly after they have come into payment, may also engage a claimant's Convention rights; *Steć v United Kingdom (Admissibility)* (65731/01; 65900/01) (2005) 41 EHRR SE18.

⁴ See the UK Border Agency's current guidance 'Public Funds': <http://www.ukba.homeoffice.gov.uk/vlsas-immigration/while-in-uk/rights-and-responsibilities/public-funds/> (last accessed 3rd January 2012).

⁵ N. Wikeley et al, note 2, p.232. The precise nature of 'residence', or residence-related, requirements has varied. In some cases a claimant might simply be required to be 'present' in Great Britain. In other cases residence was required. For example, subject to some limited exceptions an employed earner person seeking assistance from the Industrial Injuries Benefits Scheme had to satisfy the condition that the accident occurred while residing in Great Britain; K. Puttick, note 3, 5th ed (1999), p.76.

⁶ Ministry of Social Security Act 1966 s.4(1) and Supplementary Benefits Act 1976 s.1. Assistance from local authority social services required claimants to have residence in the local authority's area; see the National Assistance Act 1948 s.1.

⁷ *R v Wandsworth LBC, ex parte O; R v Leicester City Council, ex parte Bhika* [2000] 1 WLR 2539; [2000] 4 All ER 590 at 2554.

need (although the cost might be recouped from 'liable relatives' having a duty to maintain the recipient). Until the 1980s, there was no condition that only a British national or resident was entitled to benefit: mere presence in Great Britain was sufficient (s.4 of the 1948 Act; s.1 of the Supplementary Benefits Act 1976). Ogus and Barendt, in their first edition [of the *Law of Social Security* (1978) p 480] described this as 'exceptionally generous'. They commented that "a foreign visitor is required by the immigration authorities to have enough resources to cover his own needs⁸, but if for some reason he becomes short of money he would appear to be entitled under s.1 of the Act". They questioned whether the practice of the Supplementary Benefits Commission to refuse benefit save in unusual cases could be justified by reference to the statutory power to withhold it in "exceptional circumstances".

She also cited with approval the observation made by Hugo Storey in an article in 1984⁹:

'Until the mid-1970s it was broadly true that immigration law impinged hardly at all on the provision of benefits and services in the United Kingdom. The post war welfare state doctrine of Beveridge, Bevan and Butler was one of equal access to benefits and services for all those in need regardless of immigration status, and this held fast.'

If restrictions operated in respect of Supplementary Benefit (SB) before the 1971 Act was brought into force in 1973 it was largely as a result of internal 'instructions' (the 'so-called 'A Code') and guidance in the Supplementary Benefits Commission (SBC) Handbooks that started to be produced from 1970 onwards. These aimed to introduce consistency and to structure adjudication officers' decisions. They were not 'law', however, and adjudication officers, who were independent of the government and the Commission, still retained considerable discretion. Accordingly, assistance could be provided on an 'urgent case' basis or simply by making discretionary payments to avoid hardship. Whilst this was helpful, it was often difficult for advisers, claimants' unions, and groups like social workers to predict with any certainty whether the system would actually assist their clients¹⁰. Furthermore, practices in the way powers were exercised could vary between offices. Administrative discretion could therefore be as significant a 'barrier' as legislative restrictions. Unfortunately it could be accompanied on occasions by discriminatory attitudes towards claimants from overseas and ethnic minorities: a negative feature of adjudication processes, as considered in *Work* ¹¹.

⁸ This referred to the condition that 'may' be imposed on those granted *limited leave* to enter or remain, as discussed in the section 'Immigration Act 1971: Conditions', below. Undertakings could also be required from a sponsor that he or she would be responsible for the entrant's maintenance, a feature brought within the scope of 'subject to immigration control' status by the Immigration and Asylum Act 1999 s.115(9)(c). It took entrants out of eligibility for most benefits except child benefit and disability allowances from 3rd April 2000. On undertakings, see the Immigration Rules (Consolidated Version), Part I, r.35.

⁹ H. Storey 'United Kingdom Immigration Controls and the Welfare State' [1984] JSWL 14.

¹⁰ Whilst SB was not payable for 'normal living expenses' to some categories of immigrant they were eligible at reduced rates on an 'urgent case' basis; Wakeley et al, note 2, at p.232. Some influential commentators in the SBC supported such discretion and had concerns with 'legalisation' of welfare rights, seeing a risk that it would be 'mystifying' for claimants; R. Tilmuss 'Welfare Rights', Law and Discretion', Political Quarterly, April 1971, pp.113 et seq, discussed in Lynes, note 13, p.25.

¹¹ P.114. Discriminatory attitudes towards claimants from overseas was one of a number of areas of complaint about discrimination by groups like claimants' unions; see the National Federation of Claimants Unions *Claimants Handbook* 1977, Birmingham: NFCU, 1976, section 1. In the author's experience of working in an East London law centre, and working with migrants groups including the Bangladeshi community, this was a common concern. It could be aggravated by a lack of transparency in the way discretion was exercised (often not helped by a lack of adequate 'reasons' for refusals of support). There is a significant literature on discrimination in benefits adjudication. See, for example, *Service Delivery to Customers from Ethnic Minorities* (Benefits Agency, 1997); and N. Wayne *Race Inequality in the Benefits System* (Disability Alliance, 2003), welcoming initiatives like the DWP's Race Equality Scheme.

Although the SB system could assist migrants, albeit on just a discretionary or 'urgent case' basis, as Lady Justice Hale went on to say in the *O* case that was 'soon to change':

'The Codes of Practice hitherto used by the Supplementary Benefits Commission were translated into regulations and those regulations made specific provision for 'persons from abroad' (see the Supplementary Benefit (Aggregation, Requirements and Resources) Amendment Regulations 1980, SI 1980/1774, and now the Income Support (General) Regulations 1987, SI 1987/1967, reg.21(3) and Sch 7, as frequently amended). These expressly linked entitlement to income support to immigration status, by denying full entitlement to, among others, illegal entrants and overstayers. These came into effect shortly after a change in immigration rules, which increased the use as a condition of entry that a person did not have recourse to public funds: see Statement of Changes in Immigration Rules, HC Paper 394 (1979-80). Certain categories of persons from abroad might however qualify for 90% of benefit as 'urgent cases' (reg 70(3), 1987 regulations).'

Immigration Act 1971: 'Conditions' The reference in Lady Justice Hale's judgment to the 'condition of entry that a person did not have recourse to public funds' was to one of the statutory conditioning powers introduced by the Immigration Act 1971. The operation of the 1971 Act's conditioning provisions merit commentary in discussing the research context in which restrictions started to affect the support given to foreign visitors and migrant communities. The transition to a more restrictive support regime began in earnest from 1st January 1973 when the 1971 Act came into operation¹². This date also coincided with entry into operation of the European Communities Act 1972. Specifically, s.3 introduced a power to impose conditions on the grant of leave to *enter* to those coming to the United Kingdom from abroad. Leave to *remain* could also be required. In either case if leave was only granted on a *limited* basis rather than 'indefinitely' it could be made subject to conditions. A number of conditions were possible. First, they could restrict take up of employment or 'occupation' - a change that then impacted indirectly on a person's ability to pay NI contributions and thereby qualify for contributory benefits. Second, a condition could be imposed requiring the person to maintain and accommodate himself and his dependants 'without recourse to public funds'. Leave could be subsequently varied, so that a condition could be imposed or changed *after* entry (s.3(3)). As authors like Tony Lynes observed¹³, foreign visitors could be expected to maintain themselves and could be forbidden from taking employment as a result of immigration conditions.

¹² The background to the Act and key provisions were outlined by the Home Secretary at 2nd Reading in the Commons. The debate is accessible at <http://hansard.millbanksystems.com/commons/1971/mar/08/immigration-bill>. The power to impose such conditions now applies in the case of a person who is not a British citizen, a Commonwealth citizen with a right of abode, or a European Economic Area national. That person will generally require leave to enter the UK. If the leave that is granted is only 'limited leave' it may be conditioned; see the Immigration Rules HC 395 (Consolidated Version), Part I, r.8. Entry clearance may take effect as 'leave to enter' subject to conditions; Immigration (Leave to Enter and Remain) Order 2000, SI 2000/1161.

¹³ T. Lynes (1972) *Penguin Guide to Supplementary Benefits*, p.178. Lynes added, however, that the Commission had a duty to 'prevent hardship'. Accordingly, support could be provided on an 'urgent need' basis under the Ministry of Social Security Act 1966 s.13. If a visitor was taken ill or for some other reason it was not appropriate to make benefit conditional on registration for work, payments could be made 'in the normal way without resorting to the urgent needs provisions in s.13'. This could continue only for as long as it was necessary to allow other arrangements to be made.

Changes in 1971: The Immigration Rules

Ss.1(4) and 3(2) of the 1971 Act gave authority to the Home Secretary to make statements about the 'practice' to be followed in the administration of the Act. These are now set out in the Statement of Immigration Rules HC 395 (Consolidated Version) made under the authority of the Immigration Act 1971 ss.1(4) and 3(2) (the 'Immigration Rules'). They are regularly updated and changes are published in the 'Statements of Changes in Immigration Rules'. The most recent changes were laid before Parliament on 19th January 2012 (HC 1733). The specific benefits or other forms of welfare provision which are within the scope of the concept 'recourse to public funds' are referred to in the Immigration Rules and in UK Border Agency 'Public Funds' guidance. 'Public funds' now encompasses most forms of benefits other than contributory benefits and a limited number of non-contributory benefits, for example Statutory Maternity Pay¹⁴. It includes housing under the Housing Act 1995 Part II, and the Housing Act 1996 Parts VI and VI. A claim for benefits or housing by a person subject to a public funds condition generally triggers a breach of the condition and action by the immigration authorities.

As noted in the extract from the *O* case judgment previously referred to, barriers to welfare support from the benefits system based on migration status continued to be introduced, mainly by secondary legislation, in the 1980s. In particular, the concept of a 'person from abroad' was progressively moved out of codes, guidance and other forms quasi-legislation and incorporated into regulations from 1980 onwards¹⁵. After that, 'person from abroad' status in its legislative forms underwent successive changes culminating in its present statutory role in regulating access to means-tested benefits like Income Support¹⁶.

The most far-reaching change to the definition of a 'person from abroad' came after the UK's implementation of Directive 2004/38 on free movement by the Immigration (European Economic Area) Regulations 2006¹⁷, and enactment of the Social Security (Person from Abroad) Amendment Regulations 2006¹⁸.

This change was considered in the discussion of the research undertaken for *Component 4*.

¹⁴ See note 4.

¹⁵ See, in particular, the Supplementary Benefit (Aggregation, Requirements and Resources) Amendment Regulations 1980, SI 1980 No 1774.

¹⁶ See, now, the Income Support (General) Regulations 1987, SI 1987/1967, reg 21AA.

¹⁷ SI 2006/1003.

¹⁸ SI 2006/1026.

Habitual Residence & Other Restrictions

Further significant changes to the welfare support system for migrants were made after 1994. These included the imposition of a 'habitual residence' rule on means-tested benefits claimants¹⁹. This extended in some cases to UK nationals with a right of abode²⁰. The test required claimants to have a settled intention to reside demonstrated, if necessary, by a requirement to serve an appreciable period of residence in the UK of up to three months before benefits like Income Support could be claimed. Pending authoritative guidance in 1999 from the House of Lords in *Nessa*²¹ Commissioners' decisions indicated that the period had to be long enough to enable the person to 'integrate in UK society' but not be so short as to put support on the same footing as recipients of support under the National Assistance Act 1948 for applicants²². The political and policy context in which the habitual residence rule was introduced in 1994 was a growing concern about the risks posed by 'benefit tourism'²³.

Although further changes continued to be made by the government, with varying success given the interventions of the courts to mitigate some of the effects of the changes on groups like asylum claimants, the next major development was as a result of restrictions made by the Immigration and Asylum Act 1999 (the 'IAA'). As well as taking asylum claimants completely out of mainstream welfare support, anyone 'subject to immigration control' was also taken out of eligibility for most benefits²⁴. Only a limited number of prescribed categories of person were exempted²⁵. 'Person from abroad' status was brought into the new, re-structured definition of a person 'subject to immigration control' effected by s.115. Variants on the 'person from abroad' concept were subsequently deployed in a number of schemes established by post-1999 legislation and regulations. The effect of such requirements was to take claimants out of eligibility for tax credits²⁶ and pension credit.²⁷

¹⁹ Income-Related Benefits Scheme (Miscellaneous Amendments) (No 3) Regulations 1994, SI 1994/1807. The measure was introduced against the advice of the Social Security Advisory Committee; see the Report on the Income-Related Benefit Schemes (Miscellaneous Amendments) (No 3) Regulations 1994, Social Security Advisory Committee, 2004, Cm 2608.

²⁰ Puttick, note 3, p.292; and *Work 8*, H-201.1 and H-241. On the impact on UK nationals and advisers' wider concerns, see J. Albesson (1996) *Falling the Test: CAB Clients' Experience of the Habitual Residence Test in Social Security*, National Association of Citizens Advice Bureaux; and M. Adler (1995) 'The Habitual Residence Test: A Critical Analysis' (1995) 2(4) *Journal of Social Security Law* 179-195.

²¹ *Nessa v Chief Adjudication officer and Another* [1999] 4 All ER 677; [1999] 1 WLR 1937, House of Lords. See, further, the discussion of the test in the section 'Residence' and Access to Support, p.67.

²² I. Macdonald and R. Toal (2008) *Macdonald's Immigration Law & Practice*, Lexis-Nexis, 7th ed, Vol 1, at 13.20, p.987. As the authors note, assistance under the 1948 Act was still available on an 'emergency' basis.

²³ 'Benefit tourism', an important driver for restrictions from 1994 onwards, was referred to in a speech by the Rt Hon Peter Lilley MP, Secretary of State for Social Security, at the Conservative Party Conference in September 1993.

²⁴ S.115, with effect from 3rd April 2000. Some forms of State Retirement Pension (namely Category D), benefits under the Industrial Injuries Benefit Scheme, Guardian's Allowance, and Statutory Maternity Pay were among the non-contributory benefits that could still be claimed.

²⁵ See s.115(3)-(6) and Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, SI 2000/636.

²⁶ Eligibility was aligned to the position of other means-tested benefits in that claimants who were not ordinarily resident in the UK could not be treated as 'being in the UK'. They were therefore ineligible for support; see the Tax Credits (Residence) Regulations 2003, SI 2003/854, reg 3(1).

²⁷ See the State Pension Credit Regulations 2002, SI 2002/1792, reg 2. Reg 2(1) provides that a person is to be treated as 'not in Great Britain', and therefore is ineligible, unless he is 'habitually resident'. As considered in the discussion of *Component 4* research, the courts have generally been supportive of this restriction and the superimposition of the 'right to reside' on the habitual residence test. The point was illustrated by the Supreme Court's judgment in *Patmalniece* in 2011 (pp.83-85, post).

Subject to limited opportunities for residual or 'last resort' support, facilitated in some cases by a judicially-constructed welfare safety net based on Convention rights, a number of groups were completely barred out of mainstream support. This was a significant concern for front-line advice organisations, and lobby groups. The restrictions were generally subject to fierce resistance. Indeed, exclusion of such groups was described by one critic as 'welfare apartheid'²⁸ – a harsh comment, but one which reflected the concern among lobby groups that sizeable sections of the resident claimant community were being taken out of any kind of eligibility for mainstream welfare support. By 2002 and the enactment of the Nationality, Immigration and Asylum Act 2002 (the 'NIA'), the focus appeared to be on a programme of progressive removal of any 'last resort' or 'residual' support for many groups (including restrictions on assistance from local government administered Community Care services).

Judicial Perspectives & Concerns The courts' role in interpreting and applying legislation that introduces restrictions to the welfare support regime was, of course, an important one. In this busy and fast-moving area of Public Law the attitudes of senior members of the judiciary who were being called upon, in effect, to complete the legislative process provided useful insights to the 'change' process. Most judges have been well aware of the political context in which government policies in this area develop, and they have provided useful insights. This observation was made in 2002 by Lord Hoffman, now a Supreme Court judge:

'There was a time when the welfare state did not look at your passport or ask why you were here. The State paid contributory benefits on the basis of contribution and means-tested benefits on the basis of need. Some flat-rate non-contributory benefits like family allowances required residence in the UK for a minimum period of time. But immigration status was a matter between you and the Home Office, not the concern of the social security system. As immigration became a political issue, this changed. Need is relative, not absolute. Benefits which in prosperous Britain are regarded as sufficient only to sustain the bare necessities of life would provide many migrants with a standard of living enjoyed by few in the misery of their home countries. Voters became concerned that the welfare state should not be a honey pot which attracted the wretched of the earth. They acknowledged a social duty to fellow citizens in need but not a duty on the same scale to the world at large.'²⁹

On occasions during the research programme it was evident that some judges had wider concerns about the general direction of travel of the reform process, and the policies on which it was based. On occasions they articulated those concerns when supporting interventions. For example, Lord Justice Sedley, speaking at a conference in 2003, clearly regarded the courts' role in intervening to assist destitute asylum claimants as an important one. Indeed, he said it had only been the combined 'triple effect' of (a) the Human Rights Act 1998, (b) section 55(10) of the NIA 2002 (enabling support to be given despite the bar in

²⁸ I. Ferguson in U. Brown et al (eds) (2002) *Poverty in Scotland*, CPAG/Scottish Poverty Information Unit, p.118.

²⁹ *R (Westminster City Council) v National Asylum Support Service* [2002] 4 All ER 854, referred to in *Works 2* and 3.

section 55(1) on supporting 'late' applicants, to avoid a breach of human rights), and (c) the courts' ability and willingness to make emergency interim orders, that was saving many asylum seekers and their dependants from 'starving in the streets'.³⁰

Other judges went a lot further and sometimes took the opportunity to direct their concerns much more widely. Lord Justice Jacobs, for example, in the *Limbuela* case³¹ considered that not only were the actions of the authorities in the particular case a contravention of the claimant's Convention rights, the whole *policy* on which the legislative restrictions were based was 'unlawful'. The Lord Chief Justice, Lord Woolf, also engaged in a series of attacks on policy aspects of the evolving regime at this time, particularly during debates on the Asylum and Immigration (Treatment of Claimants, etc) Bill 2004. As well as concerns about substantive changes to the rights of groups like asylum seekers, he was particularly opposed to attempts to reduce the courts' oversight of decision-making³². This marked the start of a period of significant tension between senior judges and New Labour Home Secretaries at the time, particularly David Blunkett.

The Position at the Start of the Research Period

The change process was on-going at the start of the research period in 2003. Two major new Acts, namely the IAA and the NIA, had been passed but were still being implemented. Newer restrictions in what was shortly to be the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 were being developed. The restrictions being planned included plans to impose conditions on access to the labour market and welfare support by entrants from the eight new Member States that were due to accede to the EU on 1st May 2004 (the 'A8' States³³) and Bulgaria and Romania (the 'A2' States³⁴). Regulations due to operate from that date aimed to ensure that such entrants could not be treated as 'habitually resident', and therefore eligible for support from means-tested benefits, unless they *also* had a right of residence in the UK³⁵. The context for the introduction of controls on A8 States from 1st May 2004 was that the UK, like Ireland and Sweden, had opened its labour market to nationals of those countries. As considered in *Work 4*, controls on nationals from the A2 States then followed from 1st January 2007.

³⁰ 'Emergency Support for Asylum Seekers', Legal Action Group Conference 2003; see *Work 2*, p.190 and *Work 3*, p.219.

³¹ [2005] 3 All ER 29, CA.

³² See, for example, C. Dyer and P. Wintour 'Woolf Leads Judges' Attacks on Ministers', *The Guardian* 4th March 2004.

³³ The A8 countries are Poland, Hungary, Slovakia, Slovenia, Lithuania, Latvia, Estonia, and the Czech Republic.

³⁴ These States acceded to the EU from 1st January 2007.

³⁵ The Social Security (Habitual Residence) (Amendment) Regulations 2004, SI 2004/1232 were replaced by the Social Security (Persons from Abroad) Amendment Regulations 2006, SI 2006/1026. The regulations undoubtedly reduced the number of non-EEA entrants able to demonstrate habitual residence. Apart from EEA nationals with 'qualified person' status (or a right of residence based directly on the EU Law) and their family members, the main non-EEA groups eligible for a right to reside after 1st May 2004 were British nationals with a right of abode; Commonwealth citizens with a right of abode; and any remaining entrants or residents from outside the EEA exempted from immigration control under the Immigration Act 1971 s.8.

By the start of the research period in 2003 further restrictions on access to welfare support, and barriers based on 'Presence', 'Residence', and immigration status, were still being developed. At the same time, though, it was also clear that the welfare support regime was becoming increasingly regulated by European Law, namely ECHR law and EU law. In the case of the ECHR this was the result of the Human Rights Act 1998 which operated from 1st October 2000. In the case of EU law, the UK's accession from 1st January 1973, and the need to ensure that UK law was compatible with the Community's legal order in areas like 'free movement', posed some significant challenges for law makers and the courts.

Critical Appraisal of the Programme

The Research Aims

After an initial examination of the project's historical and theoretical context, key factors informing reforms, and the impact of 'soft' EU measures' at the start of the research period, the research aimed to assess the impact of European Law – the EU Law and the ECHR – on the legal regime regulating welfare support. The focus was on several key groups: asylum claimants, those subject to immigration control, and EEA nationals and their family members.

Following entry into force of the Human Rights Act 1998 in October 2000, the research critically analysed the role played by the ECHR in facilitating support for a number of needy groups, including those affected by migration status barriers and restrictions introduced by measures like the NIA in 2002. It analysed whether, and to what extent, Convention rights 'made a difference'; and whether, in effect, a judicially constructed 'safety net' was in operation as a result of court interventions. The programme then focused on:

- The effects of restrictions operating in the UK on support for nationals³⁶ from the A8 and A2 States: these included expectations of 'contribution' and 'reciprocity', and the requirement that A8 claimants should complete a period of twelve months continuous employment that was registered under the Worker Registration Scheme as a condition of take-up of welfare support³⁷. In undertaking the research, the author sought to compare UK approaches to the other Member States admitting Accession State nationals, namely Sweden and Ireland.
- Implementation by the UK in 2006 of free movement measures in Directive 2004/38. The research was particularly interested in the UK scheme's operation, including the 'right to reside', the courts' role, expectations that claimants should normally be 'economically active' or self-sufficient, the position of family members, and aspects such as the scope of proportionality and discrimination requirements.

³⁶ 'EEA national' refers to nationals of EU Member States other than the UK as well as citizens of Iceland, Norway, Liechtenstein, and Switzerland.

³⁷ The scheme operated in accordance with the Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219. By way of derogation from TEC Art 39 and EEA nationals' free movement rights, the regulations provided that A8 workers requiring registration could only be authorised if they worked for an 'authorised employer' under the registration scheme (reg 7). The scheme was finally abolished in 2011, subject to transitional provisions, by the Accession (Immigration and Worker Registration) (Revocation, Savings & Consequential Provisions) Regulations 2011/544. However, as considered in *Component 3*, the scheme for regulating A8 entrants provides a model for regulating future entry to the labour market by entrants from new EU States in the future, and government ministers have made it clear that it will be re-deployed again, for example to regulate workers from States like Croatia in 2013, and then Turkey.

Description of the Programme's Component Parts

The programme had four components, and a number of 'questions', as follows:

Component 1: *The development of the UK's support regime.* This critically considered the historical and theoretical context, including the role played by 'Presence' and 'Residence' requirements. To what extent did they help to shape the modern support regime? Work in this component went on to analyse the factors shaping legislative reforms and affecting the regime in the study period. A critical analysis of the impact of EU measures made after the addition of Title IV of the Treaty on the Establishment of the European Community (TEC) was then undertaken. On the face of it, this suggested that the EU legal order was, by this point, starting to exert greater control over Member States' welfare systems – albeit by relatively limited interventions such as the requirement of minimum conditions for reception support for asylum claimants on a Europe-wide basis. To what extent did such developments really influence Member States management of their welfare systems; and to what extent could they be seen as limiting or Member States traditional control over 'welfare'?

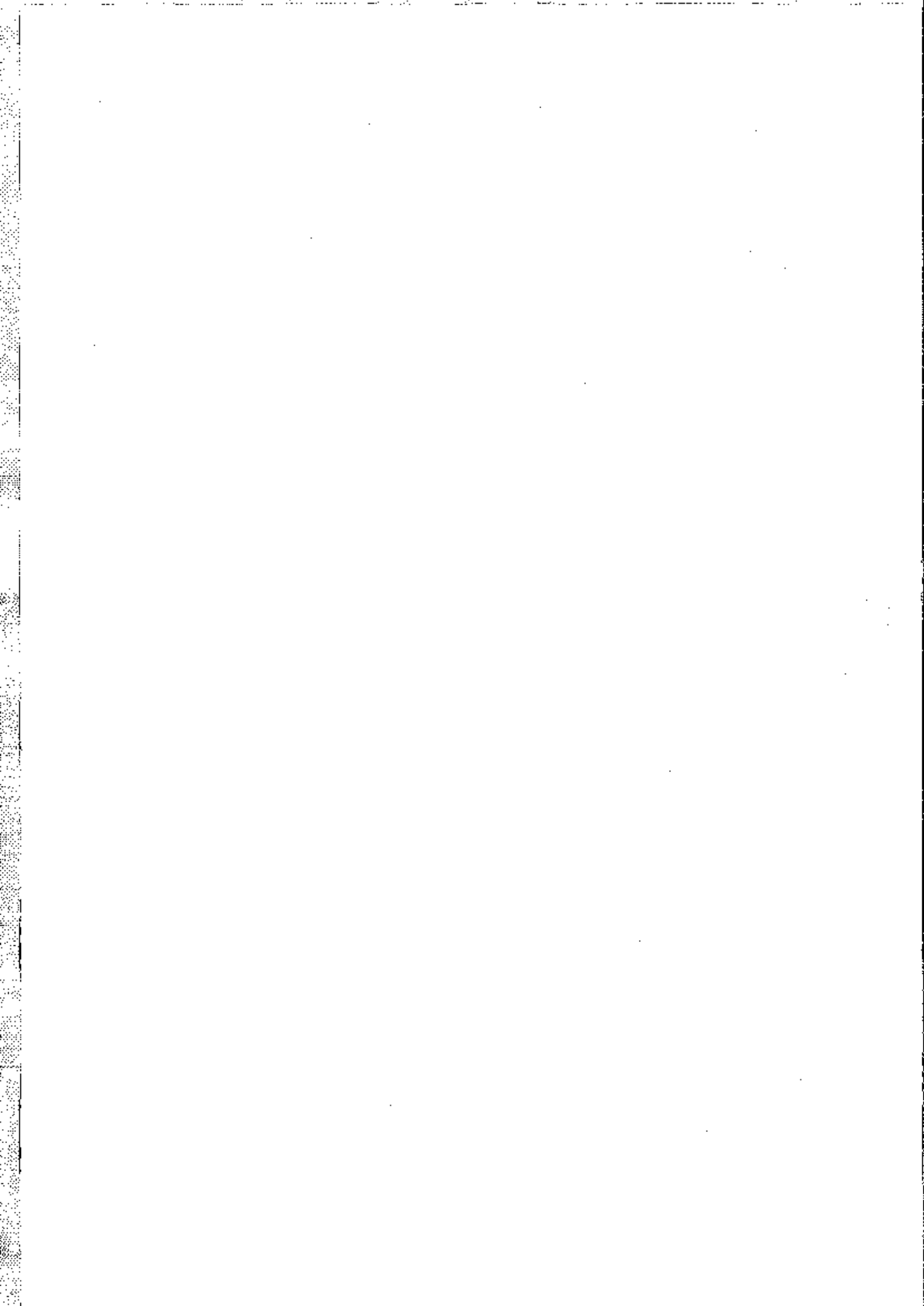
Component 2: *Analysis of the impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') on the support regime.* The work done in this phase of the project critically analysed the role played by the ECHR following enactment of the Human Rights Act 1998 (from October 2000, when the Act came into operation). To what extent did interventions by the courts in welfare decision-making processes 'make a difference'? By the end of the research period could it be said that, in effect, a judicially constructed 'safety net' was in operation?

Component 3: *The New Europeans: Assessment of the restrictions on welfare support for nationals from the new Accession States ('A8' and 'A2' States) after 1st May 2004, and their longer-term impact on the UK's support regime.* This part of the research examined the restrictions on access to welfare support by nationals from the new Member States (the 'A8' and the 'A2' States) residing in the UK after 1st May 2004 – restrictions authorised by EU law. What were the concerns and policy factors that informed UK approaches, and their impact? As the UK, initially, was only one of three EU States admitting A8 nationals to their labour markets (the others were Sweden and Ireland), how did UK approaches to preparing for the new arrivals differ from those countries' reception arrangements; and what was the approach taken by the UK courts when interpreting and applying the restrictions?

Component 4: Implementation in the UK of Directive 2004/38. This component critically examined the UK's legislation that implemented the free movement-related rights of EEA nationals and their family members in Directive 2004/38. The research was particularly interested in the courts' role in interpreting and applying the UK scheme, and in dealing with the limitations and conditions on EEA nationals' ability to access to support that resulted from the superimposition of the 'right to reside' on habitual residence requirements. These limitations reflected the UK's expectation that EEA claimants should, as a general rule, be expected to be either 'economically active' or self-sufficient after their arrival. These were the key conditions of eligibility for support from means-tested benefits like Income Support and Pension Credit. EU law permitted such conditioning to a degree, for example by enabling host States to make the right of residence conditional on entrants not becoming a burden on their social assistance systems. However, like other States the UK has faced a significant challenge in trying to ensure that its restrictions are compatible with EU requirements. As part of the enquiry, the author also examined the UK scheme's effects on EEA nationals' family members, and the difficulties relating to the operation of retained and derived residence rights. The research was also interested in the operation of proportionality and discrimination requirements. To what extent have these aspects of the support system been problematic? Have proportionality and discrimination requirements actually provided any assistance to claimants, or helped to structure adjudication decisions in ways that are compatible with EU requirements and 'guidance'?

Coherence of the Programme

The research programme has been designed around the key developments between 2003 and 2011 with which the research is concerned. Sequentially, these included the enactment of a number of EU Directives such as Directive 2003/9 on minimum reception conditions for asylum claimants; incorporation of the ECHR in the UK from October 2000; the imposition of controls on A8 and A2 new arrivals in 2004; and implementation by the UK of free movement legislation in 2006. This approach informed the four core components making up the programme, and the research questions. In providing a coherent structure in this way, this approach enabled the author, by the end of the programme, to gain a holistic understanding of the support regime's operation, and to reach informed and reasoned conclusions about the impact of Europe on the support regime's development.



Analysis of the Components & Synthesis of the Works

Component 1

The Development of the UK's Support Regime

(i) Introduction

Although a claimant's nationality or immigration status had little bearing on eligibility for State welfare support until legislative changes in the 1970s, 'residence' and 'presence' requirements were features of the Poor Law system operated until 1948, albeit in less structured ways than in the modern benefits, tax credits, and Community Care systems.

To what extent did these early features help to shape the modern support regime, including key features like 'habitual residence'³⁸, which is now a corner-stone of the modern regime?

(ii) The Historical Context: 'Residence', Migration Status & the Courts

Applicants claiming assistance under the Poor Law system not only had to be resident in the parish from which they claimed, they had to have *settled* residence³⁹. The need for this was evident from Poor Law cases kept in court records and, in Scotland, the records in the main Sheriffs' Courts. Records of proceedings in the period 1846-1933 in the National Archive of Scotland Archive⁴⁰ also suggest that issues of residence, and the question whether claimants had acquired and *maintained* a 'settlement', were as hard fought as they were in England⁴¹. Although immigration status was not a factor in the way that it is now, nationality certainly played a role at different times. In Scotland, for example, destitute English or Irish claimants after 1845 could not only be refused assistance they could be *removed* if they made a claim⁴². However, the introduction of a 'removal' power in Scotland in 1845 must be seen in context. There had been exceptional levels of demand on the resources of the

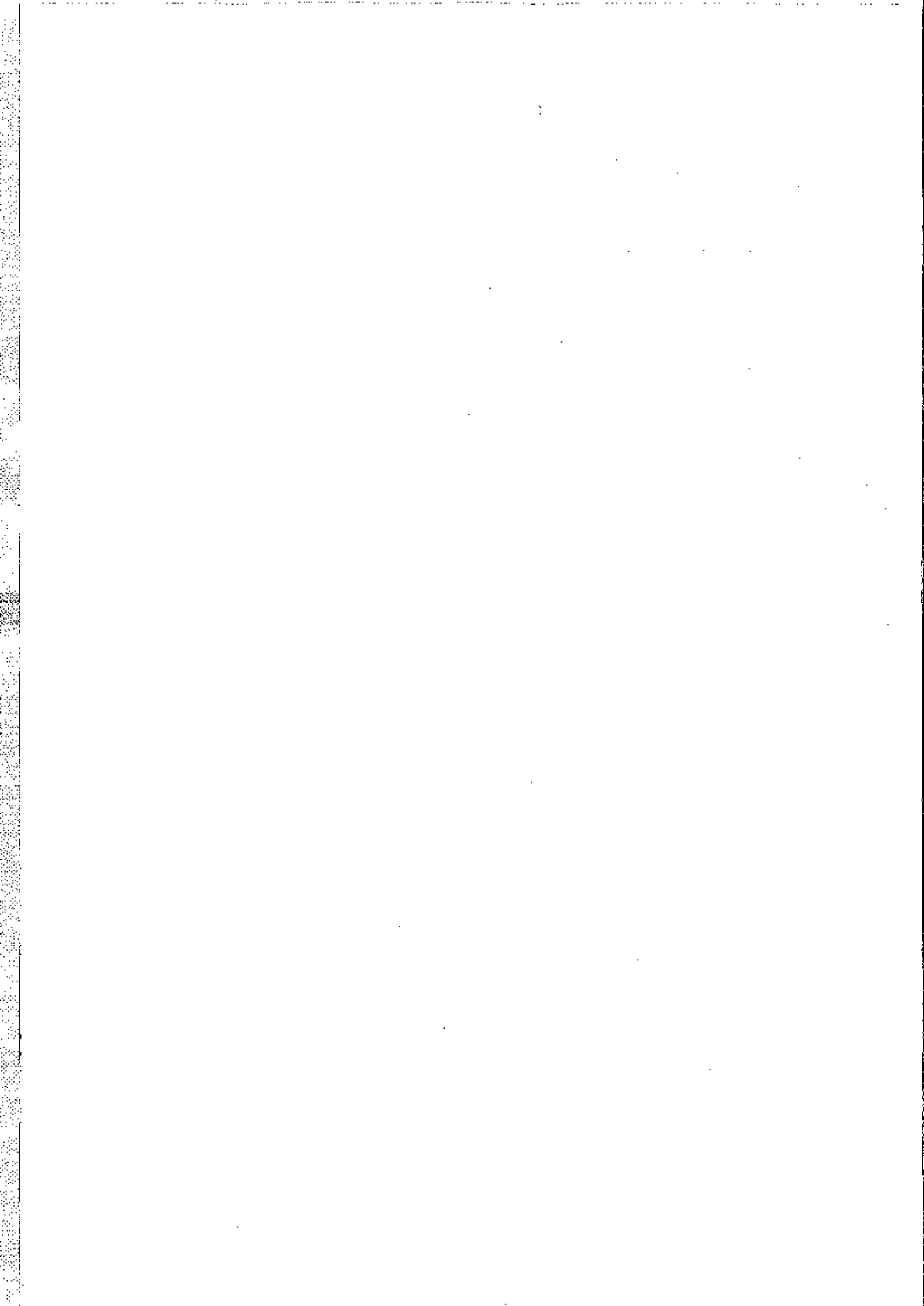
³⁸ Puttick (2006), note 3, pp.292-295.

³⁹ *Work 8*, Section H-1.

⁴⁰ National Archive Ref.SC6/82.

⁴¹ In England, Blackstone referred to the complex provisions, including those in the Statute 13 & 14 Car II c 12, regulating the acquisition of a settlement under the law of settlements. In the course of his discussion of the 'settlement' requirement he referred to the 'infinity' of expensive lawsuits between litigating neighbourhoods and the process of 'removals'; Blackstone, *Commentaries on the Laws of England (1765-1769)* Vol 1, ch xi, pp 362 et seq, discussed in *Work 8*, H-1.

⁴² *Ibid*, H-1. The powers were in the Poor Law Amendment (Scotland) Act 1845.



parishes and the Destitution Boards in the aftermath of the Highland clearances, famine, and the failure of central government to provide additional resources and support. Attempts to manage this took the form of measures capping and means-testing relief⁴³. The precise reasons for the introduction of a power in 1845 to remove destitute claimants are unclear, but from a perspective of the authorities at the time it may, perhaps, just have been seen as the logical 'next step' in managing the crisis. Taking groups of English and Irish claimants out of eligibility and removing them was an obvious, albeit highly controversial, way of reducing the demands on the system for support⁴⁴. The removal powers operating after 1845 have obvious parallels with current powers in the modern regime to remove economically inactive migrants. These are not confined to third country nationals who are residing in the UK unlawfully or who may be at risk for other reasons (typically after their visa has expired, or their sponsors stop providing adequate support for them). Removal powers also extend to EEA nationals if they do not have, or cease to have, a right to reside⁴⁵. Since 2009 the right to reside of a person at risk of becoming a burden on the UK's social assistance system can be removed. It has been argued that it would be unlawful for the immigration authorities to actually deploy the power against an EEA national⁴⁶. However, this is a difficult position to sustain, particularly in cases where the person is economically inactive and is dependent on State benefits. Indeed, in cases since 2009 the UK Border Agency can and occasionally does remove EEA nationals. In some cases, though, appeals by EEA nationals have been successful, as discussed by the author in *Work 10* when commenting on an attempt to remove a Czech national who had been 'reported' for begging, and for selling *The Big Issue*⁴⁷. Removal powers are regulated and the process is subject to important caveats. In particular, removal should not be the *automatic* consequence of loss of residence rights. The operation of 'proportionality' requirements is the key constraint. As the author's research indicated (in *Works 8* and *10*), EU guidance in 2009 requires decision makers factor in key questions like the *extent* of the claimant's dependence on social assistance, and the period/s over which claims have been made⁴⁸. Those considerations then inform the question of whether removal of residence rights and rights to support are 'proportionate' in legal terms.

⁴³ J. Prebble (1963) *The Highland Clearances*, discussed in Puffick (2006), note 3, p.6.

⁴⁴ This approach would be highly questionable today, and 'unlawful' in terms of the Human Rights Act 1998 s.6(1). There are precedents, however. During the short reign of Edward VI (1547-1557), and after periods of recession, unemployment, and unrest, foreigners without a 'settlement' were barred out of support. If they were categorised as a *foreign 'vagrant'* they could be forcibly removed from a parish (Statute 1 Ed 6, c.3, s.13) or, worse, 'shipped off' from the nearest port; 3 & 4 Ed 6, c.16, s.16.

⁴⁵ Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 19(3), added in 2009 by SI 2009/1117.

⁴⁶ A. Weiss (2010) 'Unqualified Persons: The Lawfulness of Expelling Homeless EEA Nationals from the UK', *Journal of Immigration, Asylum and Nationality Law*, 24(3) 246-256.

⁴⁷ *Work 10*, p.292. The appeal was supported by the AIRE Centre, and was assisted by evidence that the claimant had not, in fact, received any social assistance, and may also have acquired 'self-employed' status thereby becoming a 'qualified person' for the purposes of acquisition of a right to reside.

⁴⁸ *Ibid*, pp.286, 287. Reg 19(4) of the Immigration (European Economic Area) Regulations 2006 stipulates that removal must not be the 'automatic' consequence of having recourse to the UK's social assistance system. Furthermore, if the person also has the benefit of leave to remain under the Immigration Act 1971, removal is prohibited except on much narrower public policy, public security, or public health grounds; regs 19(5) and 21.

Barring out Foreign Nationals from Support

In 1803 the English system went in an entirely different direction from Scotland's, particularly in its approach to 'nationality' as a basis for refusing support for foreign nationals. In the important decision of *R v Inhabitants of Eastbourne* an English court made it clear that nationality should *not* be a barrier to acquiring a settlement and receiving support⁴⁹. This would have been at odds with the 'law of humanity'. This was an important ruling by the courts at the time. It also had significant longer term implications for the support regime's development, as considered in the analysis of *Component 2* work. As the analysis of pre-Human Rights Act 1998 approaches showed, judicial interventions to assist claimants in the face of increasing restrictions, including measures in the IAA limiting access to residual Community Care support by claimants subject to immigration control, were 'greatly assisted' by the courts' stance in 2003, and the scope of the law of humanity principle (*Work 2*, p.188).

However, closer analysis of the deployment of the law of humanity principle in cases coming before the courts in the modern system, including cases at the start of the research period, highlighted considerable uncertainty about the precise scope and limits of the principle. It also showed that there were divisions among the judges, for example on the issue whether, and to what extent, it was subject to any *exceptions*. Such divisions were evident, for example, in cases in which Community Care assessors had expected foreign claimants to return to their home country⁵⁰. This was an issue considered in *Work 3*, and it is revisited later in this Critical Appraisal when discussing the research undertaken in *Component 2*.

'Residence' Gateways in the Modern Era To what extent did long-standing requirements such as 'settled residence' continue to influence the modern social security system's development? Plainly, continuity in this regard was maintained when the local services provided under measures like the National Assistance Act 1948 (subsequently brought within the Community Care system) maintained the requirement that claimants for services should be resident in the area from which assistance was sought⁵¹. As far as the Social Security system was concerned, residence and presence requirements continued as

⁴⁹ *R v Inhabitants of Eastbourne* (1803) 4 East 103; 102 ER 769, clarifying the position after *St Giles Parish v St Margaret's Parish* E2 Geo 1, 1 Sess Cas 97. There is no evidence that the law of humanity principle extended to Scotland. Even if it had, it would have been abrogated by the Poor Law Amendment (Scotland) Act 1846 which explicitly provided for exclusion from support and removal.

⁵⁰ See in particular *R v Wandsworth LBC, ex parte O*; *R v Leicester City Council, ex parte Bhika*, note 7, discussed in *Work 3*, pp.218, 219.

⁵¹ National Assistance Act 1948 s.1 provided for the supersession of the Poor Law, and 'continuity' provisions regarding local authority services. These have to be read in conjunction with specific powers and duties in the enabling powers themselves. For example, even if a claimant has 'no settled residence' or is not 'ordinarily resident' in the local authority area she lives, if the need is 'urgent' a duty to provide residential accommodation 'as if he were ordinarily resident' is engaged – a provision with significant longer-term implications in the migrant support context; see K. Puttick (2004) 'Social Security and Community Care' in Sir M. Burton (ed) *Civil Appeals*, Q-900 et seq, and the discussion of Community Care as the 'residual social security benefit', the role of local services, and the requirements for legal duties to assess and provide services following an assessment.

features of eligibility criteria for Supplementary Benefit and then its successor, Income Support, as considered in *Work 8*.⁵² At the same time as UK restrictions developed around 'residence' - the habitual residence test and right to reside requirements being the most significant manifestation of this - EU Law was also putting residence at the heart of its free movement scheme. Since the implementation of Directive 2004/38, the EU's 'right of residence' is a key gateway to entry and residence rights in other member States. However, it is also a double-edged sword with respect to residence-related employment and welfare rights. The right of residence, once acquired, confers the right to 'equal treatment' in terms of social benefits for those who have acquired that right. However, the absence or loss of a right of residence is a barrier to such rights. This is catered for in the Treaty provisions as part of its 'conditions and limits' on free movement and rights linked to free movement, as considered in *Work 10*. The challenge for the UK's scheme 'residence' requirements, at least in respect of post-2006 restrictions on EEA nationals, has been to ensure compatibility with the European system. Not surprisingly, perhaps, most of the challenges to adverse decisions affecting EEA nationals in the UK have focused on that 'compatibility' question. In the face of national restrictions, UK nationals as well as EEA nationals have sought to rely on EU law as a basis for contesting restrictions - a point illustrated by cases like *Swaddling* and *McCarthy*.

(iii) Reform & Policy Drivers

The scale on which the changes were taking place by 2004, assisted by adaptations to residence and presence requirements, raised a further issue. What were the factors and policy drivers influencing those changes?

This was of more than just academic interest. Some of the changes being made were far-reaching, and challenged some of the most basic assumptions on which the UK support system's development had developed. One example of this was the principle that the State's welfare role should be one of meeting welfare *need* - a consideration that had hitherto transcended issues of nationality or immigration status, but which had come under attack as welfare support became increasingly subject to immigration status requirements. The research looked in depth at the factors that appeared to be influencing the restrictions in the 1999, 2002, and 2004 Acts. It noted, for example, how the absence of any international regulation on the support of asylum claimants (notably in the Refugee Convention 1951) had left States free to develop their own national arrangements, levels of support, and restrictions⁵³. This meant that there would continue to be significant disparities in the level of

⁵² *Work 8*, Section H, paras H-201, H-241, and H-402, et seq.

⁵³ *Work 1*, pp.109 et seq.

support that European host States provided to their residents from abroad, as shown in work by Paul Minderhoud⁵⁴. Notwithstanding evidence that familial links, knowledge of the language, and the attraction of joining established communities are often the prime factors that inform migrants' choice of destination⁵⁵, a key objective for UK policy-makers has been to reduce the perceived 'pull factor' provided by the UK's generous welfare system. This was seen by the government and policy-makers as an incentive that attracted migrants who might otherwise go to other countries⁵⁶. As the research indicated, legislation removing or restricting support was driven by a number of factors, including macro-economic 'efficiency', the increasing cost to the community of welfare provision, hostility towards migrants, and 'priorities', ie putting the needs of 'our own' ahead of those of newcomers and 'outsiders'⁵⁷.

'Contribution' & Reciprocity The expectation that newcomers should offer something in *return* for the support given by the host community was already evident when the government signalled its intention to impose restrictions on access to welfare benefits by entrants from the A8 States after 1st May 2004 – a group which, as the Prime Minister indicated, would be expected to 'assist in meeting our skills shortages' and 'work hard'. Those statements were then translated into law with core requirements that new arrivals from the A8 States should work, and engage in work registered in accordance with the Worker Registration Scheme before they could be eligible for means-tested benefits. Reciprocity expectations also pervaded the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, for example in the provisions providing for integration *loans* rather than benefits or services (s.11), and the requirement that failed asylum-seekers' accommodation should reciprocate by undertaking unpaid 'community activities'⁵⁸. Such requirements undoubtedly attracted popular support⁵⁹. Furthermore, such expectations of reciprocity were just the start of a longer-term process characterising later policy objectives, and informing requirements designed ahead of 1st May 2004 to coincide with the admission of entrants from A8 countries in May 2004, when the need for claimants to be economically active and register with the Worker Registration Scheme became a condition of eligibility for means-tested benefits. Post-2006 requirements embedded in the UK's legislation implementing Directive 2004/38 also expected claimants in most cases to be 'economically

⁵⁴ P. Minderhoud (2009) 'Access to Social Assistance and Directive 2004/38', ch.12 in E. Guild, K. Groenendijk, S. Carrera (Eds) *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*.

⁵⁵ S. Castles, H. Crawley, H. S. Loughna (2003) *States of Conflict: Causes and Patterns of Forced Migration to the EU and Policy Responses*, Institute of Public Policy Research.

⁵⁶ The research explored this as one of the policy factors informing the support regime's development, and referring to the doubts that it exists, or its extent; 'Controversy surrounds even the existence of such a 'pull' factor, and yet it is a potent factor informing welfare policy...' (*Work 1*, p.109).

⁵⁷ *Work 1*, pp.108-111. Increased restrictions on access to healthcare, introduced in 2004, were prefaced by the observation by a Health Department minister that the NHS is a national institution, not an international one; *Work 3*, p.217.

⁵⁸ S.4(8)(a) of the IAA 1999, inserted by s.10(1) of the Asylum and Immigration (Treatment of Claimants etc) Act 2004.

⁵⁹ As observed by the Independent Asylum Commission's *Review of the UK Asylum System* (Co-Chairs Lord Justice Waite and Ifath Nawaz): Report & Interim Findings, London: Citizen Organisation Foundation, March 2008. Whilst recommending that the State's support for those seeking sanctuary was essential, it also recognised that most of the public had objections to asylum seekers and immigrants having 'priority' in terms of housing allocations; and it expected them to reciprocate for their support.

active', either as a 'worker' or as a 'self-employed person', thereby contributing to the country's labour market needs.

In the face of such pressures to 'condition' support for migrant groups in these ways, to what extent could EU Law, in setting minimum conditions and standards for the support of groups like asylum claimants, assist entrants who might not be able to reciprocate for their support in such ways – for example groups like asylum claimants and their family members and dependants? This was considered in the last part of this component.

(iv) EU Law: Influential, but *how* Influential...?

In this final part of the component, the research focused on what appeared to be the EU's growing role in the management of 'welfare' aspects of immigration, particularly after the addition of Title IV of the Treaty Establishing the European Union⁶⁰, now the Treaty on the Functioning of the EU ('TFEU')⁶¹ and ability to legislate to set minimum conditions for migrant groups. This phase of the research was interested in evaluating the extent to which such measures such as Directive 2003/9 made any significant impact on the underlying trend, which was towards an increasingly restrictive UK support regime. On the face of it, and given the increase in globalising pressures, growing regionalisation, and 'elements' of an emerging EU welfare law⁶², it might be assumed that control by Member States like the UK over their welfare systems was starting to *weaken*, leading to diminution in sovereignty over immigration. Interestingly, immigration has been seen by some commentators as an area of legal control that is one of the 'last bastions' of State sovereignty⁶³.

There was every reason to question such assumptions. The author's doubts about this rest on a number of factors, not least the lack of agreement between Member States that appear to typify the process by which Directives and other EU measures were made in this period. The inherent weaknesses that appeared to characterise the kind of 'soft law' coming on stream in the research period – typified by measures like Directive 2003/9 on minimum standards of support for asylum claimants – also raised doubts about the *effectiveness* of such EU law as a mechanism for setting minimum standards and regulating Member States' support arrangements. This suggested that Member States like the UK were being left with considerable residual power, and would be able to continue introducing national restrictions.

⁶⁰ Now Title V, TFEU.

⁶¹ Treaty on the Functioning of the European Union (Consolidated) (2008/C 115/01), OJ C115, 9 May 2008.

⁶² G de Búrca (ed) (2005) *EU Law and the Welfare State: In Search of Solidarity*. The author identified 'soft' attempts at cross-EU measures as one of the elements of an emerging 'EU welfare law' (p.2).

⁶³ C Dauvergne 'Sovereignty, Migration and the Rule of Law in Global Times', (2004) *Modern Law Review* 67(4) 588. See, as well, K Ohmae (1996) *The End of the Nation State; The Rise of Regional Economies*.

Soft Law Measures The EU's approach involved the setting of requirements and new minimum 'standards' for groups like temporarily displaced persons⁶⁴ and third country nationals⁶⁵. However, as the analysis in *Work 1* pointed out, in seeking to improve third country nationals' rights 'reaching agreement was never going to be easy'. This was particularly evident in relation to the EU's attempts to try to align the employment and social security conditions of third country nationals more closely with those of EU citizens. The process was not made any easier by the ability of Member States to insist on 'opt-ins' and 'opt-outs'. This was commonly required by Denmark, Ireland and the UK in order to secure their agreement. The author's comment on this was that 'such cherry-picking fundamentally weakens the effectiveness of the EU's common policy'. At the same time, however, as the author's analysis indicated, disputes between States on asylum matters 'plainly acted as a catalyst to develop common policies'. This was evident after altercations between France and the UK over the Sangatte camp in Northern France; and then the bitter disputes between Italy and its neighbour Germany after Kurdish refugees landed on the Italian coast, immediately made their way into Bavaria, and then promptly made asylum claims in Germany (see, in particular, *Work 1* and the section 'Post-Tampere: A Changing Position?').

With these considerations in mind, there were some advantageous features in the legislation for Member States like the UK. One of these was that asylum seekers could be required to remain on the territory of the first State in the EU that they reached. Support could be withdrawn if they left that State (art 16). However, the author's critique identified some serious weaknesses in the legislation. The directive conferred considerable discretion on Member States in the way they could operate support systems, for example in the way that conditions on access to employment were managed. This, in turn, meant that labour market access could vary considerably between States. Directive 2003/9 also allowed them considerable scope to withdraw support in key areas like housing. Poor provision was made by the directive in relation to adjudication standards and appeals. The difficulties in the UK context were illustrated by leading cases like *Hamid Ali Husain*. The author's analysis identified the primary 'failing' as being the lack of appeals rights resulting in a poor quality of adjudication, and dependency on judicial review as the only check on decisions⁶⁶.

⁶⁴ Directive 2001/55/EC on minimum standards for temporary protection in the event of a mass influx of displaced persons.

⁶⁵ Directive 2003/109/EC concerning the status of third country nationals who are long-term residents. Significantly, the directive made it clear that social security, social assistance and social protection rights should be 'as defined by national law' (art 11(4)(d)). Interestingly, difficulties in reaching consensus on any extensions to the original directive have continued recently. See the commentary by S Peers (2011) 'Legislative update EU immigration and asylum law 2010: extension of long-term residence rights and amending the law on trafficking in human beings', *European Journal of Migration Law*, 13(2) 201-218.

⁶⁶ *R (Hamid Ali Husain) v Asylum Support Adjudicator & Secretary of State for the Home Department* [2001] EWHC Admin 852. As the commentary in *Work 1* observed, Public Law principles had to be deployed in that case to enable the withdrawal of housing to be treated as 'unlawful'. Decisions on expenses, accommodation, and 'exceptional needs' can be appealed to the first tier of the tribunal system, but further appeal is excluded; see the Appeals (Excluded Decisions) Order 2009, SI 2009/275. Accordingly, judicial review can still be an important feature of contentious proceedings; see Puffick (2012), note 51, Q-1504.

(v) Component 1: Conclusions

In analysing the historical development of the support regime, it was clear from the research that early forms of 'presence' and 'residence' requirements provided important roots from which the modern system, and migration status and residence-based gateways and barriers to support, have been evolving. In the modern era this has made it easier to differentiate between 'insiders' and 'outsiders' in terms of eligibility for support. This is evident in the way that the 'habitual residence' rule and 'person from abroad' status now operates (issues that feature in the research undertaken in *Components 3 and 4*). However, whilst that differentiation may have been based, in earlier times on *nationality*, as was especially the case in Scotland after 1845, that was not the case in England. Initially at least, English law declared itself to be against discrimination based on nationality following the *Inhabitants of Eastbourne* judgment. As the research that informed the works showed, the Law of Humanity principle then continued to provide an important basis for judicial interventions based on perceived welfare need, albeit with the difficulties of uncertainty of the principle's scope: an issue which features in the research undertaken for *Component 2*. The problem was, to some extent, addressed in the post-Human Rights Act 1998 period when the courts were able to deploy Convention rights as an additional basis for interventions to assist needy claimants. As work in the later *Components* has shown, nationality is, in any case, less important as a consideration than expectations that claimants should be 'contributors' and 'reciprocators'. The need for migrant groups to be economically active is the main way of demonstrating this. The point is illustrated by the reasoning of the Supreme Court in *Patmalniece*, and the analysis in *Work 10* of this point (in the context of post-*Bressol* to 'justification' of indirect discrimination). Host States like the UK are keen to point out that restrictions are not 'nationality'-based, and that the habitual residence rule can also impact on UK nationals. As the author's commentary has made clear, there can be scenarios in which a UK national returning from outside the EU can be barred out of support by the habitual residence rule's operation while, at the same time, a third country national who is a family member of an EEA national, is able to access support immediately on arrival. This is the result of the 'equal treatment' provisions of Directive 2004/38. Clearly, the system has been adapting to newer rationales for restrictions, including expectations that residents should be 'economically active' – the basis of more recent 'economic integration' discourse considered in *Work 10*. In this respect, modern residence requirements operated by the UK also map on to the design of the 'right of residence' put in place at EU level. In the deployment of residence rights as the basis of restrictions on EEA nationals, the system forms part of a wider and evolving *European* system of control that is catered for by the 'conditions and limits' provided for in Treaty provisions.

Component 1 research also sought to address the key factors and policy drivers that have been informing the development of the modern regime.

In this regard, the results of the research identified a number of key factors. They showed how the rationale for restrictions had moved on from simply 'nationality' and popular antagonisms against migrants to wider considerations. At the policy-making level, expectations of 'contribution' and 'reciprocity' by migrants were translated into legal requirements. The research highlighted policy-makers' concerns about the threat from what they saw as growing numbers of new arrivals from poorer parts of the world, with few restrictions on their ability to access welfare support and services, sometimes from hard-pressed local services (an issue that featured particularly strongly in research for *Work 4* in the analysis of the role played by the Local Government Association and councils complaining about insufficient central funding for increased services). These were significant concerns that helped to shape the design of restrictions. The challenge for policy and lawmakers and the courts, as considered later in *Components 3* and *4* was to ensure that the measures introducing the restrictions operated within the remit and powers given to Member States like the UK.

The final element in *Component 1* sought to evaluate the impact of TEC Title IV measures on the regime, including the question of whether measures such as Directive 2003/9 marked a point where the EU started to influence and impact on the traditional grip exercised by Member States over their welfare systems. Plainly, the evidence produced by the research suggested that such interventions, whilst helpful to the groups concerned (asylum claimants, displaced nationals from other parts of Europe, long-term third country nationals residing in host Member States, etc) were in many respects weak and ineffectual. In some cases, they were so ineffectual as a result of opt-ins and opt-outs that they were arguably not even 'law'.

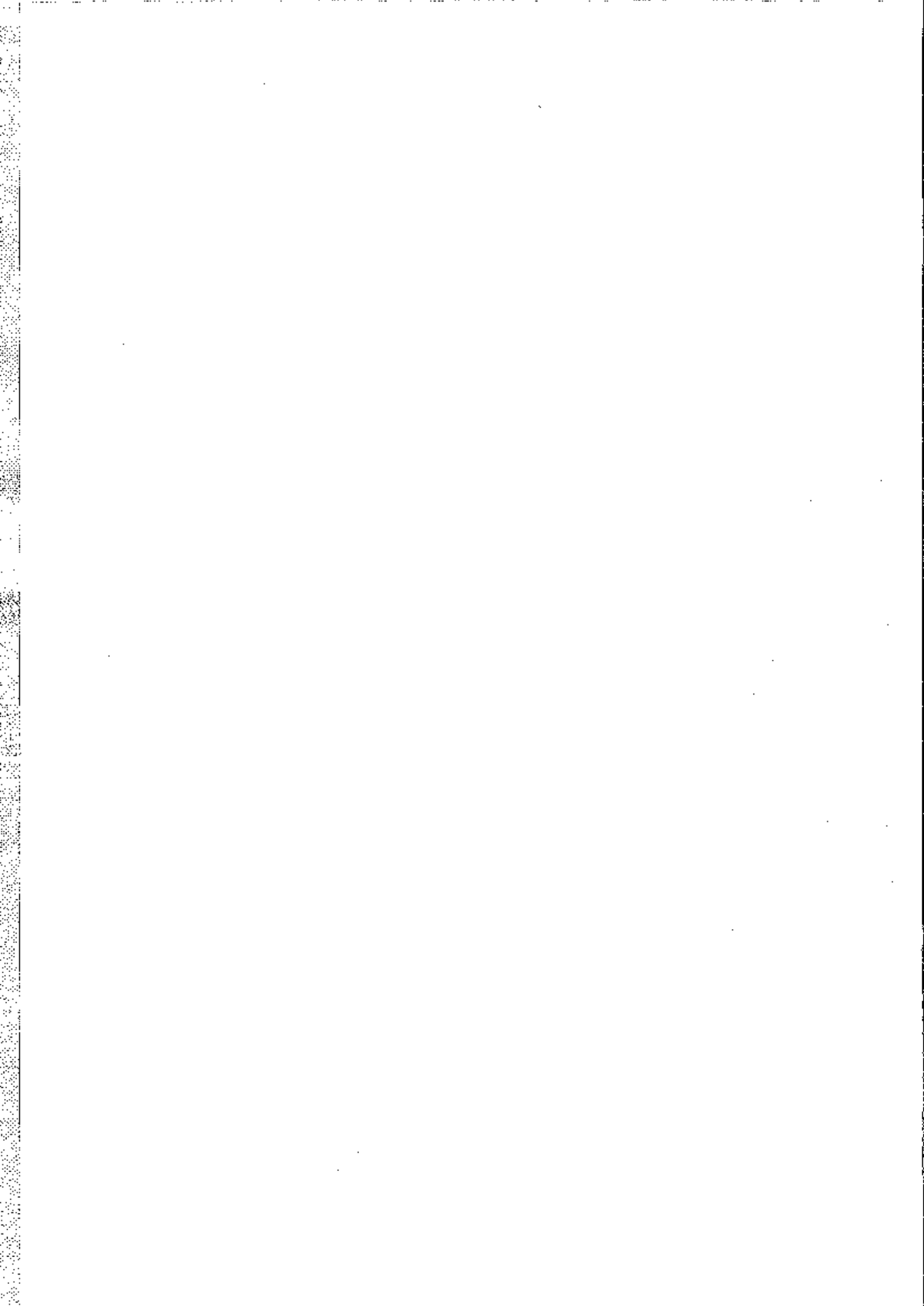
Nevertheless, as a conclusion, such 'soft law' clearly marked an important beginning ahead of more demanding, Europe-wide measures like Directive 2004/38 on free movement. As the author observed in the commentary on this area of *Component 1*, this left 'considerable scope for Member States to act independently'.

It was also pointed out that 'To date, EU legislation, and the emerging blue-print for new initiatives in respect of third country nationals entering the EU, fall well short of the 'active

and dynamic welfare State' and 'sustainable social justice' ideas⁶⁷ mooted at Tampere, and which informed Lisbon European Council's conclusions in March 2000.

Finally, it was readily apparent that soft law measures such as Directive 2003/9, analysed in *Work 1*, hardly represented any significant threat to the UK's 'sovereignty' over its management of border controls and welfare systems.

⁶⁷ The ideas of Gosta Esping Andersen and others: see G Esping-Andersen (ed) (2002) *Why We Need a New Welfare State*.



Component 2

The ECHR & the Impact of Convention Rights

(i) Introduction

The focus in this part of the programme was on critically analysing the role played by the ECHR after entry into operation in October 2000 of the Human Rights Act 1998. Assisted by the research, could it be said that interventions by the courts in welfare decision-making processes 'made a difference'; and was it possible to go further and conclude that the case-law showed that an effective, a judicially constructed 'safety net' was in operation by the end of the research period? To answer these questions, the author's research focused on the pre-October 2000 position. It then addressed post-October 2000 developments, including legislative restrictions in measures like the NIA in 2002, and the Asylum and Immigration (Treatment of Claimants, etc) Act 2004; and leading cases like *M, Adam*, and *Clue*. This aimed to facilitate an assessment of the impact of Convention rights on the UK's support regime, and identify limits on the scope of Convention rights.

(ii) The Pre-2000 Position

The courts and tribunals in welfare support cases have a well-developed jurisdiction to hear appeals. In construing the scope of enabling powers and statutory restrictions they have been able to rely on Common Law principles such as the 'law of humanity'. Within limits, they have also been able to rely on a number of other approaches to assist them in interpreting and applying legislation in legislation. Examples of this jurisdiction in action were considered in the research and in *Works 2* and *3*.

As far as the 'law of humanity' principle is concerned (referred to in the 'Research Context' and 'Historical Context' sections), several observations may be made. Although resilient enough to survive subsequent periods when nationality and status-related restrictions started to operate⁸⁸, the research highlighted some important limitations associated with the law of humanity and its use in the modern context.

⁸⁸ For example in the Aliens Restrictions Act 1919 which excluded 'aliens' from the Old Age Pension and early National Insurance benefits; and the Widows, Orphans and Old Age Contributory Act 1925, which required 'foreign workers' to re-establish residence in order to re-qualify for benefits, even if they were contributions-based: an early form of 'habitual residence' test. Steve Cohen has provided a valuable account of the restrictions, including the negative effects on the Jewish community; S. Cohen (2001) *Immigration Controls, the Family and the Welfare State*.

The Law of Humanity: Limitations As a tool that assisted the majority of the Court of Appeal in the *JCWI* case⁶⁹ to hold that restrictions affecting asylum seekers' access to Income Support were unacceptable, the law of humanity principle was helpful. As the research that informed *Works 1-3* showed, the primary consideration in the judgment focused on the effects of removing State welfare support from a group that needed such support in order to pursue their legal rights under primary legislation, namely the Asylum and Immigration Appeals Act 1993. While the court accepted that the government was entitled to restrict access to State welfare as a legitimate means of discouraging 'economic migrants', they considered that if the restrictions in the regulations were to stand the effect would be to inhibit claimants' rights under the 1993 Act. As the judgment explained, this would render the right to claim asylum 'nugatory' and 'valueless in practice' by making it not merely difficult, but totally impossible for them to remain here to pursue their claims'.

The judge who held the balance of power in the judgment, Waite LJ, focused primarily on the formal point that secondary legislation should not only be within the *vires* of the enabling statute, but that it should also not conflict with other primary legislation⁷⁰. The third judge made no mention of the law of humanity at all. For those reasons, arguably, whilst the 'law of humanity' played a valuable role it was not the *only* issue before the court; and it was not the only factor that informed the eventual decision.

The *JCWI* judgment was undoubtedly a set-back to the government's policies. The government's immediate response was to move what had hitherto been restrictions in secondary legislation into primary legislation, namely the Asylum and Immigration Act 1996. This was a move that was intended to, and did, achieve immunity for the restrictions from further attack in the courts. For their part, the courts accepted that this was legally effective, even in cases of 'urgent' need for support⁷¹. Therein lay a second, perhaps even more potent limitation on the scope for deployment of the law of humanity. In constitutional terms, and until the advent of Convention rights, Common Law and judicially-constructed approaches like the law of humanity were impotent in the face of primary legislation. In practical terms, though, as the works touched on, this provided a potent argument in favour of the deployment in the UK of a 'floor' of minimum welfare rights – especially at a time when EU-led initiatives for a Charter of Fundamental Rights were faltering.

⁶⁹ *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants; R v Secretary of State for Social Security, ex parte B* (the 'JCWI' case) [1996] 4 All ER 385, CA; discussed in *Work 3*, p.216.

⁷⁰ Waite LJ (at p.402) observed that 'Subsidiary legislation must not only be within the *vires* of the enabling statute but must also be so drawn as not to conflict with statutory rights already enacted by other primary legislation'.

⁷¹ *R v Secretary of State for Social Security Ex parte T* [1997] Crown Office Digest 480.

However, as the research showed, the 1996 Act did not stop the courts continuing to look at ways to assist needy claimants. For example, notwithstanding the removal of access to mainstream benefits, the courts plainly remained keen to maintain access to *residual* support available from local authority social services, to the extent that statutory powers could be construed in this way: a point illustrated by leading cases like *R v Westminster City Council and Others, ex parte M, P, A, and X*⁷² in which it was held that needy claimants, despite being barred out of State benefits, could nevertheless look to local authorities for residual support. Lord Woolf reinforced the arguments for this by observing that 'the longer the asylum seekers remain in this condition the more compelling their case becomes to receive assistance' (at pp.94, 95).

Changes to the Support System 1999-2004

Following the election of a New Labour government in 1997, new restrictions were developed, starting with the IAA in 1999.

The radical new measures introduced by the IAA were introduced, in part, to relieve the burden that had started to fall on local authorities as a result of removing access to mainstream State benefits⁷³. The 1999 legislation did not just impact on asylum claimants, a group completely taken out of mainstream benefits support by the Act. It also affected other groups including those affected by the new, re-worked status of person 'subject to immigration control' in the IAA s.115(9).

Social security was not the only casualty. Restrictions on access to social housing were introduced which, as well as removing eligibility from asylum seekers, affected groups brought within 'person from abroad' status and those subject to immigration control⁷⁴. In-roads were also made to other areas of Community Care as a source of residual support (by s.116 of that Act).

The Legislative Context Among the restrictions was a new s.21(1A) to the National Assistance Act 1948, added by s.116 of the IAA. It provided that residential accommodation 'if his need for care and attention has arisen 'solely –

- (a) because he is destitute; or
- (b) because of the physical effects, or anticipated physical effects, of his being destitute'.

⁷² *R v Westminster City Council and Others, ex parte M, P, A, and X* (1997) 1 CCLR 65 (*Work 3*, p.217).

⁷³ White Paper 'Fairer, Faster and Firmer - A Modern Approach to Immigration and Asylum' (Home Office, 27 July 1998); and Explanatory Notes to the 1999, para 13. The 'burden' was, in fact, the direct result of restrictions introduced since 1996.

⁷⁴ As a result of the Housing Act 1996 s.160A, added by the Homelessness Act 2002 s.14; discussed in *Work 2*, p.188.

As the commentary in the author's works noted, this was the last area of the support system that remained 'open' and 'universally accessible', and which 'assisted people on the basis of need, while imposing minimal requirements in terms of immigration status or nationality pre-conditions' (*Work 3*, p.217).

The question was whether the courts would be willing to assist needy claimants in the face of such an apparently clear, unambiguous restriction?

If so, on what legal basis could they do so?

The answer came a year after the 1999 Act was passed. In *R v Wandsworth LBC, ex parte O*⁷⁵ the Court of Appeal held that, despite the new restrictions, the door was still open to residual support for groups subject to immigration control – albeit only for those with needs that went beyond mere 'destitution'. Once again, the law of humanity principle was successfully prayed in aid, both at the High Court and Court of Appeal stages. Nevertheless, as the commentary showed, in doing so the case revealed some obvious difficulties in relying on the principle. The key one was uncertainty as to its scope. In the High Court, for example, Moses J upheld arguments for the local authorities that it was capable of 'exceptions', including one that, he said, enabled local authorities to refuse support on the basis that claimants had the option of leaving the country.

'Starving Migrants out of the Country...?'

On appeal, the approach adopted by Moses J was rejected by the majority of the Court of Appeal⁷⁶. In doing so, the court made it clear that local authorities had 'no business' with an applicant's immigration status when their role was to assess needs and support (at p.603). Simon Brown LJ commented that '... it should be for the Home Office to decide (and ideally decide speedily) any claim for ELR and to ensure that those unlawfully here are promptly removed, rather than for local authorities to, so to speak, starve immigrants out of the country by withholding last resort assistance from those who today will by definition be not merely destitute but for other reasons too in urgent need of care and assistance.' Supporting this, Hale LJ commented that the 1948 Act was about 'needs, not morality' (at p.604).

⁷⁵ *R v Wandsworth LBC, ex parte O; R v Leicester City Council, ex parte Bhike* [2000] 4 All ER 590, CA.

⁷⁶ *Work 3*, pp.218, 219.

Limitations on the Courts' Powers Despite the court's approach being sustained in later cases like *Mani*⁷⁷, it was clear there were a number of significant limitations in the courts' powers to assist claimants. In summary, the first was the uncertainty about the precise scope of the law of humanity principle – a problem highlighted by the dissenting judgment in the *JCWI* case; and then the differences of approach between judges hearing the *O* case. The value of the judgments in those cases, as precedents, was also weakened by the dissenting judgments in each case. The second, and perhaps more potent problem, was that Common Law principles and approaches to statutory construction that may sometimes assist claimants cannot stand against the clear authority of primary legislation. Indeed, this was the factor which in 1996 in the *T* case had informed the courts' acceptance that the restrictions put into primary legislation were legally immune from further attack in the courts⁷⁸.

Neither of these factors prevented the courts' ability to construe exclusions restrictively when it was possible to do so, for example where restrictions are in legislation that is 'ambiguous' and the courts are able to 'prefer' an interpretation that assists claimants maintain support where it is just to do so. This was the approach and reasoning in a number of post-2000 cases like *Kola*⁷⁹. For restrictions in legislation that were *not* ambiguous, it was clear that claimants contesting decisions refusing support were unable to look to the courts to intervene in these ways. The question was whether Convention rights could assist claimants, for example in the context of State officials' action and treatment amounting to inhuman and degrading treatment⁸⁰.

Until 'incorporation' of the ECHR in UK law, our courts had generally shown a marked reluctance to risk a constitutional clash with the government and Parliament – particularly when challenges questioned the compatibility of Parliament's primary legislation with the ECHR⁸¹.

⁷⁷ *R (Mani) v Lambeth Croydon London Borough Council* [2003] EWCA Civ 836; (2003) 6 CCLR 376 at 384-387, also discussed in *Work 1*, p.112 and *Work 2*, p.219. More recently, the constitutional impropriety of local authorities using welfare powers in ways that, in effect, facilitate removals was again highlighted in *R (Clue) v Birmingham City Council* [2010] 4 All ER 423, CA, discussed in *Work 8*, Section 5, at H-403.

⁷⁸ *R v Secretary of State for Social Security Ex parte T* [1997] Crown Office Digest 480.

⁷⁹ *Kola v Secretary of State for Work and Pensions* [2007] UKHL 54; (2007) 151 SJLB 1566, HL, analysed and commented upon in K. Puttick (2007) 'Kola and Asylum Claimants' Benefits', *Wel & Fam L & P*, 14(4), 12-14. In that case the Lords had to construe the requirement that asylum seekers claiming Income Support had to do so 'on arrival'. Giving the leading judgment, Lord Brown, after referring to the 'draconian impact of the 1996 Act regime', considered the phrase was 'ambiguous'. He then construed it in a way that ensured claimants had a reasonable opportunity to lodge claims as soon as they were able to do so, and to avoid them being barred out of ineligibility as soon as they passed through the port of arrival (the interpretation sought by the Secretary of State).

⁸⁰ *Pretty v United Kingdom* [2002] 35 EHRR 1.

⁸¹ On previous occasions when Convention-based interventions appeared necessary and appropriate the courts had invariably stepped back from such clashes; see, for example, K Puttick (1988) 'Ministers Hands on the Controls' *The Guardian* 24th October 1988.

(iii) Post-2000

By the start of the research period, restrictions affecting claimants had become wide-ranging. As the author's analysis highlighted⁸², the restrictions in the NIA 2002 added yet more restrictions and important new elements to the system, particularly in the areas of residual and 'last resort' assistance. Claims for support by those unlawfully in the UK, 'overstayers', and those trying to assert 'late' claims were among those that appeared to be clearly barred out by the legislation⁸³. Constitutionally, the courts before the enactment of the Human Rights Act 1998 were clearly unable to intervene in the face of express statutory legislation preventing such groups from being assisted by the State welfare system. Exceptionally, if they detected an uncertainty about the scope of statutory provisions, or there was sufficient ambiguity in their 'reach', the courts might intervene. Although the ECHR was not incorporated into UK law, and was therefore not treated as 'law' (in the way that EU law was incorporated from January 1973), there were limited circumstances in which the courts could resolve ambiguities in favour of litigants based on the Common Law presumption that the Crown and Parliament must have intended to abide by its international obligations – and the ECHR was a Treaty obligation before 1998. In practice, the courts avoided deploying the 'presumption' where governmental powers were sufficiently clear to enable them to avoid having to invoke Convention obligations to resolve any uncertainties or ambiguities. Even after the advent of the Human Rights Act 1998, it was far from clear whether, and to what extent, the courts would be prepared to use their new powers to intervene – particularly in an area as contentious as welfare support for migrants.

'Overstayers' There was no group more challenging than 'overstayers'. As a result of the restrictions introduced by the NIA in 2002 many in this group found themselves barred out of all support. Even though decisions on residence status were unclear or decisions by the immigration authorities were still awaited, local authority or other welfare agencies sometimes pre-empted immigration authorities' decisions and refused or stopped providing assistance. In some instances this could impact on parents of children with British citizenship or residence rights for whom the NIA made no clear provision. On the face of it, Schedule 3 to the NIA left it open to decision makers to withhold assistance from such parents⁸⁴.

This raised the question whether, and to what extent, groups like this could look to the courts for help?

⁸² *Work 2*, pp.186-189.

⁸³ NIA 2002 ss.54, 55 and Schedule 3, paras 4-7.

⁸⁴ Welfare claimants could be caught by the changes made by the NIA if they were treated by the legislation as 'overstayers' who did not act in timely fashion clarify their status, particularly as a result of s.11 of the Act (later repealed by the Borders, Citizenship and Immigration Act 2009).

(iv) Convention Rights & Judicial 'Safety Nets'

Assistance from Article 8?

As the author's commentary on the case of *R (M) v Islington LBC and the Secretary of State for the Home Department (Interested Party)*⁶⁵ highlighted, the advent of Conventions rights in the post-October 2000 period led to a number of significant innovations in the way that enabling powers of governmental bodies and welfare agencies were drafted. The key one, introduced by Schedule 3, paras. 1-17 to the NIA, was aimed at ensuring that decision-makers had sufficient discretion in the way they operate support arrangements to avoid breaching claimants' Convention rights. As a result, in the area of welfare support for families, the duty of decision-makers to comply with post-2000 'right to family' life requirements became a very demanding one.

One problem, though, was that the mechanisms in the NIA 2002 directed at welfare agencies like local authority social services lacked specificity, and were in very generalised terms. This was an issue that affected a number of key groups such as third country nationals who were parents of children with residence rights in the UK (but who did not themselves have any substantive residence right under immigration legislation). Although it was clear that article 8 and the right to family life and 'family unity' assisted them in resisting removal, particularly if a child with residence rights had no other adult carer. However, it was difficult for them to assert with any confidence a legal right to welfare support. Decision-makers, too, were in a difficult position, especially as there was little authoritative guidance clarifying when, or how, discretion to provide support to avoid breaching Convention rights should be exercised. As the research for *Works 2 and 3*, and *8* showed it was therefore left to the courts, in effect, to deal with that lacuna in the legislative scheme. They had to do this on a case-by-case basis and in the context of claims made by people who were subject to immigration control, or had become so as a result of the changes made by the NIA. Pending rulings by the courts, this was particularly problematic for a number of groups including failed asylum claimants. As the author discussed in the overview in *Work 1*, the support regime had done very little to regulate accommodation and support rights after applications for refugee status failed, and where the residence rights of other groups are removed.

Developments after the NIA. This area of the welfare support regime became even more problematic after the NIA restrictions came on stream from 2002 onwards. In providing an

⁶⁵ [2003] 2 FLR 903 918; [2004] 2 FLR 883, CA, considered in *Work 1*, p.119; *Work 2*, pp.187, 188, and *Work 8*, Section 1, H1.

analysis of the legislation and the trends in court decisions on the Schedule 3 restrictions, the author identified a number of particularly difficult areas⁸⁶. One such provision was the NIA s.18(1)(e), (2) which treats a failed asylum-seeker as *still* an 'asylum seeker' for the purposes of support, even after a claim has been determined, if the claimant's household includes a dependent child under 18. This was intended to pre-empt situations in which the removal of support would be lawful when directed at adult claimants, but which would be unlawful in terms of the HRA s.6(1) if that adult's household included (or was joined by) a dependent child⁸⁷. ECHR jurisprudence clearly looks to the host State to safeguard a child's welfare in that scenario. The commentary also critically analysed the impact of article 8 when Children Act 1989 s.17 assessments are made, and in other immigration and asylum related 'family' contexts⁸⁸.

Despite such developments, the government did not stop bringing in further restrictions. In particular, the Asylum and Immigration (Treatment of Claimants etc) Act 2004 added a new, fifth class of claimant, namely 'failed asylum seeker with family', to the other categories of ineligible claimants in Schedule 3 to the NIA. At the same time, despite concerns voiced in Parliament, the NIA also removed opportunities for those affected by the change to appeal against the withdrawal of support⁸⁹.

For their part, court interventions based on article 8 which overturned decisions withholding or removing support plainly marked the beginnings of a more comprehensive judicial safety-net. Furthermore, it was starting to become clear that the courts' role in this respect was comparable to the kind of interventions based on ECHR article 3. This is considered below in the context of asylum claimants from whom support has been removed.

The M Case: Article 8

In the particular context of the *M* case, the fact that *M*'s daughter was a British citizen and, more importantly, a *child* for the purpose of the Children Act 1989 s.20 duty to provide accommodation (bringing her within the exception provided for by Schedule 3, para 2 to the NIA), produced two consequences. First, given that the claimant and child lived together, this

⁸⁶ Considered in *Work 1*, pp.118-120; *Work 2*, pp.186-188; *Work 3*, pp.219-221.

⁸⁷ As noted in *Work 1* at p.119, however, UK courts have traditionally been reluctant to make mandatory orders that have the effect of displacing local authorities' day-to-day management of housing allocations particularly if this means asylum seekers or other migrant groups are then seen as 'jumping' waiting lists or being accorded greater priority than others. This is what made *R (Batantu) v Islington LBC* [2001] 33 HLR 76 an important exception and precedent.

⁸⁸ *Work 8*, H-402.1.

⁸⁹ NIA s.9(3). The Home Affairs Select Committee expressed a particular concern that the removal of support from such families would risk infringing article 8 without the courts having an opportunity to consider the legality of such action (and could also infringe 'proportionality' requirements). This was met with little more than an assurance that decision-makers would receive 'guidance'; *Work 1*, p.120.

was a 'family' situation, so that article 8 rights and duties were thereupon engaged. Second, the legislation only required support to be provided for the child. This produced the curious result that although local authorities were legally *required* to assist the child they were only *permitted* to provide support to the parent. There was no clear *duty* to do so – at least not in terms of the legislation. Furthermore, what was in effect just a *power* in Public Law terms only operated pending any eventual decision to refuse leave to remain and order the parent's removal (and while she co-operated with removal directions). To what extent could article 8, and duties in relation to the family unity principle, make a difference? Could it help what was essentially just a power under the legislation to crystallise into a *duty*?

The author's research indicated that the traditional pre-Human Rights Act 1998 'power-duty' distinction seemed to be becoming increasingly unsustainable, at least in this important but still evolving area of the social welfare system. It also suggested that the practical effect of the application of ECHR article 8 rights in relation to support for family life (and in helping to maintain 'family unity') could in many cases only lead to one 'outcome'. An authority had little choice but to provide accommodation and support, and do so for all those in the family unit. This analysis was subsequently borne out by decisions like *R (Grant) v Lambeth LBC*⁹⁰ where it was held that even when the authority's responsibilities duties might only be characterised as a 'power', in practice it might as well be a duty. This seemed appropriate given that it was becoming increasingly clear that local authorities' duty to accommodate was also an integral element in the duty to assist family groups to *stay together* (the 'family unity' strand of article 8)⁹¹. In *Grant*, it was held that although the authority may only have a power to provide support, the combined effect of the duty to accommodate children in the Children Act 1989 s.20 and the inability of the NIA Schedule 3, para 1 to exclude the support rights of a child, meant that support had to be provided in a way that avoided their forced separation as a 'family'.

Another significant feature of developments in this difficult area were rulings and guidance from the courts that it was not the role of welfare agencies like local authority social services to make decisions on 'residence' that properly belonged to Home Office and immigration decision-makers. Nor should local authorities make decisions which pre-empted immigration

⁹⁰ [2004] 3 FCR 494; [2005] 1 WLR 1781. The court also pointed out, however, that a local authority could stay within the law if an assessment identified an outcome that could be achieved by facilitating a return by the family to the mother's country of origin. Ultimately, it was still for the authority to decide how to avoid a breach of art. 8. If the family was unlawfully in the UK, and therefore had no substantive right to support, the NIA Schedule 3, para 3 enabled it to provide the support and travel costs needed to assist a 'return' and thereby avoid a breach of Convention rights.

⁹¹ Family unity aspects of article 8, and the assistance they have provided claimants in the 'welfare' context, have featured in the author's on-going research. It has informed work on inequalities in the support system for TCN family members of migrants; K Puttick and C Cerlitz (2012) 'Inequalities of Family Members of EU and Non-EU Nationals: Integration, Family Unity and Support in the Post-Lisbon Era' in S Morano-Foadi and M Malena (eds) *Integration of Third Country Nationals in the European Union: The Equality Challenge* (forthcoming, September 2012).

decisions, for example on the likely outcome for an application for indefinite leave. This was consistent with the courts' pre-2000 position, expressed in the *O* case in the Court of Appeal. Furthermore, while such immigration decisions were awaited, the courts were clear that article 8 dictated that support should be maintained. An exception was where Community Care, housing and other services were being abused, or appeals had no prospects for success or were 'hopeless'. The duty to maintain support was clear from leading cases and sources considered by the author in *Work 8*, including *Clue*⁹². This had significant implications for overstayers and others subject to immigration control affected by the changes made by the NIA s.54 and Sch 3 which had tried to reduce support provided under key welfare statutes like the Children Act 1989 s.17 and Children (Scotland) Act 1995 s.22.

'Family Life' after Removal from the UK? As well as assessing needs, local authorities still maintained their authority to determine *how* support should be provided to meet those assessed needs. In doing so, however, it was clear from cases like *Clue* that local authorities, when assessing claimants' needs and deciding whether to provide support, should not be pre-empting immigration decisions on immigration status. Furthermore, they should not be using their powers to provide welfare services in a way that made continuing support conditional on leaving the country. The courts had already made it clear in the pre-Human Rights Act period that community care services managers should not be making support and services conditional on claimants' agreement to leave the country. Indeed, this position had been reached without the help of article 8 and family-related Convention rights. For example, in *Damoah*⁹³ the claimant, who was born in Ghana but had lived in Sweden, was a qualified nurse. She had come to the UK with her children. She and the children had been victims of domestic violence in Sweden. She asked her local authority for assistance as she and her family were living with relatives in their accommodation. However, the accommodation was overcrowded and unsuitable for the children. The family was assessed. The assessment, which was conducted in accordance with Children Act 1989 Part III procedures, indicated that they needed support in the form of accommodation and a subsistence allowance. Bed and breakfast accommodation and a subsistence allowance was paid pending decisions on a claim for Income Support. Income Support was refused, however, as she was not 'habitually resident'. For the same reason she was also ineligible for housing under the homelessness legislation. The assessors decided, however, that the best interests of the children would be served by their return to Sweden. Swedish welfare services could provide

⁹² *R (Clue) v Birmingham City Council* [2010] 4 All ER 423; [2010] 2 FLR 2011, CA; discussed in *Work 8*, H-402.1. The author's analysis informed this observation: 'Although the Court of Appeal accepted that it was necessary for welfare agencies like local authorities to make an assessment of immigration status for some purposes, it was contrary to the "division of functions" allocated by Parliament for them to decide if a claimant for support was eligible for leave to remain. Accordingly, support should be provided pending that determination in order to avoid a breach of article 8.'

⁹³ *R v London Borough of Hammersmith and Fulham, ex parte Damoah* [1999] 1 FLR 642, High Court, discussed in K. Puttick (1999) 'Health, Social Services, and 'Inequalities': 'Modernising' Welfare', *Welfare Benefits: Law & Practice* 8(6), 29-35.

them with benefits support and housing assistance. Consequently the authority offered assistance with the costs of returning to Sweden. It said that it would cease to provide accommodation and a subsistence allowance if the family did not leave the next day. Judicial review proceedings were commenced, at the end of which the court decided that in requiring the family to leave the country the authority had acted unlawfully. It had failed to pay sufficient regard to the longer-term needs of the family and factors such as the mother's view of what was in the children's best interests; the likelihood that she would be able to take up employment in the UK; the negative effects on the children of having to start in a new school; the family's ability to be supported by relatives living in the UK; and the authority's powers to support the family pending take up of employment by the mother. Although the court accepted that an authority is able to offer financial assistance to support a transfer to another country, if this was in the children's best interests, it was unlawful and irrational to threaten to withdraw assistance as a means of forcing the family to leave the country. The court quashed the authority's assessment, holding that authorities should not use their powers to 'condition' support in that way. The court's decision in *Damoah*, a pre-Human Rights Act case, was important in highlighting how the UK courts were already able to deploy mainstream Public Law principles to assist 'family life' – even before the advent of article 8. Furthermore, as the research also considered, EU Law also provided a basis for intervention, particularly in the area of 'derived' residence rights, and linked social rights.

Derived Rights, Citizenship & the Family

As a result of the *Zambrano* case⁹⁴, as suggested in later works produced during the programme⁹⁵, the developing jurisprudence around EU citizenship-based derived residence rights of third country nationals who are parents suggests that the position of a parent like M is now even stronger. In *Zambrano* it was held that a third country national (TCN) parent of children born in Belgium (who therefore had both Belgian and EU citizenship rights, including the right to remain in Belgium, their host State) could assert a derived residence right in EU Law based on the children's residence rights. Such a derived right may be available to a TCN parent who is the primary carer of a child, particularly if this is necessary to secure the EU citizenship-related rights of her children if they are nationals of the host Member State (and therefore have EU citizenship residence and other rights to be maintained).

⁹⁴ *Zambrano v Office National de l'Emploi (OnseM)* [2011] 2 FCR 491; [2011] 2 CMLR 46, European Court of Justice of the European Union (Grand Chamber), discussed in *Work 8*, Section 5, at H-402 in which it is suggested that the decision 'opens up a new 'citizenship'-based dimension to derived residence rights. Mr Zambrano was able to take up employment and would have been 'self-sufficient' had it not been for the authorities' withdrawal of his work permit.

⁹⁵ In *Work 8*, Section 5, H-402, it was suggested the decision opened up a new 'citizenship'-based dimension to derived residence rights. As the Advocate-General noted in that case, the EU Charter of Fundamental Rights currently set to play an important part in comparable cases in the future, assisted by its 'family' provisions in article 7 (respect for family life) and article 24 (children's protection and 'best interests').

The research undertaken for *Work 2*, and later works contributing to the developing discourse on derived residence and support rights in this area of the welfare support regime, suggested that court interventions such as those in the *M* case, *Grant*, and *Zambrano* have produced a 'quiet revolution' for the rights of groups like parents of host State nationals⁹⁶. This has built on pre-October 2000 principles developed in cases like *Damoah*, and it has come ahead of possible improvements that are likely to be made after reviews of TCNs' residence and social rights as part of the Stockholm Programme⁹⁷.

The main focus of the research in *Component 2* was on the impact of the ECHR, particularly in the face of restrictions introduced by the NIA in 2002.

Art 3 & 'S.55 Cases'

As with overstayers, the NIA imposed seemingly clear and unambiguous restrictions in 2002 on support for asylum seekers making 'late' claims for asylum following their arrival in the UK. Specifically, the restrictions in s.55 provided that the Secretary of State may not provide support to a person under the asylum support powers in the IAA 1999 (mainly ss. 4, 95 and 98), or under the newer accommodation centre powers (in ss. 17 to 24 of NIA itself), if, after a person's asylum claim is recorded, the Secretary of State was not satisfied that the claim was made 'as soon as reasonably practicable after the person's arrival in the United Kingdom'.

Following the model used in Schedule 3 to the NIA, s.55(5) then provided that

'This section shall not prevent

- (a) the exercise of a power by the Secretary of State to the extent necessary for the purpose of avoiding a breach of a person's Convention rights ...
- (b) the provision of support under s.95 of the Immigration and Asylum Act 1999... or section 17 of this Act in accordance with section 122 of that Act (children), or
- (c) the provision of support under section 98 of the Immigration and Asylum Act 1999 or section 24 of this Act (provisional support) to a person under the age of 18 and the household of which he forms part'.

⁹⁶ Puttick and Carlitz (2012), note 91.

⁹⁷ Official Journal of the European Union OJ 2010 C115/282010. The programme has been identifying a more general need for review and consolidation of legislation in this area of immigration. The scope for initiating improvements seems considerable, as it is a process that can be 'based on an evaluation of the existing *acquis* and include amendments needed to simplify and/or, where necessary, extend the existing provisions and improve their implementation and coherence.' (para 6.1.4).

The intent behind these provisions was clear. As the Explanatory Notes to the legislation pointed out, s.55(5) operates as a proviso to the restrictions 'to the extent necessary to avoid the breach of a person's rights under the ECHR', or to children and their families under ss.95 or 98 of the 1999 Act or ss.17 or 24 of the 2002 Act itself.

This still begged the question whether, and to what extent, Convention rights had added anything new (or different) to traditional approaches used by the courts? Assisted by the Convention, could the courts now do more to assist needy groups affected by the restrictions?

Post-2000 Developments & 'Interventions' As the author's research and analysis has shown, judicial perceptions suggested that there was an on-going need for such interventions. This was evident from the observations made by a judge with considerable experience of hearing applications for emergency orders and appeals from decisions refusing support. Sir Stephen Sedley highlighted the importance of the Convention as one element of the support regime helping to prevent needy claimants 'starving in the streets'⁸⁸. Most of the focus for this component was on the effects of s.55. As the analysis showed, cases started to come before the courts which not only contested the legality of particular decisions, they also started to test the overall legality of this part of the regime and the *policy* behind it.

Given the scale of deprivation experienced by growing numbers of 'late' claimants who were being refused support, or who had support withdrawn, the argument started to crystallise that such action was 'treatment' for the purpose of Article 3. Furthermore, it was sufficiently serious in its effects to put the Home Office and agencies refusing support in breach of the article. The problem was compounded by the absence of any kind of statutory welfare support as well as charities' and voluntary organisations' inability to cope with the demands being made on their services, particularly in London. As the research indicated⁸⁹, this forced advisers to make emergency applications in the High Court as the *only* means of getting assistance.

Unfortunately, there was still considerable uncertainty about the scope of Convention rights in this area.

⁸⁸ Speaking at Legal Action Group conference in London in 2003, Lord Justice Sedley said it had only been the combined 'triple effect' of (a) HRA 1998, (b) section 55(10) of NIA 2002 (enabling support to be given despite the bar in section 55(1) on supporting 'late' applicants, to avoid a breach of human rights), and (c) the courts' power to make emergency interim orders, that was saving many asylum seekers and their dependants from 'starving in the streets' (discussed in *Works 2 and 3*).

⁸⁹ *Work 3*, p.219, 220.

Intervention, but at what point...?

Early cases in the Court of Appeal like *Q*¹⁰⁰ and *T*¹⁰¹ indicated that the withdrawal by the National Asylum Support Service of basic support was capable of amounting to 'inhuman or degrading treatment'. However, the question was at what *point* did the withdrawal of such support put the Secretary of State in breach of Convention requirements? As the author's commentary pointed out 'it was clear that there was ongoing uncertainty about the scope of Article 3 - and there were continuing divisions, especially among judges in the Administrative Court, on the issue'¹⁰² (*Work 3*, p.220). For that reason, the decision of the Court of Appeal in the *Limbuela* case¹⁰³, hearing joined appeals, was helpful. It clarified that it was only necessary that the 'treatment' accorded to claimants under their powers could verge on the degree of severity envisaged in *Pretty v United Kingdom*¹⁰⁴.

On the face of it this was an important landmark decision, and represented a significant step forward in comparison with the position before the advent of the Human Rights Act 1998. What did the research show?

Assessing the Impact of Limbuela

As the analysis pointed out, the value of the case as a legal precedent was substantially weakened by the robust dissenting judgment of one of the three judges, Lord Justice Laws. The analysis also indicated that there were some important differences, even within the majority camp (with Jacobs LJ going considerably further when he made it clear that not only were the actions of the authorities in the particular case a contravention of article 3, but the policy itself on which the s.55 scheme was based was unlawful). Furthermore, all three judges supported the 'spectrum analysis' approach adopted by Laws LJ as follows:

'In my judgment the legal reality may be seen as a spectrum. At one end there lies violence authorised by the state but unauthorised by law. This is the worst case of category (a) and is absolutely forbidden. In the British state, I am sure, it is not reality, only a nightmare. At the other end of the spectrum lies a decision made in the exercise of lawful policy, which however may expose the individual to a marked degree of suffering, not caused by violence but by the circumstances in which he finds himself in consequence of the decision. In that case the decision is lawful unless the degree of suffering which it inflicts (albeit indirectly) reaches so high a degree of severity that the court is bound to limit the state's right to implement the policy on article 3 grounds.'¹⁰⁵

¹⁰⁰ [2003] 2 All ER 905, CA.

¹⁰¹ [2003] EWCA Civ 1285, CA.

¹⁰² *Work 3*, p.220.

¹⁰³ [2005] 3 All ER 29, CA.

¹⁰⁴ [2002] 35 EHRR 1.

¹⁰⁵ [2005] 3 All ER 29 at 36, cited and discussed in *Work 3*, pp.222-224.

The spectrum analysis was controversial. The main concern was that a person could be experiencing considerable suffering before a court could intervene on the basis of article 3. Following the government's unsuccessful appeal to the Court of Appeal, the research programme continued to examine the impact of art.3 on the support system. It focused on a number of aspects, including the way the spectrum analysis approach of Laws LJ in *Limbuela* was being deployed by agencies and courts in the year that followed the court's decision - most notably in the controversial decision in *Gezer*¹⁰⁶. That deployment served to highlight the uncertainty about the precise reach of Convention rights in this area of the support regime. In the *Gezer* case itself, one of the curious effects of deployment of the spectrum analysis was that the Court of Appeal, whilst holding that art 3 was engaged as a result of the Gezer family being 'dispersed' to a thoroughly dangerous, high-risk housing estate), nevertheless declined to intervene. The court's decision and its implications were discussed in *Work 1*¹⁰⁷.

The research also examined statutory developments, including the implementation of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. The major development, however, was the Lords rejection of the government's appeal, a year after *Limbuela*¹⁰⁸. As the author's analysis indicated, the case was a 'high profile' one attracting considerable media interest. Furthermore, the judges in the Lords went to a lot of trouble to stress that their decision focused on the *law*, and not 'politics'. Plainly, the idea that unelected judges could reverse a central plank of government policy – policy that had been endorsed by the legislature in clear and unambiguous terms – was a novelty after only five years since the Human Rights Act came into operation. The author's comment on this was that 'No doubt such nervousness was due, in part, to the recent propensity of some ministers to attack the judiciary, often unfairly, on immigration and asylum issues, and to portray the judiciary as interfering excessively in government 'policy' and what they see as discretion given to decision-makers by Parliamentary laws'. Given the importance of the judicial role in identifying the limits of such discretion, and maintaining effective judicial scrutiny of adjudications, it is not unreasonable for our top court to remind the Government periodically

¹⁰⁶ *R (Gezer) v Secretary of State for the Home Department* [2005] Imm AR 131; [2005] HLR 16, CA.

¹⁰⁷ At p.121. In *Gezer* (note 106) the court treated the case as one at the 'less serious' end of the spectrum, largely because it considered the family had a choice whether or not to accept the offer of housing on a racist and dangerous estate (and despite the point that a refusal would result in a withdrawal of financial support). Surprisingly, the court also refused to accept that NASS was under any kind of duty to enquire into the conditions on the estate, or how these might affect a person like the claimant who was suffering from severe depression. Notwithstanding such limitations, or the 'discretionary' nature of the support provisions under which housing is provided, courts are not unwilling to intervene in housing cases where Convention rights may be engaged, as illustrated by cases like *R (Hamid Ali Husain) v Asylum Support Adjudicator and Secretary of State for the Home Department* [2002] ACD 10, *The Times* 15 November 2001, discussed in *Work 1*, pp.121, 122. As well as damages (which the trial judge in *Gezer* was ready to award, and indeed he had provisionally made an award to the family of £5000), the courts can grant interim relief in accordance with the Civil Procedure Rules r.25; Puttick (2004), note 51, para 1613.

¹⁰⁸ Sub nom *R (Adem) v Secretary of State for the Home Department* [2005] UKHL 68; [2006] 1 AC 396, considered in *Work 3*.

of the discrete roles played by the courts and executive, and in a variety of contexts, for example when debates on asylum and counter-terrorism policy get intertwined¹⁰⁹.

In the event, the Lords not only confirmed the principle that art 3 *could* be engaged, it went on to clarify *how* the concept of 'treatment' could in appropriate circumstances amount to 'inhuman or degrading' in legal terms. As the author's commentary noted, the Lords did not formulate any single test for determining when art 3 was engaged. However, it was sufficient that in the leading judgment Lord Bingham made it clear that the 'threshold' would be crossed if there was persuasive evidence that 'a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed.' Several of the judgments (notably Baroness Hale's and Lord Hope's) expressed concerns with the spectrum analysis approach to article 3¹¹⁰.

(v) Component 2: Conclusions

The research clearly showed that the introduction of Convention rights and duties from October 2000 added an important new dimension to the welfare support regime for key groups like asylum seekers and other groups subject to immigration control, and those who would otherwise face restrictions on access to support. As well as broadening the basis on which courts exercised a traditional 'review', based on Administrative Law illegality, irrationality, and procedural grounds, the 'reach' of Convention rights based on articles 3 and 8 is potentially very potent, particularly in the Community Care context. Furthermore, awareness of Convention requirements shaped the mechanisms incorporated into new legislation like the NIA 2002. From the courts' perspective, new powers of intervention (with the HRA s.6 principle stipulating that public authorities that act in breach of Convention rights are acting 'illegally' in Public Law terms) created a significant new jurisdiction in the field of social rights. These have built on the existing jurisdiction, including the ability of the courts to continue invoking traditional principles based on considerations such as the 'division of powers' between agencies like the immigration authorities and local authority social services, highlighted in important decisions like *Clue* (discussed in *Work 8*). Perhaps, as important, is the range of remedies available, founded on the added powers in s.8 of the 1998 Act. These clearly facilitate interventions that can require support to be provided or resumed if it has been withdrawn, as pointed out in the analysis in *Work 3*. This was also readily apparent in

¹⁰⁹ *Work 3*, p.225.

¹¹⁰ *Work 3*, pp.229-231.

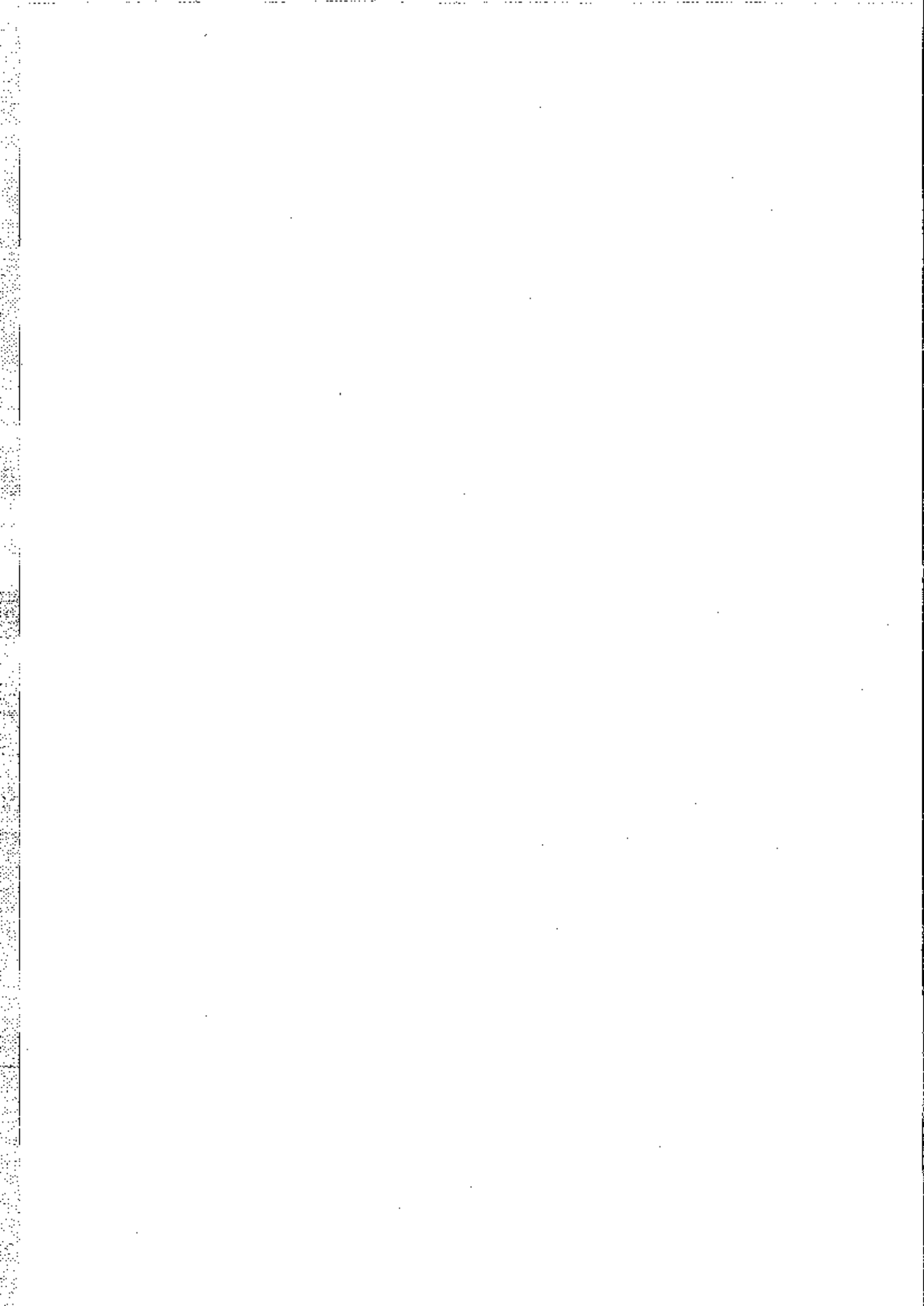
the other cases considered in the research¹¹¹. Just because restrictions are in *primary* legislation it does not follow that the courts are prevented from intervening in decisions or other administrative actions that are incompatible with the Convention. Our courts and tribunals, including the First-tier Tribunal (Asylum Support), can and do intervene to overturn decisions when they are incompatible with claimants' Convention rights. For constitutional reasons, however, the 1998 Act scheme stops short of permitting courts to set aside primary legislation, instead limiting incompatibilities in such legislation to be the subject of a 'declaration'. It does not appear to matter that restrictions of the kind in s.55 are authorised by EU legislation. The fact that Directive 2003/9 clearly authorised Member States' authorities to withhold support from asylum claimants in the circumstances specified in the NIA s.55 did not prevent the House of Lords intervening in the *Adam* case. This is an interesting aspect of the judgment, particularly in the context of 'conflicts' between the two main European law sources currently that provide the European framework within which the Common Asylum and Immigration policy is operating.

Whilst the research provided *some* support for the argument that articles 3 and 8 have started to provide an effective basis for a 'judicially created, Convention-based 'safety net', it is still early days before it can be said such a net is firmly in place or is comprehensive. Plainly, the safety-net idea has its limitations. The result in *Gezer*, whereby article 3 might be 'engaged' but still not always lead to an intervention by the court (as discussed above), is a curious feature of the operation of Convention rights in this area of the support regime.

It is also clear that the Convention could not be used as a basis for stipulating the precise content of substantive welfare entitlements, for example when trying to resist removal to other EU jurisdictions where provision may not be as good as in the UK¹¹².

¹¹¹ In cases like *R (T) v Secretary of State for the Home Department* [2003] EWCA Civ 1285 and the other joined cases joined in the *Limbueta* appeal to the Court of Appeal, traditional *Wednesbury* 'unreasonableness' and Irrationality grounds had been tried but immediately rejected by the courts at first instance. However, arguments founded on article 3, as an alternative basis of review, were then accepted as an effective basis for intervention.

¹¹² See *R (EW, Entrea) v Secretary of State for the Home Department* [2009] EWHC 2957 Admin. In that case it was made clear that Convention rights could not provide a basis for the courts to intervene to prescribe what minimum standards of material conditions should actually be. Nor could article 3 be relied on in support of applications to the courts to block removals to countries where article 3 standards are not likely to be adhered to. For that reason, the claimant's removal from the UK to Italy could not be stopped.



Component 3

The New Europeans: A8 & A2 Nationals in the UK

(i) Introduction

The context for the introduction of controls on A8 States¹¹³ from 1st May 2004 was that the UK, like Ireland and Sweden, had opened its labour market to nationals of those countries. Controls on nationals from the A2 States, Bulgaria and Romania, followed in 2007¹¹⁴. The UK was only one of three EU Member States permitting such access in 2004. The others were Sweden and Ireland. Both the government and employers' organisations in the UK saw a need for workers from the A8 to fill skills and labour gaps, and this certainly remained the view of government ministers after 2004¹¹⁵. Subsequent studies monitoring the effects of entry, coupled with reports in 2005 and 2006¹¹⁶, generally painted a positive picture of the benefits that accrued to the UK economy as a result of A8 migration to the UK. For their part, employers welcomed the benefits that A8 and A2 migration into the UK offered them, particularly as it gave them a larger pool of labour from which to recruit, and this was coupled with positive views about the new arrivals' skills, flexibility, and 'work ethic'¹¹⁷. Nevertheless, the government was adamant that existing measures to combat the perceived threat of 'benefit tourism' were inadequate, notwithstanding the view of the Social Security Advisory Committee that additional controls were unnecessary¹¹⁸. Specifically, an additional requirement was superimposed before entrants could satisfy the habitual residence test – namely the 'right to reside'¹¹⁹. From 1st May 2004 it was not enough for an EEA to be physically present and lawfully residing in the UK. He or she also had to be *habitually resident*. By 2006, as considered in *Component 4*, EEA entrants also had to demonstrate 'qualified person' status, ie be a 'worker', 'self-employed person', or self-sufficient.

¹¹³ Poland, Hungary, Slovakia, Slovenia, Lithuania, Latvia, Estonia, and the Czech Republic; see note 33.

¹¹⁴ From January 2007. Restrictions were made by the Accession (Immigration and Worker Authorisation) Regulations 2006, SI 2006/3317 and the Social Security (Bulgaria and Romania) Amendment Regulations 2006, SI 2006/3341. The regulations added a new category of persons who could be exempted from the habitual residence test after satisfying the requirements of worker registration scheme requirements and being accorded 'worker' status.

¹¹⁵ Tony McNulty, Home Office Minister, 22nd August 2006; discussed in *Work 4*, pp.239 et seq.

¹¹⁶ See, in particular, Portes, J and French, S (2005) *The Impact of Free Movement of Workers from Central & Eastern Europe on the UK Labour Market: Early Evidence* (Dept of Work and Pensions: Working Paper 18, 2005); and Gilpin, N, Henty, M, Lemos, S, Portes, J, Bullen, C (2006) *The Impact of Free Movement of Workers from Central & Eastern Europe on the UK Labour Market* (Dept of Work and Pensions: Working Paper 29, 2006), and the other studies considered in *Work 4*, pp.239, 240.

¹¹⁷ See the evidence considered in *Work 4*, p.239, including the report in 2006 by Manpower, the recruitment organisation.

¹¹⁸ See the committee's report 'Social Security (Habitual Residence) Amendment Regulations 2004: Report by the Social Security Advisory Committee and Statement by the Secretary of State for Work and Pensions', April 2004 (Cm 6181).

¹¹⁹ Under the forthcoming Welfare Reform Act 2012 the eligibility criteria for a range of benefits will become more restrictive, and levels of support will reduce for most claimant groups; see K. Puttick (2012) '21st Century Welfare and the Wage-Work-Welfare Bargain', ILJ Vol 41, No.1 122. For migrant groups, existing controls and restrictions will be maintained, and in some cases, including non-contributory disability benefits, eligibility will become subject to additional conditions relating to residence and presence requirements. This will be the case, for example, with the Personal Independence Payment that will replace Disability Living Allowance. Power to introduce conditions was included in the Bill (see clause 78(3), HL Bill 124). Migrants workers, including EU nationals, will be affected by the new 'wage-work-welfare bargain' like UK nationals; K. Puttick (2012) '21st Century Welfare': Reconstructing the Wage-Work-Welfare Bargain', ILJ Vol 41(2) (forthcoming).

(ii) Factors Informing Restrictions

At the start of the research period EC legislation in the field of social security was confined to a limited number of areas. It included provision on matters such as 'exporting' benefits entitlements, 'co-ordination' measures¹²⁰, and soft law of the kind referred to in the works produced in *Component 1*. As a result, and as the author suggested in 2004¹²¹, Europe was still a place where Member States continued to be able to make their own rules and pursue their own social and economic objectives within their own 'bounded worlds'. Communitarian approaches to the regulation of cross-border migration, family reunification, and participation in schemes of social solidarity like benefits and social housing, remained largely within Member States' controls. Free movement rights featured in the Treaties and EC secondary law, but most EU-based residence rights depended on labour market attachment, at least pending residents' acquisition of 'permanent residence'. At the national level, welfare support for outsiders (including assistance for nationals of other EU States who could not satisfy domestic law requirements) was becomingly increasingly dependent on satisfying expectations that they should 'contribute' and 'reciprocate' to their host community¹²² - one of the dimensions perhaps to a developing integration agenda¹²³. This expectation was generally only satisfied by take-up of employment opportunities, jobseeking, and staying economically 'active'. EU nationals from the existing EU States were assisted by free movement provisions in the Treaties and EU secondary legislation like Regulation 1612/68 which accorded them what has been described as a 'privileged status' in comparison with other entrants such as those who were not in employment and had to demonstrate 'self-sufficiency'¹²⁴.

Controls on A8 Entrants: Preparing the Ground. As the date for admission of A8 nationals neared, ministers in the UK started to prepare the political ground for the introduction of controls to coincide with the A8 States' accession. In a paper for the

¹²⁰ Primarily in Regulation 1408/71 (see now Regulation 883/04 on the co-ordination of social security systems). 'Equal treatment' and discrimination aspects of this were considered in *Work 10*, pp.9, 10 and 12.

¹²¹ In the conference paper 'Towards a Just European Welfare System for Migrants? EU Measures and 'Minimum Standards' in Title IV (Arts. 61-63) and States' Use (and Abuse) of Welfare and Employment Restrictions', delivered at the W.G. Hart Conference *The Challenge of Migration to Legal Systems*, Institute of Advanced Legal Studies, University of London, 29th June-1st July 2004.

¹²² 'Balanced' or 'conditional' reciprocity are terms sometimes used to describe this; M. Sahlins (2004) *Stone Age Economics*, pp.191-204. Another factor considered in the research was the propensity for host States to want to put the priorities of 'their own' ahead of those of 'outsiders', as considered in *Work 1*, pp.109, 110. 'British Jobs for British Workers', 'local homes for local people' and suggestions that rules on allocations of social housing should be changed to give 'more priority to local people' (*Building Britain's Future*, HM Government, Cm 7654, 29 June 2009), illustrated this feature of some of New Labour's policies towards the end of its period in office.

¹²³ K. Puttick (2010) 'Europe's New Europeans: Family Migration, Reception and Integration after Lisbon', Conference Paper *After Lisbon: The Future of European Law and Policy* EU Jean Monnet European Law & Policy in Context Conference, Birmingham University Institute of European Law, Birmingham University, 23rd June 2010; Puttick and Carlitz (2012), note 91.

¹²⁴ I. Macdonald and R. Toal (2010) *Macdonald's Immigration Law & Practice*, Lexis-Nexis, 8th ed, Vol 1, at 13.13. In the same commentary the authors also pointed out that EU nationals with longer term residence in the UK generally had no problem in accessing benefits.

Challenge of Migration to Legal Systems conference in 2004, the author referred to a key rationale for the controls. It was provided by the Prime Minister on 9th February 2004 when he said that migrants to the UK could and should be expected to 'give something back to their host communities'; and that welfare support would only be available to those who 'come here to assist in meeting our skills shortages', and to 'work hard'¹²⁵. In the wider political context in which restrictions were being introduced there were also political advantages to be gained by being seen to be 'tough on immigration' and 'in control'¹²⁶. In the period after the changes were introduced from 1st May 2004 this became increasingly important for Home Office ministers. Unfortunately for the government, though, it was becoming increasingly obvious by the middle of 2006, particularly after a series of Home Office débâcles, that it certainly was *not* in control. An admission to that effect was made in May 2006 by the Home Secretary¹²⁷. In the case of entry to the UK from the A8 States, criticism of the arrangements regulating admission to the labour market and controls over social security came from all sides of the political spectrum. From within the ranks of the senior judiciary there were also some concerns that some of the controls could be, in legal terms, unnecessary and 'disproportionate'. There was also doubt as to whether the controls were *capable*, in law, of being 'justified'. Those doubts surfaced in the leading House of Lords case of *Zalewska*¹²⁸. In that case, the Lords split on the issue of proportionality. Three of the judges accepted the government's arguments that the controls were proportionate, but two disagreed¹²⁹. The controls on entry to the UK's labour market and take up of social security benefits that were introduced in May 2004 was the prelude to the introduction of longer-term controls that would be extended to all EEA nationals in 2006. This is considered later in this critical appraisal when the research undertaken as part of *Component 4* is appraised.

The Impact of the 2004 'Controls'. By early 2004 it should have been clear to ministers and policy-makers that there were likely to be some negative practical consequences to imposing restrictions on access to support like Income Support and means-tested benefits like Housing Benefit, particularly for A8 workers in low-paid sectors characterised by high labour turnover, short periods of employment, and gaps in employment necessitating short-term income replacement and support. After all, that is one of the primary functions of a modern

¹²⁵ Prime Minister's Official Spokesman, 9th February 2004. Points then translated into law by the Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219, and the Social Security (Habitual Residence) Amendment Regulations 2004, SI 2004/1232, ensuring that all such entrants first obtain a job, register, and complete a year's employment *before* being able to get benefits, tax credits, social housing, etc; *Work 4*, p.241.

¹²⁶ Discussed in *Work 4*, p.253. Other commentaries had suggested that part of the problem was that the two main parties had approached immigration debates rather like a 'Dutch auction', competing to see which of them could be 'tougher' in regulating immigration; see U. Brown et al (eds) *Poverty In Scotland: People, Places and Policies*, London & Glasgow: Child Poverty Action Group/Poverty Information Unit, p.118.

¹²⁷ BBC (2006) 'Immigration System Unfit John Reid', BBC News, 23 May 2006.

¹²⁸ *Zalewska v Northern Ireland Department for Social Development* (Child Poverty Action Group and Public Law Project Intervening) [2008] 1 WLR 2602, HL.

¹²⁹ The dissenting judgments are at [2008] 1 WLR 2620 (Baroness Hale) and 2625 (Lord Neuberger).

welfare system. This was not just a problem for the workers themselves and their families. It was also likely to be a problem for employers and governmental agencies. In particular, as the author's commentary suggested, the restriction would inevitably impede efforts to attract skilled staff from Accession States into low wage sectors in high cost areas like London and the South-East where transitional support was essential, for example in meeting housing costs¹³⁰. In the wider 'welfare' picture, it should have been obvious that such systems not only support the employment relationship (and help to meet employers' as well as workers' needs), they also play a vital 'integration' role – for example by providing migrants and their family members with support at times when they might be affected by domestic crises. This was the context in which the *Zalewska* case (discussed in the preceding section) had come to court. Ewa Zalewska, a Polish worker who was working in Northern Ireland sought, but was refused, Income Support. Despite working for the requisite twelve months in paid employment she did not comply with the strict requirements of WRS registration, and the House of Lords eventually by a bare majority upheld the refusal of support¹³¹.

In other contexts, beyond employment and benefits restrictions, groups like A2 residents also struggled. Romanian families, driven out of their accommodation by attacks by sections of the Belfast community in 2009, had to look to community organisations for support rather than local councils. Temporary accommodation was generously provided by local community groups and people, local churches (some of which were then attacked and in one case fire-bombed), and the Northern Ireland Council for Ethnic Minorities¹³².

The EU's Perspective on Restrictions At the EU policy and law-making level, it had been clear for some time before 2004 that the EU was keen to promote free movement, including movement from the newer Accession States. In order to facilitate such movement, the EU was keen to remove impediments, including national restrictions on access to social benefits needed to make a reality of free movement. This was a key issue in the deliberations at the Stockholm Conference in 2001 where a number of influential papers produced by the EC Commission started to inform policy-making in this area¹³³. However, it was acknowledged that there were still some complex issues to address. Key factors included the differences in pay levels in the newer Eastern European States in comparison with the rest of the EU,

¹³⁰ Tony McNulty, Home Office Minister, 22nd August 2006: discussed by the author in *Work 4*, pp.239 et seq.

¹³¹ *Zalewska v Northern Ireland Department for Social Development*, note 128.

¹³² H McDonald *The Guardian* 17 June 2009 'Romanian race attack victims housed for own safety in Belfast sports centre'; and V Allen & P Griffin *Daily Mail* 19 June 2009 'Fresh racist attack on Romanians as families are forced to flee Belfast'. The cover image for this thesis ('Fleeing Belfast', Cathal McNaughton) is reproduced with the permission of Reuters.

¹³³ The report 'New European Labour Markets, Open to All, with Access to All' Communication 6453/01, submitted to the Stockholm European Council, March 2001 was particularly influential in the lead-up to A8 Accession. However, in the UK, where the report was considered by the House of Lords Select Committee on the European Union, there was growing unease at the prospect of unregulated access by EU nationals to the UK's labour market: see, in particular, the committee's *Fifteenth Report* (Session 2001-02), 26 February 2002.

coupled with high levels of unemployment and lack of employment opportunities in those States. With the added attraction of comparatively better social welfare programmes, these could all be factors that might precipitate significant cross-border movements in the immediate aftermath of the A8 States' accession to the EU¹³⁴. The research that informed projections on likely migration trends, predicting an annual net in-flow of between 5000 and 13,000 up to 2010, was clearly unreliable given the numbers that were subsequently recorded by the Home Office¹³⁵. Furthermore, much of the data and assumptions indicated that the EC and host States like the UK, Ireland and Sweden were still operating in uncharted territory. They did not really know *what* to expect in terms of cross-border movements, or likely 'impacts'. Unlike previously predicted migrant 'invasions', including the one forecast in 1904 that marked the beginning of the modern immigration system¹³⁶, there was indeed a mass exodus westwards from the A8 States. In the first two years after 1st May 2004 there were 447,000 applications by A8 nationals for registration under the Worker Registration Scheme, and 427,000 were approved¹³⁷. By 2008 the cumulative total rose to 932,000, with 895,000 initial applications approved¹³⁸. The numbers of entrants continued to rise until they peaked in 2009 before starting to fall back as a result of the financial crisis and unemployment rising.

The EU's Authority to Impose 'Controls' Ahead of the A8 States' accession to the EU in 2004 it was accepted that Member States should be able to introduce transitional restrictions to protect both their labour markets and social security systems, while at the same time monitoring entry and evaluating labour market 'disturbances'. Authorised by the Accession legislation¹³⁹, the UK permitted entry but decided to implement controls. In the UK's case, the European Union (Accessions) Act 2003 provided the legal basis on which the UK derogated from the free movement rights of A8 and A2 States' nationals would otherwise have under the EU Treaties and secondary legislation. The 2003 Act authorised regulations to be made that regulated the kind of employment that new entrants were required to undertake. At the heart of the controls was a requirement that the employment had to be registered with the Home Office's Worker Registration Scheme (WRS), and continue for a minimum of twelve months. As well as enabling the Home Office to track employment trends,

¹³⁴ In most cases, the A8 States had still only recently started to construct social welfare programmes as part of post-communist era 'transitions'. See L. Andor (2004) *Hungary on the Road to the European Union: Transition in Blue*; and L. Dziewiecka-Bokun (2000) 'Poverty and the Poor in Central and Eastern Europe' in D. Gordon and P. Townsend (eds) *Breadline Europe – The Measurement of Poverty*, and the author's discussion in *Work 1*, pp.112-114.

¹³⁵ Dr Herbert Brücker of the economic think-tank DIW Berlin in a report commissioned by the European Commission in 2003; see *The Impact of EU Enlargement on Migration Flows* (Home Office On-line Report 25/03 at p 58). Both sources were considered in the research, and the findings informed *Work 4*, p.240.

¹³⁶ For an excellent account, see Galner, B (1972) *The Alien Invasion: The Origins of the Aliens Act of 1905*. On the impact this had in shaping modern immigration controls, see Pannick, D (2005) 'A Century Ago Immigration Control was an Alien Concept - How it has Changed', London: *The Times*, 28 June 2005.

¹³⁷ *Accession Monitoring Report May 2004-June 2006* (Home Office, DWP, et al, 22 June 2006); see *Work 4*, p.240.

¹³⁸ *Accession Monitoring Report May 2004-Sept 2008* (Home Office/UK Border Agency et al, 2008); *Work 10*, p.292.

¹³⁹ See, in particular, the Treaty of Accession 2003, Annex XII, Part 2.

and report on those trends, this provided the basis for the construction of a mandatory gateway to means-tested benefits.¹⁴⁰ In this respect, the UK was arguably doing no more than other States were doing soon afterwards – and which they have continued since 2004 – which was to put both labour market and social security controls in place. In the case of labour market controls, the UK's restrictions on access to employment were directed at A2 nationals by limiting the sectors in which they could take up employment¹⁴¹.

A 'Model' for other States' Controls? Spain, 2011 Interestingly, elements of the UK's controls appear to have provided something of a 'model' for other States. This includes, most recently, Spain. In early 2011 Spain decided to impose similar limitations and work permit requirements on Romanian workers as a result of high and rising unemployment among its own nationals. The difference, however, is that whereas the controls imposed by the Home Secretary in 2005 (discussed in *Work 4*) were 'selective' and time limited, Spain's restrictions amount to a blanket ban on entry by Romanian nationals, and for an indefinite period. Effectively, they impose a blanket ban on access to employment. The justification, as approved by the EU Commission¹⁴², was that the country had been experiencing high and rising levels of unemployment, coupled with rising numbers of Romanians entering Spain since 2006 (823,000 by 2010).

A further rationale for permitting restrictions was supplied by the EU Commission itself. It noted that over 30 per cent of the Romanian residents in Spain are, reportedly, unemployed – a sizeable group competing with Spaniards for jobs¹⁴³.

(iii) The UK's 'Controls' & Comparisons with Sweden & Ireland

UK Controls Following the introduction of the UK's restrictions, domestic pressure on the government to maintain the controls came from a variety of sources. These included groups representing local authority providers of services like the Local Government Association (LGA). Influenced, no doubt, by such an influential lobby, and Parliamentarians like John

¹⁴⁰ The regulations were the Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219.

¹⁴¹ Bulgarian and Romanian jobseekers lost the automatic right to take up vacancies from January 2007. Limited numbers of workers entrants were permitted to work in the food processing and agriculture industries, skilled workers could obtain a work permit under the highly skilled category of the Highly Skilled Migrant programme, and limited access to low skilled schemes was permitted - but subject to 'quotas' and a cap of 20,000 a year; Written Ministerial Statement to the House of Commons on Romania and Bulgaria by the Home Secretary on 24 October 2006, discussed in *Work 4*, p.253.

¹⁴² EU Commission Approval of Application dated 28 July 2011 to Re-Impose Restrictions on A2 Workers (EU Commission Directorate for Employment, Social Affairs & Inclusion, Communication 17 August 2011).

¹⁴³ 'Spain Wins the Right to Limit Romanian Immigration', Public Services Europe, 11 August 2011: <http://www.publicserviceeurope.com/article/724/spain-wins-right-to-limit-romanian-immigration>

Denham MP who wanted a complete block on further A8 migration¹⁴⁴, the government imposed a number of restrictions to coincide with A8 nationals' arrival.

Whatever the merits or otherwise of legislating to put in place such controls (and by 2006 it was readily apparent that EC Commission predictions of likely numbers migrating from Eastern Europe were well wide of the mark¹⁴⁵), it was clear from May 2004 onwards that very little was done to protect the interests of A8 migrant workers or their families, particularly in the employment protection area of migrant workers' welfare. This was among the concerns considered by the research, and it was referred to extensively in *Work 4*, the central theme being that EU regimes could leave entrants caught between two 'very hard places': that is a lack of secure employment, while at the same time withholding essential State welfare support. Another variant on this, and one that was readily apparent from the proliferation of atypical, often short-term agency work available to EEA nationals, was the problem of lack of income in periods where the worker might be technically 'employed' but not actually earning. Another concern was that the UK's reception regime failed to address the problem of how workers and their dependants are supposed to get by in intervals between short-term jobs – or if employment ends without the 12 months' qualifying period being completed. In employment law terms this would normally be a risk that employers transfer to the State welfare system if it is not dealt with by the employment contract¹⁴⁶.

In the employment domain, as considered in *Work 4*, the WRS scheme was the centre-piece of the A8 restrictions. One unfortunate effect was to make it difficult, if not impossible in some cases, for EEA nationals to benefit from mainstream employment rights if there was non-compliance with WRS requirements. More specifically, a key effect of the legislation was that if the employment that an A8 national entered was not registered with the WRS within 30 days of the work starting, and did not comply in other ways with the legislative requirements, it risked being treated by the courts and tribunals as 'illegal'¹⁴⁷. As a result of the operation of the 'illegality' doctrine this could leave the worker without a range of Employment Law remedies. As the research showed, A8 workers affected by the 'illegality' doctrine could be barred out of a variety of types of employment proceedings founded on the

¹⁴⁴ Chair of the Commons Home Affairs Committee. Denham was speaking on BBC Radio 4 *The World at One* 15 August 2006, reported in the *Guardian Unlimited*. 'Ex Minister Calls for Block on New EU Migrant Workers', 15 August 2006; *Work 4*, p.240. John Denham later became Secretary of State for Communities and Local Government, remaining a strong advocate for limiting immigration to those who are able to contribute to the UK economy. A concern that he had, as a minister, was with what he referred to as the 'localised impact of immigration' and the public's perception of unfair access to housing and services; see J. Denham (2009) 'Managing the Welfare Impact of Migration during the Recession' (Speech to the Policy Network of the Secretary of State for Communities and Local Government, The British Academy, 1st December 2009). He said that 'In the UK, entitlements to public services are based on residency and citizenship, paying taxes, and playing by the rules – people have a strong sense that these entitlements are 'earned'. If people believe that others are benefiting from jobs, homes, training – things that we and our families have to wait for and work for – that understandably fosters a sense of unfairness.'

¹⁴⁵ *Work 4*, pp.240 et seq.

¹⁴⁶ Painter, R and Puttick, K (2006) *Employment Rights*, 3rd ed, p.504, and a point was reiterated in *Work 4*.

¹⁴⁷ SI 2004/1219, reg 5(2)-(4).

employment contract; and employment tribunals and courts could be prevented from awarding a remedy in contract or tort-based actions¹⁴⁸. Furthermore, unless the claimant undertook WRS registered work¹⁴⁹, the person was unable to satisfy residence requirements and she or he could not be eligible for benefits, social housing, etc. A bar operated if the employment ended before the completion of 12 months continuous, WRS-registered service¹⁵⁰. Breaks of more than 30 days before the 12 months service was completed generally meant that the person would have to start again, and complete another period of qualifying service. This was not unlike a lengthy game of snakes and ladders, with the constant risk of going down the biggest snake on a snakes and ladders board - and then having to start all over again.

The research highlighted a number of other disturbing features, including the suggestion from a Solicitor in a leading firm in Scotland that it was 'not uncommon' for some employers to deliberately seek to delay registration to prevent staff gaining 12 months continuous employment. This, he said, produced a number of negative consequences. As well as the problems posed by the requirement that many employment rights depend on lawful employment, rights such as unfair dismissal require 12 months continuous, lawful employment¹⁵¹. Evidence of employers taking advantage of restrictions on EEA workers became apparent from other reliable sources, including case studies referred to in the TUC's enquiries as part of the work of the Commission on Vulnerable Employment¹⁵².

Sweden & Ireland: Comparisons

This area of *Component 3* offered a valuable opportunity for the author to undertake research into the approaches taken by Sweden and Ireland. The results helped to inform *Work 4*¹⁵³. Among other things, these highlighted a number of significant differences taken by the authorities of those countries in their preparations ahead of 1st May 2004.

¹⁴⁸ *Work 4*, p.245.

¹⁴⁹ *Ibid.*, reg 2.

¹⁵⁰ *Ibid.*, reg 2(4). See the discussion of *Zalewska*, note 100; and see below, and *Works 4, 5*. *Zalewska* was the leading case on the impact of the restrictions on claimants not complying with the WRS requirements.

¹⁵¹ T. Lamb (2006) *Britain's Appeal to Migrant Workers*, *The Guardian*, 5 September 2006, commenting on an earlier Guardian item 'Losers in the Win-Win Migration Game', *The Guardian*, 5 September 2006; *Work 4*, p.244. He also pointed out that, besides the negative impacts on clients' employment rights, delayed WRS registrations could prevent access to key sources of support like contribution-based Jobseeker's Allowance.

¹⁵² 'Hard Work, Hidden Lives: The Full Report of the Commission on Vulnerable Employment', London: Trades Union Congress, 2008. Some of the case studies involving mistreatment of workers, including 'Daniel', an A8 worker from Poland, informed the film 'Exploited! Britain's Vulnerable Workers' made by the TUC in 2007; http://www.congress.tv/conference/congress_2009/vulnerable_workers/ The results of some of the Commission's research were presented to the conference *Dignity, Welfare and Work*, 22nd March 2005, Staffordshire University, by the TUC's Deputy General Secretary, Frances O'Grady. The results subsequently informed a number of legislative provisions in the Employment Act 2008 aimed at assisting migrant workers.

¹⁵³ *Work 4*, pp.246-248.

Sweden. In the case of Sweden, the research highlighted how preparations for the arrival of A8 nationals in Sweden in 2004 began with a focus on the new arrivals' welfare at work. As the author's commentary in *Work 4* observed, this included steps 'designed to pre-empt the risk of exploitation of new arrivals, and the real risk offered to agencies and employers to discriminate in the recruitment and employment process'¹⁵⁴. Unlike the UK, Sweden's government and Labour Market took active steps to reduce the scope for irregular working – something that would, in turn, obviate, or at least reduce, the need for workers to look to the State for welfare support. Although, as the author noted, Sweden already had wide-ranging employment legislation in place in 2004, it went considerably further in seeking to give full effect to EC anti-discrimination measures 'with the specific needs of Accession State workers in mind'; and with the need to secure the protection of workers engaged in irregular employment. In this respect, as the commentary noted, 'Swedish courts are not impeded by requirements that the labour contract is legally viable and consistent with migration laws'¹⁵⁵ – a major point of difference with UK approaches.

As the research showed in *Work 4*, Sweden came under pressure to regulate access to the jobs market and limit access to State welfare systems. In this respect, it followed a similar path to the UK. The Swedish restrictions were contained in proposals¹⁵⁶ put forward to Sweden's Parliament, the Riksdag during a 'period of adjustment'. A distinctive feature, however, was that restrictions were accompanied by *anti-discrimination 'guarantees'* to ensure that new workers would enjoy the same rights and responsibilities as Swedish citizens, observing that 'We do not want a guest worker system, in which workers are only permitted limited access to Swedish welfare. Nor do we want people to be exploited on the labour market in a way that would risk wage dumping and weakening of the terms of employment for all'¹⁵⁷. The rationale that informed reception measures, which were formulated after consultations with trades unions, employers and other interest groups, was that without such an approach there was a risk that the great differences in pay levels and social security between Sweden and the new Member States would lead to substantial strains on the employment and social systems; and these could 'result in a labour market divided into 'first team' and 'second team' players'¹⁵⁸.

¹⁵⁴ *Work 4*, p.246.

¹⁵⁵ *Ibid*, p.246.

¹⁵⁶ *Employment Transitional Rules for All Concerned* (Holmberg-Karlsson Communication), 15 March 2004.

¹⁵⁷ Barbro Holmberg, Minister for Migration and Asylum Policy in the 'Debate Article' for the Riksdag and Introduction to *Transitional Rules for All Concerned*.

¹⁵⁸ It was also observed in the Holmberg-Karlsson Communication, note 157, that 'A person can come here and work for just a few hours a week on very low pay, or no pay at all, and at the same time obtain access to our whole social welfare system. Our child allowance for three children, for example, exceeds a normal income in most of the new Member States...'

Ireland The comparisons with Ireland's arrangements for receiving A8 nationals from 1st May 2004 showed how, like Sweden, Ireland introduced specific plans to counter the likely risk of discrimination against the new arrivals. Specifically, it set out an 'action plan', the *National Action Plan Against Racism (2005-8)*, designed to address discrimination issues, and concerns about the 'cultural differences'. As far as welfare support arrangements are concerned, Ireland did not introduce wide-ranging restrictions on access to benefits. However, like the UK, it directed restrictions at those who were economically inactive, and an Irish variant on the habitual residence test was introduced. As with the UK test, considered in more detail in the analysis of *Component 4* research, Ireland excludes those without habitual residence, or who have *become* economically inactive. The author's comment was that this could prove to be as problematic as in the UK, particularly given 'the short-term nature of much of the work available'¹⁵⁹.

Cross-Border Migration for Work: ILO & UN Norms

The author's commentary¹⁶⁰ on ILO and UN measures that seek to regulate the conditions on which migrant workers cross borders to take up work in host States was, of course, relevant to the research on A8 and A2 workers and the conditions which they experience. This was the case both in terms of labour and wider 'welfare' conditions. The ILO's adoption of the *Multilateral Framework on Labour Migration* in 2006, coming so soon after the accession of the A8 and A2 States, was arguably an important development, not least in the context of the ILO's promotion of the 'Decent Work' agenda, and recognition that the rights under the framework should extend to all those in 'regular' employment in host States. The issue was particularly relevant, given the evidence provided by the TUC's Vulnerable Work Commission, and case studies of exploitation of A8 workers following their arrival.

Similar considerations were pertinent to the discussion of Part III of the UN Convention on the Protection of the Rights of All Migrant Workers and their Families 1990. Given the ease with which A8 workers in the UK can fall foul of regulatory requirements such as those in the WRS scheme – a point amply illustrated by the *Zalowska* case – the UN Convention's 'reach', encompassing all migrant workers and irrespective of their migration status, is particularly relevant.

¹⁵⁹ *Work 4*, p.249.

¹⁶⁰ *Work 4*, pp.250-254.

'Residence' and Access to Support

EEA nationals have not, in general, been disadvantaged in comparison with UK nationals, particularly if they are either economically active or can at least show a link with the labour market, gained perhaps in previous periods of employment¹⁶¹. The introduction of the 'habitual residence' test in August 1994 by the Income-Related Benefit Schemes (Miscellaneous Amendments) (No 3) Regulations 1994¹⁶² was intended to curb 'benefit tourism'. As noted by a report in 1996, the test could also impact on UK nationals returning from employment abroad or stays with relatives¹⁶³. In this case she or he could be required to regain their 'residence' by serving out an 'appreciable period of residence', usually three months, before they could be ineligible for means-tested benefits like Income Support¹⁶⁴. An EEA national and his or her family members, on the other hand, were immediately eligible for benefits from the date of their arrival if they had a right of residence at that point and retained it. EU-based 'residence' was also reinforced by EC 'equal treatment' provisions.

UK nationals are still subject to the habitual residence test and the requirement to 'regain' their residence before they can claim means-tested benefits like IS. However, the test now only applies to them if they are coming to the UK from a country outside the EU, either for the first time or following a period of residence abroad that has been long enough to affect their UK 'residence'. It does not apply to them if they have been working in another EU country. This was the result of an ECJ ruling in *Swaddling v Adjudication Officer*¹⁶⁵. Maintaining this feature of habitual residence requirements has been helpful to the UK government in a number of ways, since then, not least by demonstrating that the scheme is not based, primarily, on nationality and applies to UK nationals – a point that featured in the *Patmalniece* litigation (considered in the appraisal of *Component 4* work later). Interestingly, the Dutch government, when trying to introduce a similar feature in their 'habitual residence' rule in 2005 sought to argue that as the restriction would also impact on Dutch nationals it was not 'nationality' based. In the Netherlands, unlike the UK, EEA nationals are excluded from social assistance benefits for the first three months of their residence (something that is permitted by Directive 2004/38).

¹⁶¹ Restrictions on access to unemployment benefits by those without a link, including a requirement to comply with habitual residence requirements, were held in 2004 not to infringe EC equal treatment provisions if they operated independently of nationality requirements; *Collins v Secretary of State for Work and Pensions* Case C-308/02 [2004] 2 CMLR 8, ECJ.

¹⁶² SI 1994/1807. The measure was introduced against the advice of the Social Security Advisory Committee. See the Report on the Income-Related Benefit Schemes (Miscellaneous Amendments) (No 3) Regulations 1994, Social Security Advisory Committee (Stationery Office, 2004, Cm 2609).

¹⁶³ For commentary, see J. Albesson (1996) *Falling the Test: CAB Clients' Experience of the habitual Residence Test in Social Security*, National Association of Citizens Advice Bureaux; and M. Adler (1995) 'The Habitual Residence Test: A Critical Analysis' (1995) 2(4) *Journal of Social Security Law* 179-196.

¹⁶⁴ For a fuller analysis of habitual residence, including leading cases like *Nesse v Chief Adjudication Officer* [1999] 1 WLR 1937, HL, see Puttick (2006), note 3, pp.292-295. For a commentary on earlier versions, see editions 1-3, starting in 1995.

¹⁶⁵ [1999] ECR I-1075; [1999] 2 FLR 184, ECJ; *ibid*, p.293.

In order to try to insulate the legislation from legal challenges based on equal treatment requirements and Dutch anti-discrimination law, an attempt was made to extend the exclusion to Dutch nationals for the same three months period when returning to the Netherlands. However, this change was not pursued after the threat of a legal challenge based on Dutch constitutional requirements that protect Dutch nationals right to access State welfare support without conditions; and the government in The Hague was then obliged to give an undertaking that any changes would not bar out Dutch nationals. The concession immediately raised doubts about the compatibility of Dutch domestic law with EU equal treatment requirements¹⁶⁶. Clearly, the governments of EU Member States like Holland can be caught between two hard places: on the one hand the need for compliance their domestic constitutional law while, on the other, at EU equal treatment requirements inhibiting legislation enabling them to give precedence to their own nationals.

For its part, the EU does not lay down any preference for EU nationals. The focus is on requiring 'equal treatment' for EU citizens who are residing in other EU States on the basis of EU law¹⁶⁷ - at least while the EEA resident satisfied EU-based conditions in its secondary legislation, as explained by Lady Hale in her analysis of this in her Supreme Court judgment in *Patmalniece*. Interestingly, it would appear to be possible for host States to withhold social assistance from EEA nationals residing in their territories in circumstances where third country nationals may be eligible for support received by their own nationals¹⁶⁸.

The most problematic issue for EEA nationals residing in the UK is when they are (or become) economically inactive. This may lose them their right of residence and therefore their gateway to support from the host State. In some circumstances, once again, UK nationals who are economically inactive may also be affected – for example when trying to assert residence rights for their non-EU spouses¹⁶⁹.

¹⁶⁶ P. Minderhoud (2011) 'Directive 2004/38 and Access to Social Assistance Benefits', *Journal of Social Security Law* 18(4) 153 at 157.

¹⁶⁷ See in particular Directive 2004/38, art 24.

¹⁶⁸ For its part, EU Law does not seem legislate to establish any kind of hierarchy or preference for EU nationals, for example in relation to residents from countries outside the EU. Indeed, That said, the ECJ has at different times declined to hold that there is anything in the Treaties to prevent States withholding social assistance from EEA nationals residing in their territories in circumstances where third country nationals may be eligible for the same kind of support sought by their own nationals; see on this point, *Valsouras v Arbeitsgemeinschaft (ARGE) Numberg 900* (C-22/08) [2009] All E.R. (EC) 747; [2009] ECR I-4585; [2009] CEG 1024.

¹⁶⁹ In *McCarthy v Secretary of State for the Home Department* [2011] 3 CMLR 10, CJEU, Mrs McCarthy was unable to invoke free movement rights, but she was, in any case, economically inactive and dependent on UK benefits, and therefore unable to assert EU-based residence and social rights for her and her husband, as discussed in *Work 10*, pp.281, 282.

(iv) The Courts' Response

As the author's research showed, although initial test cases were partially successful¹⁷⁰, most subsequent challenges made between 2004 and 2011 failed.¹⁷¹ Furthermore, the sizeable numbers of entrants coming to the UK¹⁷² undoubtedly helped to shape judicial attitudes - indeed, so much so that in 2007 Lord Justice Lloyd thought that the need for the restrictions in the face of the risks posed by 'benefit tourism' was so obvious that it 'required no explicit justification'¹⁷³. As already noted, the restrictions affected sizeable numbers of A8 and A2 entrants, and official statistics kept by the Home Office and other departments (including the Department of Work and Pensions, and HM Revenue and Customs which manages the tax credits system) indicate that a surprising level of applications for welfare support failed. Specifically, as the author's discussion of the statistics noted, in the first four years of the post-1st May 2004 restrictions 76% of claims for tax-funded, income-related benefits and tax credits were disallowed. This was explained, officially, by the claimants' inability to satisfy the 'right to reside' and habitual residence test¹⁷⁴.

The fact that decision-makers in welfare agencies like the DWP and HMRC have been able to reject applications for support made by so many claimants suggests that, for the most part, those agencies have generally enjoyed a significant level of support from the courts and tribunals. The author's examination of court decisions where claimants from A8 and A2 countries have contested decisions shows that arguments that the restrictions are incompatible with EU Law, or are either discriminatory or disproportionate, have not had much success in the courts.

The seven year period from 1st May 2004 until the controls on A8 entrants ended in 2011¹⁷⁵ was clearly influential in the development of later policies, including implementation in the UK in 2006 of free movement measures in Directive 2004/38. This is evident from the fact that expectations that claimants should be economically active as a pre-requisite to acquiring and maintaining a right to reside after 2006 built on the policies underpinning the restrictions

¹⁷⁰ *R (H) v Secretary of State for Work and Pensions* [2004] 3 CMLR 11; *Work 1*, p.110. On the central issue in that case, however, Collins J accepted that notwithstanding any discrimination involved against A8 workers on the basis of their nationality, the restrictions were a permissible means of combating benefits tourism, and were 'proportionate'.

¹⁷¹ The restrictions ended in 2011; see the Accession (Immigration and Worker Registration) (Revocation, Savings and Consequential Provisions) Regulations 2011/544. However, the government has made it clear that they will be re-applied when the next State accedes to the EU (which is likely to be Turkey); see the 'Written Ministerial Statement on the Closure of the WRS Scheme' (Home Office 10th March 2011). It is possible that, like Spain (see note 143), they may be re-applied (for example if unemployment rises much higher).

¹⁷² By 2008 the cumulative total rose to 932,000, with 895,000 initial applications approved; *Accession Monitoring Report May 2004-Sept 2008* (Home Office/UK Border Agency et al, 2008).

¹⁷³ *Abdirahman v Secretary of State for Work and Pensions* [2007] 3 CMLR 37 citing Sedley LJ in *R (Morris) v Westminster City Council (No 3)* [2006] EWCA Civ 1184, discussed in *Works 5, 8* (H-241), and *10*, p.284.

¹⁷⁴ *Accession Monitoring Report May 2004-Sept 2008* (UK Border Agency et al, 2008), p.23, considered in *Work 10*, p.292.

¹⁷⁵ Accession (Immigration and Worker Registration) (Revocation, Savings & Consequential Provisions) Regulations 2011, SI 2011/544.

in 2004. This is revisited again in the discussion of research undertaken as part of *Component 4*. This approach is also clear from later pronouncements, for example in 2007 when Home Office Ministers observed that new entrants from among other migrant groups should be expected to 'contribute' more, and should help to meet the costs of their welfare support. Although the Home Office accepts that migrants are 'net fiscal contributors' to the economy¹⁷⁶, it also believes that 'migrants can place transitional pressures on public services'. This is the rationale for expecting them to contribute to meeting the costs of their welfare¹⁷⁷. More recently, the Coalition government has proposed to extend the period of 'probation' before spouses and partners can apply for settlement (from two to five years) to facilitate integration; and for three years access to a number of non-contributory benefits would be postponed. However, access to employment would be maintained, as would eligibility for contributory benefits, on the basis that such rights are 'earned' by employment and the payment of NI contributions¹⁷⁸.

Expectations by the government that entrants to the UK from the A8 countries should remain economically active during their initial period of residence have been endorsed by the courts. In general, legal challenges were resisted, even in 'hard' cases like *Zalewska*¹⁷⁹ when it was made clear that the WRS requirements, and rationale behind them, merited support. Furthermore, as the author's analysis of leading cases like *Patmalniece* showed, the courts maintained their resistance to permitting exceptions. Fortunately for the government, the courts' take on the matter was that whilst less favourable treatment of the kind experienced by *Patmalniece* and other A8 residents was discriminatory it was the kind of discrimination, ie indirect, that was capable in law of 'justification'¹⁸⁰.

The EU Commission, however, has taken a rather different approach than the courts on aspects of the restrictions applied to A8 nationals. Indeed, it has characterised some aspects of the 'right to reside' regime, and the treatment involved, as 'discriminatory'.

¹⁷⁶ *The Economic & Fiscal Impact of Migration*, Home Office/DWP, Oct 2007.

¹⁷⁷ *The Path to Citizenship – Next Steps in Reforming the Immigration System* (Home Office, Feb 2008), ch 5. More recent Proposals by the Coalition government in *Family Migration: A Consultation* (UK Border Agency, 13 July 2011) are discussed in the next section.

¹⁷⁸ *Family Migration: A Consultation* (UK Border Agency, 13 July 2011), Section 2, para 2.34.

¹⁷⁹ *Zalewska v Department for Social Development*, note 128.

¹⁸⁰ As considered in Works 9 and 10.

(v) Component 3: Conclusions

As the research showed, having initially indicated its desire to free up cross-border movement, the EU moved to a position which by the start of 2004 was one of permitting Member States like the UK to impose significant limitations on access to welfare support. The factors that informed this were complex. However, it was clear that this owed much to a real fear in the UK that both the labour market and welfare systems could be 'swamped' by the new arrivals. This concern was well articulated by key bodies like the Local Government Association and particular authorities, as well as influential MPs, as the research for *Work 4* highlighted. The response of the government to the domestic pressures that built up in the Spring that year – a process charted in detail in *Work 4* – was that by 1st May 2004 a number of tough restrictions were in place. These made it clear that the only terms on which access to support from social assistance systems like Income Support and other means-tested benefits could be accessed was that there should be a visible 'contribution' by claimants to the country's labour and skills needs. That contribution should not only come from gainful employment, it should come from employment that complied with WRS registration requirements.

Unfortunately, in contrast with the preparations made by Sweden and, to a lesser extent, Ireland, little was done to address the likely risks of exploitative *employment* conditions. Nor did the scheme appear to deal adequately with the impact of atypical cases where the demands of the WRS could impact adversely on the welfare needs of new arrivals – a point highlighted by *Zalawska*. Claimants could find themselves caught between *two* hard places: exclusion from the State benefits and other support systems enjoyed by workers in the mainstream of employment conditions, and poor in-work and out-of-work welfare conditions. Indeed, the phrase 'welfare at work' started to be coined at this time in the context of shortcomings in the working conditions of groups like casuals and agency workers, many of whom were drawn from the ranks of A8 and A2 nationals after May 2004¹⁸¹. The research undertaken by the author which examined the different approaches taken by Sweden showed a conscious attempt at legislative and administrative levels to avoid this problem, and the start of a labour market of 'two teams'.

The WTR restrictions, as considered by the work in this component, led to a number of 'hard' cases and results. *Zalawska* was the leading case in this respect. As the analysis showed,

¹⁸¹ The TUC's Commission on Vulnerable Employment report *Hard Work, Hidden Lives* (2008), note 152, identified a significant number of case studies of Accession State EEA nationals earning below the NMW, exceeding the WTR weekly hours limit routinely, or working at well under the prevailing conditions in the sector in which they found themselves; see also R. Painter and K. Puttick (2006) *Employment Rights*, ch.22.

the claimant had, in fact, satisfied the *main* legislative objective behind the WRS scheme which was to ensure that new arrivals from A8 States obtained gainful employment, worked for 12 months, and thereby contributed to the economy. In doing so, this would show that they had reciprocated for any support the community then gave them. Nevertheless, despite substantial compliance, the majority of the court was still prepared to bar Ewa Zalewska out of welfare support on the basis that she had not complied with the registration renewal part of the scheme. This was clearly one of the less important, indeed 'technical', aspects of the scheme, but which the Lords considered sufficiently important to merit strict compliance. The fact that her welfare needs arose from a particularly dark and violent history of domestic violence, and those circumstances may have played a part in her inability to comply with the WRS requirements, did not assist her or her daughter. Furthermore, the majority were clearly unwilling to allow 'proportionality' and discrimination considerations to make any inroads into the courts' tough stance on the need for compliance. Clearly, this was a position that was entirely consistent with decisions in the Court of Appeal like *Kaczmarek*. This identified a need for 'open textured' rules that can provide certainty and consistency rather than an approach based on a consideration of appeals on a case-by-case basis.

A key conclusion at the end of this phase of the programme was that much of the discourse around the need for EEA nationals to be 'economically active', rather than simply demonstrating the characteristics of 'social integration', has been a *judicial* discourse¹⁶². As one of the pervasive themes in this thesis, it was clear that expectations of economic *integration* started to crystallise in 2004 when controls on access to support by A8 and A2 nationals were initiated. As the research for *Works 6-10* then showed, this continued to be an important driver for the policies underpinning the post-2006 UK regime, including measures implementing the free movement provisions of Directive 2004/38. This is now considered in the commentary in this Critical Appraisal of *Component 4* work. This also highlights how the courts continued to be supportive of most of the government's objectives.

¹⁶² A point highlighted at all stages of the *Patmalnee* case study: see, in particular, though, the observations of Moses LJ in his concluding remarks in his Court of Appeal judgment, as considered in *Works 9 and 10*.

Component 4

UK Implementation of Directive 2004/38

(i) Introduction

This component considered the UK's implementation, from 2006 onwards, of the free movement and social rights of EEA nationals and their family members in Directive 2004/38. Much of the research focus was on analysing the courts' role in determining the scope of restrictions imposed by the UK regime. A key question concerned the extent to which the courts helped the government to secure its objectives in the period after 2006 when the scheme came under significant pressure in cases coming before the courts. The restrictions plainly sought to maintain the government's expectation that EEA nationals should generally be 'economically active' or self-sufficient. These have been the principal requirements needed to satisfy 'right to reside' requirements and thereby qualify for assistance from the means-tested benefits system (at least pending the acquisition of 'permanent residence', normally after five years lawful residence)¹⁸³.

This part of the research programme also examined 'family' aspects, including the difficulties spouses and other family members can experience in acquiring and retaining residence rights in order to satisfy conditions on access to welfare support. This necessitated consideration of the UK courts' treatment of proportionality and discrimination requirements – a task undertaken, for the most part, in the last two years of the research programme.

Implementation: The Government & Courts' Role A central thesis of the author's work has been that implementation of free movement-related rights in the UK has been taking place at *two* levels. First, the government was responsible for the design of the scheme in the Immigration (European Economic Area) Regulations 2006¹⁸⁴ ('2006 Regulations'), as well as the content of the social security legislation that then mapped on to the 2006 Regulations, namely the Social Security (Persons from Abroad) Regulations Amendment Regulations 2006¹⁸⁵. The changes sought to ensure that eligibility for means-tested benefits assistance depended on satisfying 'habitually residence' requirements – something which by 2006 also necessitated acquisition of the 'right to reside'. Essentially, this required a claimant to be a 'qualified person': ie a 'worker', 'self-employed person', or 'self-sufficient'; and to

¹⁸³ At which point access to support becomes unconditional: something which may be far from easy, particularly for those who may not be (or have been) economically active, as considered in *Work 10*.

¹⁸⁴ SI 2006/1003.

¹⁸⁵ SI 2006/1026.

maintain that status. As the research showed, this could be problematic for groups who might have been in employment but who could not retain 'worker' status for a number of reasons, including the way the retention provisions were narrowly drawn. Retention could also be difficult in the 'family' context, for example for spouses of EEA nationals who left their employment and the country, as in the *Ibrahim* case¹⁸⁶.

Furthermore, the process was far from complete, even by 2006. Further changes have continued to impact on other areas of the social welfare system, including social housing. An example has been the restrictions aimed at barring out economically inactive EEA nationals from rights under the homelessness legislation¹⁸⁷.

At a *second* level, implementation has also been dependent on the courts. At the heart of this part of the process has been the courts' role in interpreting and applying the law, and in some cases filling lacunae¹⁸⁸ set by the legislative scheme, and setting the parameters of entitlement when these are unclear. An example has been the need to clarify the limits of claimants' ability to invoke EU Treaty provisions on free movement, and to address arguments that in some cases it may be sufficient for an unemployed claimant to found a right of residence on evidence of 'social integration' and 'proportionality', and without satisfying the requirements of the national scheme. The decision of the Court of Appeal in *Kaczmarek*¹⁸⁹ rejecting such arguments was considered in *Works 8* and *10*. Although the decision itself clarified a number of important points about the acquisition of residence rights and their retention, it also highlighted the important role played by the courts in completing the legislative process.

The Courts & Free Movement Social Rights: Law-Makers? The idea of courts as 'law-makers' – a reality recognised by a number of authoritative tracts on the subject¹⁹⁰ – is particularly relevant in the context of EU law. This is an area of Public Law where it has been necessary for the UK courts to ensure that decisions of the Court of Justice of the European Union (the CJEU, formerly the European Court of Justice) are properly implemented. On

¹⁸⁶ *Harrow London Borough Council v Ibrahim (Secretary of State for the Home Department Intervening)* [2010] 2 CMLR 51 (Case C-310/08), ECJ (Grand Chamber), discussed in *Works 5, 6, and 8*.

¹⁸⁷ For example, the Housing Act 1996 was amended, with effect from 2nd March 2009, by the Housing and Regeneration Act 2008, Schedule 15, and EEA nationals who are not students or workers (and therefore within the definition of a 'qualified person' under the 2006 Regulations, is a 'restricted person' under s.1B4(7) of the 1996 Act. As held in *Lekpo-Bozua v Hackney LBC* [2010] HLR 46, Court of Appeal (discussed in *Work 10*, pp.281, 282) this means that a local authority duty was not a 'full' duty but only the 'lesser' duty under s.193 (7AA) of the Act. The concept of 'residing legally' in the Citizens Directive was taken to mean living in accordance with the conditions laid down by EU Law; and just because an economically inactive EEA national residing in the UK had not been removed did not mean that she had ceased to be 'subject to immigration control' and unable to assert a right to assistance).

¹⁸⁸ Case R (IS) 4-09 (31 October 2007), Judge Rowland, discussed in *Work 10*, p.284.

¹⁸⁹ *Kaczmarek v Secretary of State for Work and Pensions* [2009] 2 CMLR 3, CA.

¹⁹⁰ See, for example, A. Barak (1969) *Judicial Discretion*; and Lord Reid (1972) 'The Judge as Law Maker', *Journal of the Society of Public Teachers of Law*, p.22.

several occasions it has been clear that the legislation and UK court decisions (and implementing legislation) have been out of kilter with CJEU decisions. This was illustrated when provisions in the 2006 Regulations had to be re-worked¹⁹¹ in the aftermath of the *Metock* judgment¹⁹². This was essential in order to bring UK law into line with EU Law after the ECJ's decision, and to remove requirements about prior residence in other EU States as a condition of take-up of residence rights by family members. The difficulties for the UK scheme's operation, and the courts, have also been challenging for another reason, namely the need to have regard to formal guidance from the EU Commission. Typically, important guidance is given in the form of guidance on transposition of directives; or when the Commission formally brings to the attention of Member States' governments concerns that domestic legislation may be incompatible with EU law¹⁹³. In the latter respect, the UK government received a clear signal from the Commission that it regards aspects of the 'right to reside' scheme as unlawful and discriminatory¹⁹⁴. 'Guidance' also takes the form of less demanding suggestions to governments about measures that can be taken to ensure that national administrative processes are compatible with what the Commission expects. In this regard, the Commission has been particularly active with regard to adjudication processes, including the implementation of procedural steps needed to ensure that States' border and welfare agencies reach decisions that are 'proportionate'. It issued an important 'communication' and guidance on this in 2009, as discussed in *Work 10*¹⁹⁵. This was a development which, as the author suggested, may require the UK to reconsider its approach to the deployment of proportionality requirements before removing a claimant's right to reside¹⁹⁶.

The 'Right to Reside' & Government Objectives

Given that the government's key objective in introducing the 'right to reside' scheme in 2006 has been to try to ensure that EEA entrants should be economically active, and independent of the State welfare system whenever possible, to what extent have the courts been supportive of that position? The question is an important one, not least because it has been suggested by some commentators that the rights linked to EU citizenship and art 20 on free

¹⁹¹ Immigration (European Economic Area) (Amendment) Regulations 2011, SI 2011/1247, reg 2(2)-(4).

¹⁹² *Metock and Others v Minister for Justice, Equality and Law Reform, Ireland* [2008] Case C-127/08, ECJ, Grand Chamber.

¹⁹³ In its role as custodian of the Community's laws, the Commission is empowered to provide States with a 'reasoned opinion' when it considers it has not fulfilled its obligations under the Treaties (TFEU, art 226): a process that may be followed by enforcement action.

¹⁹⁴ EU Commission Notice IP/10/1418 *Free Movement of Workers: Commission Requests UK to End Discrimination on other Nationals' Right to Reside as Workers* (Brussels: 28th October 2010); *Work 10*, pp.291, 292.

¹⁹⁵ P.286. See the 'Communication from the Commission to the European Parliament and the Council on Guidance for the Better Transposition and Application of Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States', Brussels 2.7.09 COM (2009) 313 Final, Section 2.3, discussed in *Work 10*, pp.286, 287.

¹⁹⁶ *Ibid.*, p.287.

movement can be expected to increasingly 'detach' from the exercise of economic rights – a proposition for which there is some authority, albeit limited, from European Court of Justice judgments¹⁹⁷. There are also interesting discourses suggesting that as the idea of 'Europe' and European 'solidarity' gain momentum, Member States' control over access to their welfare systems may, in time, diminish in favour of a developing EU 'welfare law and policy'¹⁹⁸. In anticipation of an end game to this, some commentators have indicated that they expect to see greater 'de-territorialization' of national welfare systems¹⁹⁹.

An alternative discourse is that far from relaxing requirements based on labour market attachment, and expectations of migrants' contribution, reciprocity', and 'paying their way' (key themes of *Work 10*), Member States like the UK may, in fact, be going in an entirely opposite direction. Furthermore, commentators in other European jurisdictions have not only been identifying this tendency at the Member State level, they also perceive a 'trend' towards requiring migrants to earn their legal status, rights and inclusion in host Member States as an idea that has been 'taking root' at the EU level²⁰⁰. In considering the operation of barriers to support operating under the UK's scheme for implementing Directive 2004/38, the development since 2006 of what has been referred to as 'economic integration' requirements was addressed as part of the evaluation of the operation of post-2006 restrictions.

(II) Holding the Line? The 'Right to Reside; 'Economic Integration' & the Courts

Plainly, there have been a number of problematic features to the UK's scheme of implementation. The main uncertainty relates to the idea that a claimant may be physically residing in the UK quite lawfully in immigration control terms, and yet *not* have the requisite 'residence' status for the purpose of accessing mainstream welfare benefits like Income Support and Pension Credit on the same basis as UK nationals. Given that EEA claimants, are exercising a right of residence in accordance with EU Treaty provisions, their apparent ability to invoke EU anti-discrimination provisions, added a further dimension to this. What was unclear, however was whether it was possible to rely *directly* on EU legislation in that way. This was one of the key issues for the Court of Appeal in *Abdirahman* in 2007.

¹⁹⁷ G. Clayton (2010) *Immigration and Asylum Law*, p.174. The cases referred to are *Grzelczyk v Centre Public d'Aide Sociale d'Otignies Louvain la Neuve* (C-184/99) [2002] 1 CMLR 19, ECJ; and *Baumbast v Secretary of State for the Home Department* (Case C-413/99) [2002] 3 CMLR 23, ECJ.

¹⁹⁸ G. De Búrca (2005) *EU Law and the Welfare State: In Search of Solidarity*, ch.1.

¹⁹⁹ *Ibid.*, ch. 1 and other contributing authors' analysis of developments in European solidarity. See, for example, Maurizio Ferrera's interesting chapter in which he describes a process of 'de-coupling' of social rights from national citizenship, and the gradual construction of an 'EU space' for European social citizenship.

²⁰⁰ The trend towards expecting migrants to earn their legal status, rights and inclusion in host Member States by having to meet integration conditions is plainly not just a UK phenomenon, it seems, and it has also been 'taking root' at the EU level according to three commentators writing in 2009; see D. Kostakopoulou, S. Carrera & M. Jesse (2009) 'Doing and Deserving: Competing Frames of Integration in the EU' (ch.9) in E. Guild, K. Groenendijk, S. Carrera (Eds) (2009) *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*.

Abdirahman Soon after the 2006 Regulations were enacted the issue of whether an EEA claimant could rely directly on EU legislation to assert a right of residence (and therefore access to UK welfare support without having to comply with the UK's right to reside requirements) came to the fore in the *Abdirahman* case²⁰¹. That case provided strong support for the right to reside scheme, making it clear that even if EEA nationals are lawfully present in the UK, unless they can also satisfy the requirement under the 2006 Regulations to be a 'qualified person', and thereby acquire a right to reside, they could still be barred out of support from benefits like Income Support and Pension Credit. As the author's commentary²⁰² explained, the Court of Appeal did not rule out the possibility that a claimant could, in appropriate cases, acquire a right of residence directly from Directive 2004/38 (or, indeed, from the EU Treaty itself). However, this was not the case where a claimant was subject to the limitations and conditions on take up of free movement rights. The key limitation was the need for claimants not to risk becoming a burden on the host State's social assistance system. This was a requirement that the UK system had carefully and very explicitly embedded into domestic requirements in 2006. The court concluded that this was within the scope of Directive 90/364 (now Directive 2004/38), and it rejected the appeals.

Doubts remained, however, particularly among a number of immigration practitioners and commentators²⁰³. It was not until four years later that the main features of the UK scheme, including its distinction between 'mere presence' and 'habitual residence', received authoritative endorsement from the Supreme Court in *Patmalnicke*²⁰⁴. Essentially, the case was about whether the UK's scheme could be reconciled with EU law, and whether it could bar out economically inactive claimants without infringing the EU's bar on discriminatory treatment. In the event, as the analysis of the judgment in *Works 9 and 10* showed, Baroness Hale and the other judges of the Supreme Court (with one dissenting voice on the issue of 'justification' of the discrimination inherent in the restrictions) were supportive of the right to reside scheme. They were clear that ECJ case-law, including cases like *Trojani*²⁰⁵, enabled host States to bar out economically inactive claimants out of support.

²⁰¹ *Abdirahman v Secretary of State for Work and Pensions* [2007] 3 CMLR 37, CA.

²⁰² *Works 5*, p.6; *8*, at H-241; and *10*, pp.283, 284. The distinction made by the Court of Appeal between 'presence' and 'residence' for the purposes of the requirements was approved by Baroness Hale in *Patmalnicke*, as discussed in *Work 10* at pp.290, 291. She did not find anything in European cases like *Trojani* to suggest that 'mere presence, without any right to reside in the host country, was sufficient'.

²⁰³ It was argued, for example, that the court should not have so readily distinguished cases like *Martinez Sala v Freistaat Bayern* (Case C-85/98) [1998] ECR I-2691, and *Baumbast* (on the basis that the claimants in those cases were economically active); and that the court should have looked more closely at the scope for invoking non-discrimination provisions in the Treaty as a basis for establishing residence rights. There was also a view that the decision ran counter to the ECJ's ruling in *Collins v Secretary of State for Work and Pensions* (C138/02) [2005] QB 145, ECJ; see, in particular, Macdonald and Toal, note 22 Section 13.24, p.991.

²⁰⁴ *Patmalnicke v Secretary of State for Work and Pensions* [2011] 1 WLR 783, UKSC.

²⁰⁵ *Trojani v Centre Public d'Aide Sociale de Bruxelles* C-456/02 [2004] ECR I-7573; [2004] All ER (EC) 1065, ECJ.

Residence & 'Retention' Issues In the research that examined the operation of the statutory scheme, including the three 'phases' of residence provided for in the Directive and the 2006 Regulations, the analysis touched on a number of other complex and contentious areas of the UK scheme. These included the difficulties associated with retention of the right to reside, not least for a number of vulnerable claimant groups. These included groups like single parents and carers, as highlighted by cases like *Maryam Mohamed*²⁰⁶ and *St Prix*²⁰⁷. Carers are a group which, as the research highlighted, benefited considerably from landmark decisions of the Commissioners (now the Upper Tribunal). In the important case of R (IS) 4-09 (31 October 2007), discussed in *Works 5* and *10*, the French wife of a Cameroonian claimant was obliged to give up her employment in order to care for her sick husband. By doing so she became, of course, economically inactive. Unfortunately, however, this was a scenario that was not explicitly catered for, either in Directive 2004/38 or in the 2006 Regulations. The claimant, who derived his right to reside from his French wife's residence status, was therefore adjudged to lack the necessary residence right to make a claim for Income Support. Despite this, Judge Rowland was able to invoke the precedent of *Baumbast*, coupled with a combination of proportionality and ECHR article 8 considerations, to treat the wife as retaining a right to reside. In his judgment, he said that 'to put financial pressure on a couple to leave the UK because the wife needed temporarily to cease work to care for her husband was not consistent with a 'due regard for family life and dignity'.

Despite such judicial interventions, as Judge Rowland himself noted, the case must be regarded as exceptional. Furthermore, later cases showed how such interventions are not possible where it is evident that the EU has purposefully declined to include claimant groups like pregnant women who have left the labour market and claimed support on the basis that they are a group that *should* have been catered for. In *St Prix*, a French national who had been working in the UK until six months into her pregnancy ceased teaching work. As the author's commentary suggested, it was surprising that art 7 of the Directive does not expressly provide for the retention of 'worker' status by pregnant workers. In principle, this might well have been a comparable situation to that addressed by Judge Rowland in Case R (IS) 4-09. However, two factors were against her. First, there was a clear precedent in the *Dias* case establishing that if a claimant does not come within one of the groups provided for by the retention provisions in art 7(3)(a)-(d) she thereupon ceases to be a 'worker'. The ECJ was clearly not prepared to extend the provisions in order to bring pregnant women within the scope of the provisions enabling them to be treated as suffering from an illness or temporary incapacity. Nor was the court in *St Prix* prepared to treat her as a 'worker' on

²⁰⁶ *R (Maryam Mohamed) v Harrow LBC* [2006] HLR 16; discussed in *Work 5*, p.8.

²⁰⁷ [2010] UKUT 131 (AAC), Judge Ward; [2011] EWCA Civ 806, CA.

maternity leave – something that would have brought her within the scope of Regulation 1612/68 art 7. Second, it closed off any opportunity for invoking discrimination arguments as a basis for retention by pointing out that if there was any discrimination, then it was indirect discrimination rather than direct discrimination. Following the Supreme Court's judgment in *Patmalniece* this could be 'justified'. Finally, it was clear from the *travaux préparatoires* that the EU had chosen to omit pregnant workers from the scope of the retention provisions.

(iii) The 'Family' Dimension

A key element in the EU free movement rights, and in the operation of Directive 2004/38 has been the right of residence conferred on family members of EEA nationals. As discussed in *Works 5* and *6*, the right extends to spouses and other family members who are not themselves EEA nationals. For that reason it is a significant strand of the family migration 'route' in to the UK, and into the EU in general. Ahead of the *Family Welfare and Migration* workshop for lawyers and advisers in April 2009²⁰⁸ at which the author was one of the three main speakers (the others were Judge Mark Rowland of the Upper Tribunal and Richard Drabble QC), the editor of *The Adviser* commissioned the author to write an article on family and family members' rights to reside, access support, and work in the UK. The chosen theme focused on the 'precarious' nature of the family member's right to reside, and therefore eligibility for State welfare support. As the research highlighted, the reasons for that precariousness are clear. As with other beneficiaries of free movement, access to support depends on a right of residence being maintained – and that, in turn, may depend on the EEA spouse retaining his (or her) right to reside. Furthermore, the right to reside depends on the EEA national and his or her family and dependants not becoming 'an unreasonable burden' on the host State's social assistance. Both family and extended family members' residence rights, and therefore rights to benefits generally, depend on residence rights being maintained. If they are lost by the EEA national, they will generally be lost by the family member as well unless she or he can demonstrate eligibility under one of the various, narrowly defined heads of 'retention' in the Directive and the 2006 Regulations. For spouses and family members who are EEA nationals the impact is less serious than it is for family members who are third country nationals. The reason for this is that EEA nationals are able to maintain, as of right, the ability to reside in the host State as part of their wider 'free movement' rights as EU citizens. However, the expectation that they should be economically active or self-sufficient as a condition of eligibility for the host State's benefits will generally

²⁰⁸ 30th April 2009, Ashley Conference Centre, Staffordshire University. This was part of the 'Work & Welfare' bi-annual series of conferences for advisers, was organised in collaboration with Citizens Advice, the Child Poverty Action Group, TUC, Law Centres Federation, Disability Alliance, and other law and advice organisations.

continue to apply). For the third country national, in comparison, the position is more tenuous. If the retention provisions in reg 10 of the 2006 Regulations are not applicable then an alternative basis for retention (or else a new basis for 'residence') is needed. This is essential if the person is to maintain the right to go on living in the host State *and* for the purposes of accessing support.

This consideration necessitated analysis of the alternative ground for retention provided by the *Ibrahim* case²⁰⁹. This was where spouses who are unable to bring themselves within the scope of the retention provisions in Directive 2004/38, for example on the basis of the EEA national's death or departure from the country (or as a result of divorce), may nevertheless be able to assert a *derived* right of residence. This is helped by the provisions of Regulation 1612/68 article 12 which enable children of EEA nationals who are employed, or have been employed, in the host State to be admitted to the State's education system, and then to complete their studies. If the child commenced education while the parent was employed then, as the child's primary carer, that parent derives a right of residence to enable the child to be looked after while she or he completes their education in the host State. At the time that *Work 6* was published the result of the ECJ's decision in *Ibrahim* was still not known. A similar consideration applied to the analysis of *Teixeira*²¹⁰. That was a case raising similar issues. It was considered by the ECJ at the same time as *Ibrahim*, but featured a parent who was an EEA national. A commentary on the result was provided in *Work 8*. Among the intriguing aspects to *Ibrahim* was the point that it was not only possible for a non-EU national to acquire and maintain a derived right of residence on this basis, it was possible to do so without being 'self-sufficient' (paras 58, 59 of the judgment). As the commentary in *Work 10* noted, the parent's right of residence in such circumstances is now reinforced by ECHR article 8 considerations. This was a further factor in ensuring that, as the court observed, 'the integration of the family, once installed, should be on the 'best possible terms', and without being restricted by the requirements for self-sufficiency in art 7 of Directive 2004/38.

EU Citizenship: A 'New Generation' of Derived Residence Rights? As the research for showed, art 20 of the TFEU has been construed in *Zambrano* as precluding national measures such as the removal of TCN parents if this jeopardises the residence of children

²⁰⁹ *Harrow London Borough Council v Ibrahim (Secretary of State for the Home Department Intervening)* [2010] 2 CMLR 51 (Case C-310/08), ECJ (Grand Chamber).

²¹⁰ *Teixeira v Lambeth London Borough Council (Secretary of State for the Home Department Intervening)* (Case C-480/08) [2010] 2 CMLR 50, ECJ (Grand Chamber).

who are EU nationals. It also precludes measures such as the refusal of a work permit to the parent if this means he will have insufficient resources to provide for his family.²¹¹

Divorce, Residence Rights & Access to Support

A further aspect to the difficulties that the right to reside system can pose for some groups is highlighted by the position of spouses and their children in situations where, having divorced, they may nevertheless be ineligible for residence rights – and therefore support from the State welfare system. The position of victims of domestic violence was considered in *Work 6*, with reference to Local Authority Social Services practice and case studies like *Khan*²¹². However, the problems for this particularly vulnerable group do not stop there.

Changes introduced when Directive 2004/38 was enacted undoubtedly improved the position of spouses of EEA nationals, particularly if they were non-EEA nationals. In particular, before those changes most non-EEA spouses did not have the right to remain in the host State following events like separation and divorce, or the departure from the host State of their spouse. Similar problems could face non-EEA spouses following the death of the spouse from whom their right of residence 'derived'. Despite the improvements made by the Directive, and now reflected in the provisions implemented by the 2006 Regulations 2006, primarily in reg 10, there can still be significant problems. In practice, as the research for *Work 7* showed, it may not be possible for a spouse who divorces (or is divorced), for example in the one year 'reception' phase following arrival in the UK, to meet the conditions for retention. Specifically, the scheme looks to such claimants to have resided with the spouse for at least a year. Without eligibility for such retention spouses are liable to become subject to immigration control, and therefore face restrictions on access to welfare support. This includes eligibility for assistance from local authority social services, as highlighted in the *Khan* case referred to. As the research indicated, there are a number of particularly vulnerable groups such as spouses and children affected by unilateral divorce who are adversely affected by the limitations on retention in reg 10 of the 2006 Regulations. This linked to other problems, as the research for *Work 7* showed. These included the UK's delay in implementing Protocol 7, article 5 of the ECHR, a measure that stipulates that 'Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, during marriage and in the event of its dissolution').

²¹¹ *Zambrano v Office National de l'Emploi (Onem)*, note 94. Plainly this adds a 'new dimension' to derived rights to residence and support, as observed in *Work 6*, para H402.4. The court reasoned that such 'refusals' would lead to a situation where those children would have to leave the territory of the Union in order to accompany their parents.

²¹² *Oxfordshire County Council v R (Khan) and Office of the Deputy Prime Minister* [2004] HLR 41, CA.

The UK's ratification and implementation of this provision would undoubtedly help to protect the rights of divorcing parties; and it would also ensure that the welfare of spouses and children on divorce could be brought more effectively into mainstream, court-based divorce proceedings. In this regard, the position would be aligned to that of other EU States including France where recognition of overseas unilateral divorce can be withheld, particularly in cases where the procedural rights of the other spouse have been breached, and there is a therefore an increased risk that the divorced spouse's needs (and those of her children) would have to be met by State welfare provision.²¹³ The problem for the claimants considered in this part of the project was that having been affected by the effects of unilateral divorce, and in ways that meant they were not assisted by welfare provision at a private law level, they faced some insurmountable barriers to State welfare provision. In particular, their inability to retain a right to reside following divorce in the early stages of their marriage, divorcees (as a result of the requirements of reg 10) meant that they were also barred out of support from the State. Support for the post-divorce, reconstituted family at the private level is also currently hampered in recognition cases by the poor provision made in the Matrimonial and Family Proceedings Act 1984, Part III for those affected by divorces abroad and atypical divorce procedures. However, as the discussion in *Work 7* showed, there are a number of positive developments that are starting to assist the position. This has included moves towards the adoption of new arrangements (including 'support' features) as part of a new Islamic Marriage Contract (pp 82 et seq, *Work 7*).

(iv) Proportionality and Discrimination

Proportionality

Although 'proportionality' is a well established principle in European Law, it was not well known in the UK legal system until Lord Diplock put it on the map in 1984. He referred to it in the *CCSU* case²¹⁴ as a new, but still developing, ground of judicial review for contesting the validity of governmental actions. Deployment of the principle enjoyed some success in the *Zalewska* case, as considered in the discussion of WRS restrictions in the *Component 3* research. Two of the five judges in the House of Lords in that case – Lord Neuberger and Baroness Hale - were prepared to allow Eva Zalewska's appeal on the basis that she had not complied with the strict requirements of the scheme was manifestly unfair. This was particularly the case, in their view, given that she had in fact been employed for 12 months in

²¹³ See Gilles Cuniberti (2008) 'The Recognition of Foreign Judgments Lacking Reasons in Europe: Access to Justice, Foreign Court Avoidance and Efficiency', *International & Comparative Law Quarterly* (2008) 57, 25-52.

²¹⁴ *Council for Civil Service Unions (CCSU) v Minister for the Civil Service* [1985] AC 374, House of Lords.

the UK labour market and the scheme was primarily designed to facilitate monitoring of the operation of the labour market in the period after 1st May 2004. To that extent the dissenting minority were plainly ready to accept that the legislative scheme's requirements had largely been complied with by a claimant who had satisfied the primary pre-condition of the 'conditioning' process, which was that she had been economically active throughout most of her residence in Northern Ireland. This was not the view of the majority, however. In a 3:2 judgment the prevailing view, led by Lord Hope, was that under the A8 transitional controls it was legitimate for the UK to derogate from the Treaty of Accession by requiring A8 nationals to work for an authorised employer, and to do so for an uninterrupted period of 12 months before they could be eligible for benefits like Income Support. It was apparent that proportionality, as a requirement of *Community* law, was less significant in the context of *national* law requirements. In any case, argued counsel for the government, if the controls were expected to satisfy proportionality requirements the government's position was that the legislation performed a 'legitimate aim' and was proportionate in the ways that it achieved its aims.

The decision of the House of Lords in *Zalewska* was clearly informed and shaped by decisions of Commissioner Rowland in cases in which claimants had been employed for a year but without satisfying WRS registration rules. This informed the court's acceptance of the government's position and the rationale for the A8 controls²¹⁵. The Lords considered that the WRS requirements were a 'rational' way of imposing pressure on workers to register their employment 'when taking advantage of the rights afforded to them to enter the United Kingdom's labour market', even though they came at a 'cost' to claimants and could result in 'hard cases'. As the author's research showed, later and newer strands of proportionality such as 'regression' have been met with similar responses, and have for the most part been accepted by the courts. This was evident, for example, in *Miskovic* in which 'regression' was put forward but rejected²¹⁶.

The author's research into the operation of proportionality requirements, and their impact on the support regime, continued in a number of other directions. As the *Kaczmarek* case²¹⁷ has shown, the courts have largely rejected the use of proportionality principles as a means of founding a right of residence, even where there are indications that claimants have met social integration criteria. They have done so, essentially, on the basis that periods of time of less than five years residence and employment in the UK fall short of the standard set by the

²¹⁵ See Lord Hope's approval of Judge Rowland's analysis in Cases CIS/3232/2006, CIS/160/2007, CJSA/700/2007, and CIS/775/2007, 12 March 2008 at p.2619 of the WLR judgment.

²¹⁶ *Miskovic v Secretary of State for Work and Pensions* [2011] 2 CMLR 20, CA, discussed in *Work 10*, p286.

²¹⁷ *Kaczmarek v Secretary of State for Work and Pensions* [2009] 2 CMLR 3, CA.

Directive before access to assistance from the benefits system becomes unconditional. As the results of research into this aspect of proportionality showed, the courts are generally against what the lead judgment in *Kaczmarek* described as an 'open textured' approach to construing the legislation, preferring instead the certainty of requiring claimants to satisfy the core requirement of the UK scheme. This is that pending the acquisition of permanent residence they should be economically active, and either remain so or satisfy the other 'routes' to the acquisition of a right to reside, based on 'qualified person' status or self-sufficiency. The analysis in *Work 8* highlighted the point that in *Kaczmarek* the court plainly considered that 'social integration' arguments, based on the claimant's UK residence for three years (first as a student, and then as a worker in a care home), were not sufficient to side-step the UK scheme's requirements and invoke a right of residence based on the Treaty. In rejecting the 'social integration' route to the acquisition of a right to reside the courts have plainly utilised the five year requirement for permanent residence as a 'measure' for gauging 'the parameters of proportionality'. This position, as the discussion of 'discrimination' requirements that follows highlights, was reinforced by the views of the majority of the Supreme Court in *Patmalnece*^{21B}.

The EU Commission's 'Guidance' In the aftermath of *Kaczmarek*, as the author indicated in the commentary in *Work 10*, the EU Commission has clearly had concerns about the processes that Member States follow when withholding or removing a right of residence, and in refusing assistance to groups like unemployed EEA nationals. For that reason, as the research showed, the Commission's 'guidance' since 2009 has been important in setting out procedures for ensuring that decision-making is in accord with what Directive 2004/38 envisages and requires. Among other considerations, this necessitates adequate consideration of the circumstances in which claimants look to the State's social assistance systems for support. Factors for consideration include the duration of benefits support, the 'level of connection' the claimant has with the host community (clearly a reference to the importance of *social* integration criteria rather just *economic* integration as the UK scheme and courts have favoured), and the *amount* of aid given.

Finally, the guidance reminds States that it is only when a claimant has actually received support that a decision should be taken that a person is at risk of becoming a burden on the social assistance system. This has been a factor which, as the author's research has shown, has recently started to be addressed in the UK tribunals. It was discussed when considering First Tier Tribunal cases in *Work 10*.

^{21B} *Patmalnece v Secretary of State for Work and Pensions* [2011] 1 WLR 763, UKSC.

Discrimination

Although the potential for claimants to rely on 'discrimination' arguments has been an increasingly important feature of this area of the UK support regime for several years, and has been highlighted by leading cases like *Collins*²¹⁹ as early as 2003, the scope for invoking such arguments in support of demonstrating a right of residence, and therefore to welfare support, has really only come to the fore as a result of high profile cases like *Patmaliece*. As the author observed in the analysis of the tribunal stages of the case, judicial positions in this area have been quite polarised (as the case history showed in *Zalewska*). At the 1st Tier stage of the appeal, the President of Tribunals took the 'line' that, as the claimant's claim for Pension Credit would have been accepted had she been a UK national, and that it had been refused on the basis that as an EEA national she had not demonstrated acquisition of right to reside (having been economically inactive since her arrival), the case was one of 'nationality'-based discrimination. As such direct discrimination was unlawful, the appeal was allowed. The President thereupon ordered that the benefits should be paid to her. Interestingly, the dissenting Supreme Court judge at the Supreme Court stage of the appeal adopted a similar position. The problem with that approach, as Judge Rowland held when allowing the government's appeal at the Commissioners stage of the appeal, was that if discrimination involved could be characterised as 'indirect' rather than direct it could be 'justified' in law. On that basis he proceeded to explain why the UK's scheme of implementation could, in fact, be justified. Interestingly, and as the research showed, by the time the case got to the Supreme Court the ECJ had decided in *Bressol*²²⁰ that withholding support in a comparable case (involving educational benefits) was, indeed, 'indirect' rather than direct discrimination. This position, as the author's analysis in *Works 9* and *10* discussed, enabled the courts to maintain the stance that in order to acquire and then maintain a right to reside claimants had to be economically active. Clearly, this was something that Galina Patmaliece, in her circumstances, was unable to show.

Whilst acknowledging that the *Patmaliece* decision was correct in terms of the UK system's requirements (although noting the concerns that have been raised by the EU Commission in its notice to the government about the 'discriminatory' nature of aspects of the right to reside system), the author's commentary in *Work 10* made the point that the result seemed 'harsh'. In particular, it did not reflect well on the EU given the negative effect it had on EU's 'elders' - especially at a time when the EU was busily promoting *The European Year for Active Ageing in 2012*. In the bigger picture, the implications of the courts' developing discourse that a

²¹⁹ *Collins v Secretary of State for Work and Pensions* Case C-308/02 [2004] 2 CMLR 8, ECJ.

²²⁰ *Bressol v Gouvernement de la Communauté Française* (C-73/08) [2010] 3 CMLR 20.

failure to meet economic integration requirements is synonymous with a 'failure to integrate'²²¹ is problematic, with some potentially serious longer term implications for groups like EEA nationals in the UK who may have worked for lengthy periods since their arrival.

Less Favourable Treatment? EEA Nationals' Experience in the UK EEA nationals who are residing in the UK undoubtedly experience barriers to access to support that UK nationals in a comparable position do not. A key difference is that a UK national affected by unemployment is generally able to remain on out-of-work benefits for longer than EEA claimants in a comparable position (largely as a result of DWP Decision-Makers Guidance on the operation of the right to reside when claimants have become 'inactive'). The question is whether DMG guidance is compatible with the EU's stance on this? The issue was considered in Work 10, with a focus on the position in the aftermath of EU guidance in 2009. Whilst such guidance is not 'law', as the author emphasised, it does come from an authoritative source, particularly given the Commission's formal role under the Treaties.

The issue was addressed by the author in a paper as one of the three main speakers at the *Family Welfare and Migration* conference in 2009: the other two main speakers were Judge Mark Rowland of the Upper Tribunal and Richard Drabble QC (counsel for the interveners in *Patmalniece* and in earlier test cases on the operation of the right to reside). Interestingly, as became clear in the debate among the two hundred advisers present, the most difficult issues in this area of the support regime are often around *retention* of the right to reside following loss of employment. This was identified as *the* principal 'advice' issue for participants, particularly in the context of larger than usual numbers of clients looking for urgent advice from front-line agencies, law centre solicitors, and other agencies after the recession that started in 2008. The point led the author to try to address this issue more closely in his research, including the work done for *Works 8* and *10*. It was also a catalyst for the organisations supporting the bi-annual conference to establish a research project to look at the operation of migration status barriers on access to welfare support. According to the Child Poverty Action Group, a supporter of the conference for twenty years, this has been an important factor impacting on child poverty among the UK's migrant communities²²². The project has been drawing on the experience of advisers since it started in 2010²²³.

²²¹ This was the thrust of the position adopted by Moses LJ, in particular, at the end of his judgment in the Court of Appeal.

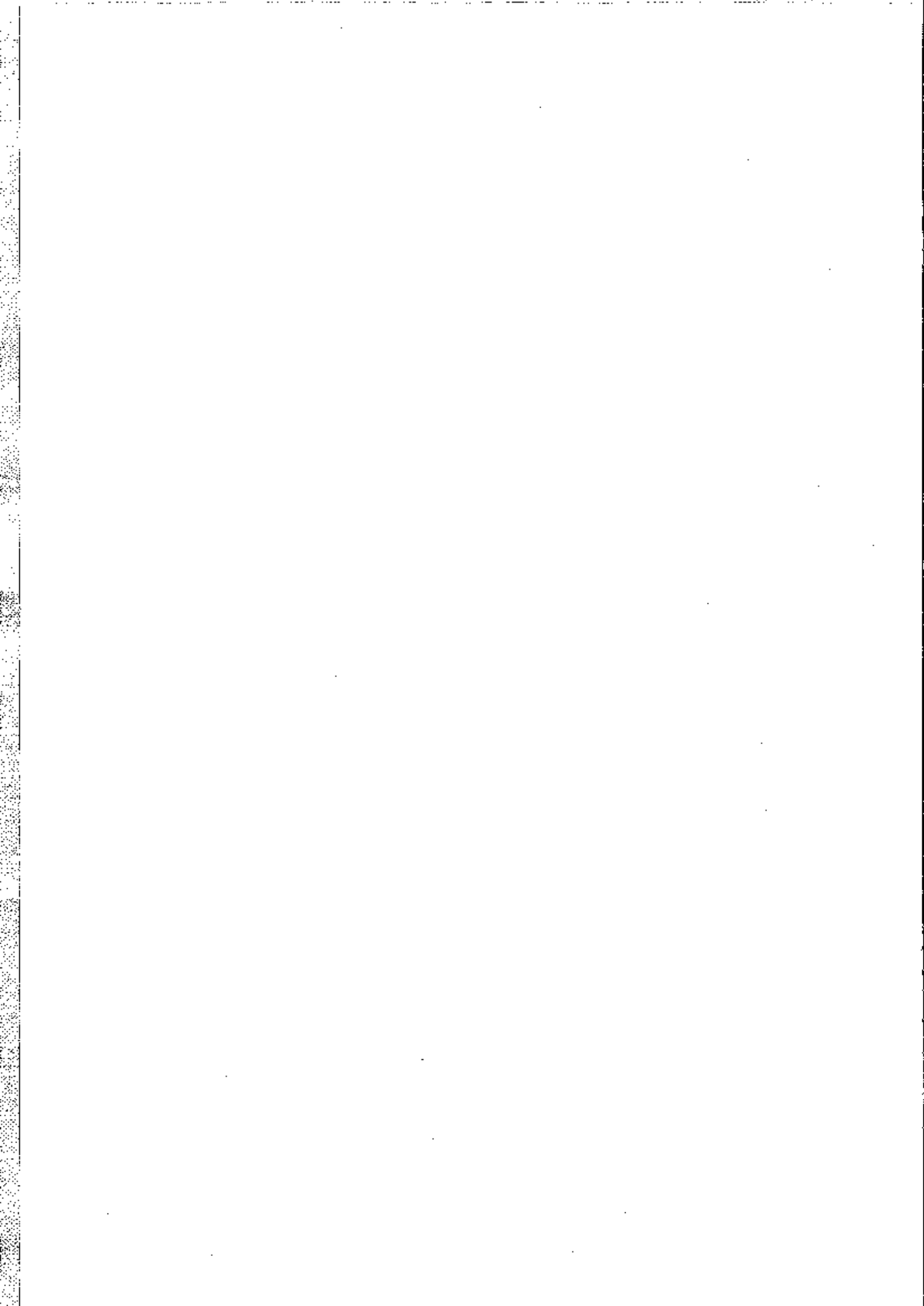
²²² Child Poverty Action Group (2009) *Ending Child Poverty: A Manifesto for Success*. This observed that children of migrant families have been 'actively disadvantaged' by policies that link social protection to migration status, for example through the 'right to reside test' (at p.19). The difficulties that claimants, immigration practitioners, and advice organisations experience in the face of 'self-sufficiency' aspects of the right of residence/RtR system highlighted in the interim findings of the *Barriers to Family Support* Project (2009-2011).

²²³ The project is entitled 'Family Welfare & Migration: Barriers to Support'. It has been examining a number of specific issues focusing on the operation of the 'right to reside' and other barriers to support since mid-2010. It will be reporting its findings at the next 'Work & Welfare' event in June 2012. It is expected that the findings will also be published by *The Adviser* and CPAG Bulletin in 2012.

(v) Component 4: Conclusions

As the research for this component highlighted, the courts have generally been supportive of most key elements in the UK's scheme transposing Directive 2004/38 into national law. In doing so, cases like *Abdirahman* and *Kaczmarek* made it clear early on in the post-2006 Regulations' case-law history that claimants who are unable to pass through the 'qualified person' gateway constructed as part of the 'right to reside' in the UK scheme, or who have become economically inactive having lost their employment, can be barred out of support from benefits like Income Support. In the longer term, EEA residents residing in the UK for protracted periods without taking up employment will suffer other consequences, including inability to access mainstream housing rights as 'restricted persons' for the purposes of homelessness legislation (as shown in *Lekpo-Bozua*, discussed in *Work 10*). The centrepiece of the UK's scheme, strongly supported by the courts, has been that an EEA national can be lawfully 'present' in terms of cross-border immigration controls and yet not have a 'right to reside', and therefore lack 'habitual residence'. The analysis provided by Baroness Hale in her strong judgment in *Patmaliece* was accompanied by a careful analysis of the Treaties, EU secondary law, and case-law like *Trojani*, and could not be clearer on this point. A key strand in the conclusions to this component of the research highlighted how, in endorsing the government's implementation scheme, the Supreme Court this year has also, in effect, endorsed what is an emerging and potentially highly problematic judicial discourse around 'economic integration' – something that is plainly capable of extending the scope of restrictions much more widely than older claimants like Galina Patmaliece.

In the retention context, as the works have shown, there are a number of groups including carers, single parents, and divorced spouses who are unable to satisfy the retention conditions of reg 10 of the 2006 Regulations. There are also older EEA nationals who may find it difficult to meet the conditions for maintaining a right to reside. Plainly there are limits to the courts' ability to assist *all* such groups, for example in the way shown in Case R(IS) 4-09. As the works highlighted, however, the scope for reliance on derived rights (including parents' derived 'residence' based on their children's EU citizenship since *Zambrano*) offers a new dimension in the important area of family-related residence and social rights. Finally, it remains to be seen whether the EU Commission pursues its concerns about the likely incompatibility of aspects of the UK's 'residence' regime with EU requirements. The issue is still important given that the government is committed to deploying restrictions again when new States accede. The next States to do so are Croatia in 2013 and then, possibly, Turkey three years after that. It will be important for policy makers, ministers, and the courts to ensure the scheme is fully compliant with EU requirements by the time it is used again.



Research Conclusions

Clearly, both European systems – the ECHR and EU Law – have had a significant impact on the UK support regime and its development in the research period. In reaching this overall conclusion, the author was able to draw on the responses to the 'questions' posed in the four components of the programme (pp.23, 24). A commentary is provided as follows.

The influence of European Law continued and grew throughout the research period. Indeed, the period after 2003 saw a number of particularly significant events and developmental phases. In the case of the ECHR, deployment by our courts of newly introduced ECHR Convention rights and duties clearly did start to 'make a difference'. The advent of Convention rights after October 2000 enabled court interventions to start regulating the withdrawal of support from groups like asylum claimants, those brought within the scope of 'subject to immigration control' status, and others affected by restrictions in the NIA 2002 and AIT 2004. In particular, it assisted claimants with no other sources of assistance, for example from charities, church groups, or family. As the commentary on the research highlighted, it was not until leading cases like *Adam* and *Clue* that the ECHR's real potential became apparent. Besides 'making a difference', in answer to the other main question for the part of the research, this phase did indeed mark the beginnings of a judicially-constructed safety net of support.

In the case of EU Law, at the start of the research period it was apparent that 'soft law' measures like Directive 2003/9 did not produce any significant effects. In any case, the UK had already adopted most of the required 'reception' measures that the EU expected States to have in place for groups like asylum seekers, displaced groups, and others. Nevertheless, such measures did signal the EU Law system's 'arrival' as a potentially important source of new law and intervention affecting Member States' management of their welfare systems. The point was significant, particularly given that at the start of the research period the EU had acquired new competence in immigration, asylum, and related social welfare matters under TEC IV – a competence that was extended still further after the adoption of the Treaty on the Functioning of the European Union (TFEU) from May 2008.

A key conclusion to the first phase of the author's research was that, despite the EU's growing 'competence' in migration and migration-related welfare matters, Member States like the UK were able to, and did, continue with their domestic programmes. In the UK's case this was important. Effectively, it gave the UK a green light to continue with reforms and restrictions under its national legislation.

As part of the author's critical analysis and evaluation of the impact of EU requirements on the UK's support regime, the next main focus was on the easement given by the EU to Member States admitting A8 and A2 entrants (the UK, Sweden, and Ireland). EU law permitted them to impose transitional controls from 1st May 2004, and regulate the terms on which entrants could access their labour markets and welfare systems. *Component 3* addressed this important phase in the support regime's development. In doing so, it commented on the way that Directive 2004/38 regulated free movement objectives. The directive must undoubtedly be seen as *the* most important part of the EU's growing competence at this time. It is also the most significant source of European law affecting the UK's welfare system since the UK's accession to the EC in 1973. It certainly marked the beginning of a shift in sovereignty away from Member States and in favour of the Union in the area of welfare.

As the research results highlighted, given that free movement is a European project and Member States' schemes of implementation of Directive 2004/38 require close compliance with EU law, the transposition of the directive posed some really difficult challenges. The difficulties involved were clearly exacerbated by the UK government's decision to design the 2006 Regulations in a way that also sought to superimpose the 'right to reside' on the existing habitual residence test. This added to the complexities involved. It also added to the difficulties in ensuring compatibility with EU's legal requirements at all levels: the government, which was ultimately responsible to the EU Commission and the Court of Justice of the EU; the courts, which would be expected to rule on the validity of challenges to adverse decisions, often against a series of complex bench-marks set by both UK and EU law; and, of course, at the decision-making level. Decision makers have carried the responsibility, on a day-to-day basis, for applying the 2006 Regulations correctly. The way in which they do this requires them to observe Public Law requirements in every recognised respect, namely in terms of compliance with legality, rationality, and procedural fairness standards. Arguably, the real challenge is in ensuring that the UK's requirements operate in accordance with European law requirements of 'proportionality'.

Before addressing that area of the research conclusions more closely, it is necessary to consider other conclusions relating to *Components 1* and *2*.

A pervasive theme throughout the research has been the increasingly restrictive nature of the support regime. This prompted the author at the design stages of the project to build into the project (as part of *Component 1*) an examination of the *reasons* for the change process

and 'policy drivers'. It is clear from the research results, including analysis of key sources like the Social Security Advisory Committee (SSAC) report in 2004, ministerial statements and speeches, and judicial perspectives on government policy (for example in leading cases like *Abdirahman* and *Patmalniccece*), that much of the focus was on successive governments' concerns with the perceived risk of 'benefits tourism', increasing numbers of asylum claims, and the scale of inward migration. At the heart of government policy, however, much of the focus has been on the potential risks associated with the arrival of large numbers of new arrivals looking to the UK's welfare systems and public services for support. This was clearly a perceived risk that was no doubt also anticipated by the other two countries admitting A8 and A2 entrants, as the research showed. The difference, though, lay in the respective countries' responses to those concerns. Whereas Sweden clearly had a primary concern with labour market conditions, the UK's first priority was with putting in place *welfare* controls. As the analysis in *Work 4* showed, most UK interests groups, but particularly in the business and financial community, saw every reason *not* to regulate labour market aspects²²⁴.

As the work undertaken for *Component 1* showed, there was some early evidence of the role played by 'nationality' in the development of barriers to support in parts of Britain, notably in Scotland after 1845. Specifically, destitute English and Irish claimants could not only be refused support as a result of provisions in the Poor Law Amendment (Scotland) Act 1845, they could then be removed. England, however, took an entirely different course following the *Inhabitants of Eastbourne* case in 1804. That case was undoubtedly a landmark. As well as providing a corrective to suggestions attributed to Holt CJ in an earlier case that it was permissible to allow foreigners to starve, the case marked the start of the 'law of humanity', and the general principle that put the claims of foreign claimants for Poor Law relief on a par with those of the rest of the population.

Notwithstanding the merits of that approach in the years that followed and before the advent of Convention rights from October 2000, the research undertaken for *Component 2* highlighted the limitations of the law of humanity in its modern context. The key limitations lay in the uncertainty of its scope, and its inability to withstand restrictions embedded in primary legislation.

Component 2 work provided a critical analysis of pre-October 2000 interventions by the courts. Comparisons were then made with the position *after* October 2000 by which time the courts were able to deploy Convention rights and duties. This informed the author's

²²⁴ See, in particular, the discussion in *Work 4* pp.239 et seq.

conclusions about the value of the Convention, and the assessment of its impact on the welfare support regime. The headline point (and conclusion) was that the ECHR has, indeed, 'made a difference'. Whilst the research and the works addressed a *number* of specific facets to Convention rights and duties, including the need for public authorities to be 'Convention-compliant', the pivotal provision was s.6 of the 1998 in the UK's scheme of implementation. This was the key element in the UK's scheme of implementation. This made it clear for appeals and review purposes that a failure by a public authority to act in a way that is compatible with Convention rights was a form of 'illegality' in Public Law terms. This then informed the need for modification of new post-2000 legislation like the Nationality Immigration, and Asylum Act 2002 in a way that ensured that welfare agencies and local authority social services managers could maintain support if this became necessary to avoid a breach of a claimants Convention or EU Law rights). The operation of such new and innovatory approaches provided a significant challenge for the UK courts – and this provided a major part of the research programme's focus.

In reaching the second key conclusion to this phase of the project work, that the research period saw the beginnings of a 'safety-net', the research highlighted the shortcomings in the sources available to the courts *before* 2000. This necessitated close analysis of the courts' constitutional inability to restrain governmental actions and adverse decisions based on primary legislation, coupled with consideration of the limitations on the scope of the law of humanity. Whilst it was helpful that the courts could utilise 'separation of powers' principles to enable them to prevent local authority social services departments using their powers to pre-empt immigration decisions or, in effect, force people out of the country by barring them out of State welfare schemes, such approaches were coming under pressure as new restrictions broadened the powers of such agencies. It was therefore important that Convention rights could redress the balance and start to offer a degree of protection to particularly vulnerable groups affected by the new restrictions. Plainly, in the 'family life' context it was helpful, for example, that article 8 enabled the courts to be increasingly interventionist to assist families faced the risk of by fragmentation and separation. As well as reinforcing the family unity principle, the research highlighted how traditional assumptions in Public Law and Social Welfare law about the inter-play between administrative law discourses on the differences between 'powers' and 'duties', were being rapidly re-shaped.

In the wider context in which the courts were faced with complex issues around article 3 and their response to welfare agencies' withdrawal of support, authoritative cases like *Adam* established more clearly the threshold at which article 3 could prevent support being withdrawn by agencies.

The research went on to identify several important limitations in the scope of the 'net', at least at this early stage of the post-October 2000 development. A key point, as the research for *Works 2 and 3*, and to a lesser extent *8*, showed, was that Convention rights are not an adequate substitute for *substantive* legal rights to support. Furthermore, even where Convention rights are 'engaged', it does not follow that there will be intervention by the court or a legal remedy to the problem. Despite the rhetoric around 'rights' there is clearly still no such thing as an *absolute* right. This is a position akin, perhaps, to the remedies stage at the end of mainstream judicial review proceedings. At that stage remedies are not automatic. They are still in the 'discretion' of the court. This is a feature that pervades a number of areas of Public Law, but which is particularly evident in Community Care Law. It has obviously continued in to the post-HRA period after October 2000. A further limitation is that the Convention cannot be invoked as a means of stipulating the *content* of substantive welfare entitlements. Courts, quite simply, do not have the ability to 'legislate' in that way.

Finally, on ECHR aspects of the research, it is clear that there are a number of intriguing, but still developing, aspects of the operation of human rights at the interface of the ECHR and EU Law systems. For example, in the important and developing area of derived residence rights, in order to bolster its developing stance on citizenship-related rights, the judicial discourses being promoted by CJEU judgments like *Zambrano* have evidently been reinforced by article 8 and family unity requirements. Although it was too early in that case for the court to be able to look to the EU Charter of Fundamental Rights as a further basis for residence (articles 7 and 24 of the Charter being the key provisions in that respect), this limitation did not, in the event, prove to be a problem for the Zambrano family. ECHR article 8 and family unity requirements provided more than sufficient additional support for the court's reasoning and judgment; and this not only reinforced the arguments based on TFEU art 20 considerations, it strengthened the court's conclusions that the family should be able to continue living together in Belgium. It also reinforced the case for requiring the Belgian authorities to grant Mr Zambrano a work permit so that he could work and thereby support his family²²⁵.

Reference has already been made to several aspects of research undertaken as part of *Components 3 and 4*. In this remaining discussion of the programme's conclusions, a number of further comments may be made on specific questions.

²²⁵ *Work 8*, H-402.4.

Once it was clear by the start of 2004 that the EU had decided to permit States to impose transitional controls on A8 and A2 nationals, the UK clearly took full advantage of that facility. Having put controls on access to welfare in place, the subsequent rigour with which decision-makers enforced the requirements, and the courts then defended the government's stance, was clear. 'Hard' cases like *Zalewska* (*Works 6*²²⁶ and *8*²²⁷) - where the claimant had, in fact, been gainfully employed for 12 months in Northern Ireland, but without complying with the strict requirements of the WRS scheme - illustrated the point well. The same conclusion may be drawn from *Miskovic*²²⁸. In that case, neither the decision-makers nor the court were prepared to accept the argument that previous employment, undertaken while the claimant was an asylum claimant, could be aggregated with other, later employment for the purposes of satisfying WRS restrictions. Given the context in which the case arose - one which plainly affected a lot of other existing residents in the UK - the issue was an important one. Again, the clear conclusion from this was that nothing short of a full, verified contribution would suffice in terms of earning the right to support.

As the research for *Components 3* and *4* showed, the UK's main priority in putting 'economic activity' and 'self-sufficiency' requirements to the fore was helped by a number of factors, not least EU Treaty provisions and the 'conditions and limits' that they set, and key provisions of Directive 2004/38 itself (particularly article 7). These provide a measure of legislative authority for such requirements. They also permit Member States *some* latitude in the operation of measures to protect their social assistance schemes (particularly when excluding from eligibility claimants at risk of becoming dependent on such assistance). In this important area of the EU's legislation, the EU Commission has gone further and provided 'guidance' in 2009. This was an attempt to regulate more closely the processes that Member States should follow when refusing or withdrawing a right of residence. This, in turn, has also served to regulate the process by which EEA nationals and their family members can be taken out of eligibility for State welfare support.

The problem was (and still is) that the precise scope of the EU's legislation in this area is often far from clear. Furthermore, it is often difficult to gauge the ambit of proportionality requirements. The work done for *Work 10* highlighted some of the difficulties that this has caused. It is this somewhat grey area that on occasions the UK's arrangements have started to look like they are out of kilter with EU law and the Commission's requirements. This was a key issue highlighted in *Works 5-10* and the conclusion from the research. It was readily

²²⁶ *Miskovic v Secretary of State for Work and Pensions* [2011] 2 CMLR 20, CA; *Work 6*, at p.10.

²²⁷ *Work 8*, at H-402.3.

²²⁸ *Work 8*, H-402.7, and *Work 10*, p.286.

apparent that, in addressing this deficit of understanding, the UK courts have had to dig deep in trying to ensure that the UK system's main features were operating compatibly with the EU's framework. This has been particularly challenging for the UK courts on aspects like the operation of EU proportionality requirements, and the operation of the scheme that confers 'permanent residence' on EEA residents who have been living in the UK but not necessarily 'residing lawfully' for the purposes of Directive 2004/38. This was an issue considered in *Work 10*. As Baroness Hale reminded the court in *Zalawska*, proportionality is itself a European law concept, and a relative newcomer to UK jurisprudence. Not surprisingly, perhaps, this has therefore been a particularly problematic area of implementation for the UK. In 'holding the line' as the work undertaken for *Component 4* described the courts role in upholding the main features of the habitual residence and right to reside requirements, the courts plainly played a pivotal role in resisting challenges to the UK scheme, and in upholding the central features of that scheme. These included, in particular, the general expectation that claimants should be 'economically active' members of the host community, or else be 'self-sufficient'. As key decisions like *Abdirahman*, *Kaczmarek*, and *Patmalnicie* also made clear, the courts regarded the ability of decision-makers to exclude those who were *not* economically active as an approach that was permitted by the EU law system.

As indicated in *Work 10*, and as an important conclusion, it is by no means clear that the UK is currently compliant with every aspect of EU requirements, particularly in the aftermath of EU Commission guidance issued in 2009 on matters like proportionality. Nor have all sections of our judiciary been in agreement with 'discrimination' aspects of the scheme's operation. In particular, Lord Walker in his dissenting Supreme Court judgment in *Patmalnicie* agreed with the other judges in the Supreme Court that the barriers created to economically inactive claimants were discriminatory. Like the other judges in the case at the final stage he accepted that the court was 'bound' by the European Court's decision in *Bressol* that the kind of discrimination involved was *indirect* rather than direct (the finding of the President of Tribunals). However, what he was clearly *not* prepared to accept (and on this point he was at one with the President), was that the discrimination could in law be 'justified'. In this respect, the critics of this area of the UK migrants' support regime have a powerful ally, the EU Commission. The Commission made it clear in its formal notice and 'reasoned opinion' issued to the government that it regards elements of the right to reside scheme as 'discriminatory' – indeed this is apparent just from the title of the notice²²⁹. Unlike the courts, the Commission is concerned with the substantive content and operation of the scheme, and it is not concerned with issues of legal justification. No doubt what it sees, quite

²²⁹ EU Commission Notice IP/10/1418 *Free Movement of Workers: Commission Requests UK to End Discrimination on other Nationals' Right to Reside as Workers* (Brussels: 28th October 2010).

simply, is that if a claimant is not a UK national a series of barriers in the form of the habitual residence and right to reside tests are erected. These have all the appearance of being 'nationality'-based, and therefore unlawful.

It will not have escaped the Commission's notice that an extraordinarily large proportion of claims by EEA nationals for support from the UK's welfare system failed in the period 2004 to 2008 (76% of all claims, on the government's own figures)²³⁰. Furthermore, the fact that the Polish community and organisations with responsibilities for ethnic minorities in Northern Ireland have been making calls for special assistance to help unemployed sections of the community living in Northern Ireland, and affected by the economic downturn after 2008, is also significant. Many of those unemployed claimants will, no doubt, have been affected by restrictions on supporting economically inactive claimants. The efficacy of the system as it is operating will no doubt come under close scrutiny.

Looking ahead, the UK's system of implementing free movement rights will need to continue to remain consistent with the EU's legal framework. It is likely that the Stockholm Programme may result in further legislation that regulates the residence and take up of social rights by third country nationals residing in the Member States, and this will no doubt provide further regulatory mechanisms that affect States' ability to manage their welfare programmes and adjudication processes. The constitutional position in this regard is clear. The EU legal order takes precedence, and if there is incompatibility between the EU legal order and laws operating at a national level, it is the national system that must give way²³¹.

As a further element of the enquiry undertaken for *Component 4*, the author also examined the effect of the UK scheme on EEA nationals' family members, and difficulties around the operation of retained and derived residence rights. How problematic have these been? A key conclusion was that at both EU level and UK national level, whilst the EU legislation improved the position of spouses and family members in the area of 'retention' of residence rights, and therefore access to social rights, there are still a number of groups including former spouses, carers, single parents, divorced spouses finding it difficult to maintain 'residence'. This is plainly the case, as the research for *Works 6-10* showed, in the case of separated and divorced spouses in some contexts. These include spouses affected by unilateral divorce at a time when they are unable to satisfy the conditions in reg 10 of the

²³⁰ *Work 10*, p.292.

²³¹ A fundamental EU law constitutional law principle; *Costa v ENEL* Case 6/64 [1964] ECR 585, ECJ. As the court explained: 'The transfer, by Member States, from their national order, in favour of the Community order of the rights and obligations arising from the Treaty, carries with it a clear limitation of their sovereign right upon which a subsequent unilateral law, incompatible with the aims of the Community, cannot prevail.'

2006 Regulations required for retention of their residence rights. Similarly, other key groups such as carers, single parents finding it difficult to return to work, and older claimants like Galina Patmalniece may be unable to retain a right to reside. They are therefore, as the law stands, barred out of support. In assisting such groups, there are limits to the assistance the courts and tribunals can give, for example in the scope there is for legislative 'lacuna-filling' of the kind illustrated by Judge Rowland's approach in Case R(IS) 4-09. In that particular case the judge was assisted by a combination of *Baumbast* principles and article 8 requirements. As the works highlighted, the scope for reliance on derived rights received *some* assistance in the aftermath of the *Ibrahim* and *Teixeira* judgments. Furthermore, as the author has argued in *Work 8*, the area of parents' derived residence based on their children's EU citizenship since *Zambrano* has offered a 'new dimension' to this important area of the EU's residence and support regime.

Helpful though such judgments have been, they highlight some significant inconsistencies in the way that the retention system is working. It is curious that following a major consolidation of pre-2004 EU directives, despite the enactment of Directive 2004/38 it is still proving necessary for the CJEU to be resorting to measures like Regulation 1612/68 which have been repealed or are largely extant to confer residence and support rights on groups like TCN single parents like Mrs Ibrahim. Furthermore, while Directive 2004/38 plainly envisages that retention normally requires claimants to either be economically active or self-sufficient (as its retention provisions in article 7 make clear): so decisions like *Ibrahim*, welcome though they may be for the groups that can rely on them, appear to be out of kilter with what EU objectives were at the time Directive 2004/38 was enacted. The review being undertaken as part of the Stockholm Programme will no doubt look closely at this.

Contribution to Knowledge

Collectively, the research and the published works supporting this submission have provided an extensive account of the impact of 'Europe' and European Law – specifically the ECHR and EU Law – on the UK support regime for migrants and its development. The work was undertaken in a particularly important phase in the regime's development, a factor that adds the relevance and value of the research. Clearly, this was a phase in which Convention rights started to add to the protection of particularly vulnerable groups. The period also saw major developments in the area of EU Law, and particularly the implementation of Directive 2004/38. In these respects, the research programme's critical analysis added to the body of knowledge in this area of migration-related 'welfare'.

In providing an account of the impact of these key European legal sources, and UK implementation measures, the role of the courts has featured particularly strongly in the author's work and 'contribution'. In providing analyses of the courts' approaches and judicial policy trends, the work has offered new insights into the functions that courts and tribunals perform in the area of immigration and immigration-related welfare support, and the ways in which they do this. Those analyses have, among other things, encompassed the core role of interpretation and application of legislation: in this case, complex welfare legislation that straddles UK, EU, and ECHR primary and secondary sources. The examination provided has generated knowledge and understanding of how that judicial role links to the wider adjudication process, taking in trends in the key areas of proportionality and discrimination requirements – areas which do not currently feature to any great extent in the current literature.

The research reinforced one of the key contentions in this thesis, which is that during this evolutionary phase the courts have gone well beyond their more traditional role of simply interpreting and applying legislation. They have also, at times, become 'legislators'. In this respect, the research has charted the changes that have taken place in the judicial role as part of the 'Europeanisation' of this area of UK Public Law. This has been particularly evident in the analysis by the courts' of new powers since incorporation of the ECHR, and in their treatment of EU treaty and secondary law. In this area of the research programme, the work offer new insights into the relationship between the UK judicial system, the two European Courts, and law-making processes at both European and national levels.

In terms of providing new knowledge and insights into the policy and law at the heart of the UK's developing regime, the research programme engaged with a number of topical and developing areas. These included family aspects of Directive 2004/38 and the UK's 2006 Regulations, the fast-evolving area of retention of residence rights and access by family members and former family members to support when there are difficulties in demonstrating retained residence under mainstream retention provisions. In this regard, the research and commentary on alternative routes to retention, including derived rights and EU citizenship as a new and developing basis for residence and support, have featured strongly in the author's work. A further dimension in the EU law context has included the operation of transitional controls on access to support when new States accede to the EU – an issue that will become increasingly relevant again as the accessions of Turkey's and former Yugoslavian States approach. In this regard, the research and commentary on the operation of controls and restrictions on welfare support by new Accession States' entrants was an important part of the programme, and offers new insights. Member States' ability to impose transitional

controls to suit their own labour market and social protection schemes' particular situation offered an important area for comparative research, and the author's research made comparisons between the UK's approaches and those of the two other admitting States (Sweden and Ireland), and the research added to the body of knowledge on matters like the interface between employment-related 'welfare' and State welfare systems, as well as the role of international regulation of migrants' work and welfare conditions: issues already proving to be relevant as debates on European enlargement and the implications of further cross-border migration gather momentum.

The issues are also relevant to debates about the re-imposition of 'controls', most recently by Spain in 2011, and soon to be followed by other States that are affected by the Euro crisis and worsening economic conditions.

Looking Ahead. The author's research identified a number of 'gaps' in knowledge, including the important area of support for third country nationals (TCNs) who are 'family members' of EEA nationals residing in host States like the UK. Linked to this are important on-going issues concerning retention of residence rights, and the increasingly important role being played by derived residence rights for TCN family and extended family groups. This has informed new priorities for the current round of Stockholm Programme reviews, partly to bring more consistency into the way that some groups are accorded a right of residence, whilst others are not. As the author's research has highlighted, *Ibrahim, Teixeira, McCarthy* and *Zambrano* highlighted some significant problems in this regard. Going forward, the research for this project has provided a useful basis for the author's contribution an EU/ESF-funded project and publication examining the inequalities affecting third country nationals and their families who migrate to the EU²³².

Coherence as a Body of Work

The scheme has provided an effective and coherent framework within which to critically analyse the impact of the two main sources of European Law - the ECHR and EU Law - on the UK's welfare support system for migrants and their families. As a design feature, inclusion at the outset of an analysis of the development of the programme's two most pervasive themes, namely 'presence' and 'residence' requirements, provided a useful foundation for the four 'components' that followed. The provision of a historical perspective, coupled with a critical examination of the factors and policy drivers that have been informing

²³² The research has informed a publication, namely Puttick, K and Carlitz, C (2012) 'Inequalities of Family Members of EU and Non-EU Nationals: Integration, Family Unity and Support in the Post-Lisbon Era' in S Morano-Foadi and M Malena (eds) *Integration of Third Country Nationals in the European Union: The Equality Challenge* (forthcoming, September 2012).

the introduction of restrictions on access to support, also provided a valuable element in the scheme. The conclusions to *Component 1* indicating that EU Law had done little to inhibit or hold back the UK's ability to bring in restrictions provided a valuable back-drop to *Component 2* issues and the analysis of the impact of the ECHR. At this point in the programme, the evidence supporting the conclusions that the incorporation of the Convention and Convention rights into the legal system had 'made a difference', and had also facilitated the construction of a judicially-created 'safety net' for key groups, marked an important point from which to begin the third phase of the programme, *Component 3*. By addressing policy factors and policy-makers' concerns about the need to regulate A8 and A2 inward migration before embarking on an examination of the complex legislative and contextual issues associated with reception conditions for new arrivals, the scheme provided a helpful context in which to address substantive issues relating to the post-2004 regulatory system. This also proved valuable in introducing comparative law and policy perspectives based around the experience of the other two Member States admitting A8 and A2 nationals, Sweden and the Republic of Ireland. The comparisons made, coupled with consideration of UN and international conventions and norms relating to migrants' welfare, added a further useful dimension to the author's critique of the evolving regime.

In the final phase of the project, *Component 4* themes and questions focused on the UK's legislation implementing Directive 2004/38 and free movement measures. In structuring this part of the programme, it was possible to organise the research in a way that focused on particularly important aspects, including the courts' role in implementing the 'right to reside' scheme and developing economic integration requirements.

It is clear that the scheme provided a coherent research framework within which to gain a holistic understanding of the regime's operation and address the research questions that were posed. Having such a framework was important, particularly as this is a complex and fast developing area of Public Law, with particularly difficult issues to address. In the event the scheme proved to be effective in enabling the author to reach informed and reasoned conclusions.

Sources & References

Adler, M (1995) 'The Habitual Residence Test: A Critical Analysis' (1995) 2(4) *Journal of Social Security Law* 179-195

Andor, L (2004) *Hungary on the Road to the European Union: Transition in Blue* New York: Prager

Barak, A (1989) *Judicial Discretion*, New Haven & London: Yale University Press

Barr N (2004) *The Economics of the Welfare State*, Oxford: Oxford University Press, 4th ed

Baubock, R (ed) (1994) *From Aliens to Citizens – Redefining the Status of Immigrants in Europe*, Aldershot: Avebury

BBC (2006) 'Immigration System Unfit: John Reid', BBC News, 23 May 2006

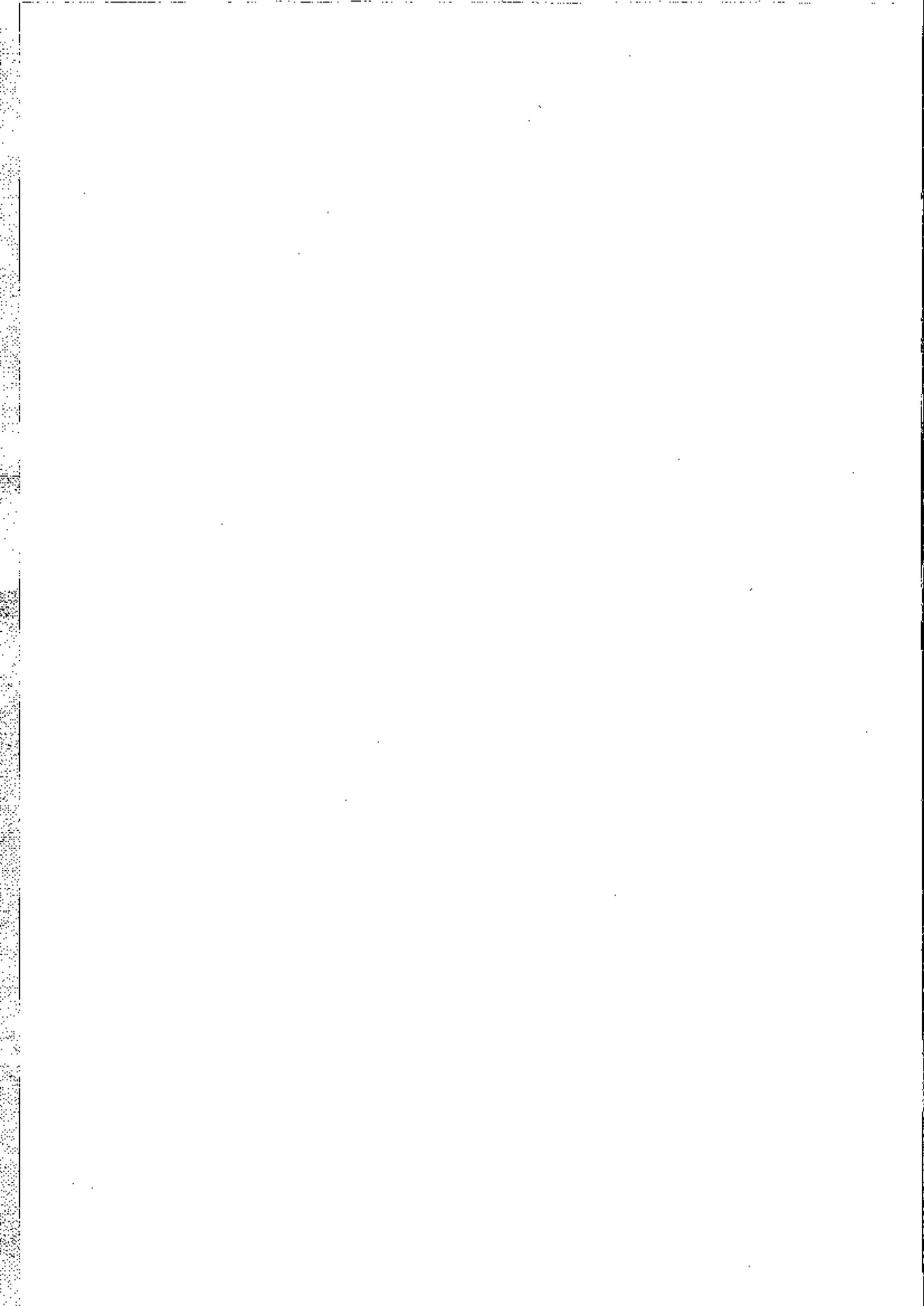
Benefits Agency (1997) *Service Delivery to Customers from Ethnic Minorities* (Department of Health and Social Security/Benefits Agency, 1997)

Bloch, A (2004) 'Labour Market Participation and Conditions of Employment: A Comparison of Minority Ethnic Groups and Refugees in Britain', *Sociological Research Online*, Vol 9, No 2 (31 May 2004) <http://www.socresonline.org.uk/9/2/bloch.html>

Brown, U, Scott, G, Mooney, G, Duncan, B (eds) (2002) *Poverty in Scotland: People, Places and Policies*, London: Child Poverty Action Group/Scottish Poverty Information Unit

Building Britain's Future (2009) London: HM Government, June 2009 Cm 7654

Castles, S, Crawley, H, Loughna, S (2003) *States of Conflict: Causes and Patterns of Forced Migration to the EU and Policy Responses*, London: Institute of Public Policy Research



COF (2008) *Independent Asylum Commission: Review of the UK Asylum System* (Co-Chairs Sir John Waite and Ifath Nawaz): Report & Interim Findings, London: Citizen Organisation Foundation, March 2008

Cohen, S (2001) *Immigration Controls, the Family and the Welfare State*, London & Philadelphia: Jessica Kingsley Publishers

Cohen, S, Humphries, B, Mynott, E (eds) (2002) *From Immigration Controls to Welfare Controls*, London: Routledge

CPAG (2009) *Ending Child Poverty: A Manifesto for Success*, London: Child Poverty Action Group Publications

Cuniberti, C (2008) 'The Recognition of Foreign Judgments Lacking Reasons in Europe: Access to Justice, Foreign Court Avoidance and Efficiency', *International & Comparative Law Quarterly* (2008) 57, 25-52

Dauvergne, C (2004) 'Sovereignty, Migration and the Rule of Law in Global Times', *Modern Law Review* 2004 67(4) 588

Dauvergne, C (2009) *Making People Illegal: What Globalization Means for Migration and Law*, Cambridge: Cambridge University Press

De Búrca, G (ed) (2005) *EU Law and the Welfare State: In Search of Solidarity*, Oxford: Oxford University Press

De Schweinitz, K (1961) *England's Road to Social Security: From the Statute of Laborers 1349 to the Beveridge Report of 1942*, New York: Perpetua

Denham, J (2009) 'Managing the welfare impact of migration during the recession' (Speech to the Policy Network, The British Academy, 1 December 2009)

DJERD (2005) *Planning for Diversity: National Action Plan Against Racism (2005-8)* An Plean Gníomhíocht Naisiunta In Aghaidh An Chiríochais, Dept of Justice, Equality and Reform and Dail Éireann, Republic of Ireland

DSS (1998b) *New Ambitions for Our Country: A New Contract for Welfare*, London: Department of Social Security Stationery Office, Cm 3805

DWP (2011) *Decision-Makers Guide*, London: Department of Work & Pensions

<http://www.dwp.gov.uk/publications/specialist-guides/decision-makers-guide/> Last accessed 21st May 2011

Dyer, C and Wintour, P (2004) 'Woolf Leads Judges' Attacks on Ministers', *The Guardian* 4th March 2004

Dziewiecka-Bokun, L (2000) 'Poverty and the Poor in Central and Eastern Europe' in D. Gordon and P. Townsend (eds) *Breadline Europe – The Measurement of Poverty*, Bristol: Policy Press

Esping-Andersen, G (1990) *The Three Worlds of Welfare Capitalism*, Cambridge: Polity Press

Esping-Andersen, G (ed) (2002) *Why We Need a New Welfare State*, Oxford: Oxford University Press

EU Commission (2001) 'New European Labour Markets, Open to All, with Access for All' Communication 6453/01, submitted to the Stockholm European Council, March 2001

EU Commission (2007) 'The Right of Union Citizens & their Family Members to Move and Reside Freely within the Union: Handbook on Integration for Policy-Makers and Practitioners', Brussels: EU Commission, Directorate-General for Justice, Freedom & Security, May 2007 (2nd ed)

EU Commission (2008) 'Report from the Commission to the European Parliament and the Council on the Application of Directive 2004/38/EC on the Right of Citizens of the Union & their Family Members to Move and Reside Freely within the Territory of the Member States', Brussels 10.12.08 COM (2008) 840 Final

EU Commission (2009) 'Communication from the Commission to the European Parliament and the Council on the Application of Directive 2004/38/EC on the Right of Citizens of the Union & their Family Members to Move and Reside Freely within the Territory of the Member States', Brussels 2.7.09 COM (2009) 313 Final

EU Commission (2010) 'EU Commission Notice IP/10/1418 Free Movement of Workers: Commission Requests UK to End Discrimination on Other Nationals' Right to Reside as Workers', Brussels, 28 October 2010

Ferguson, I (2002) in Brown, U et al (eds) *Poverty in Scotland*, London: CPAG/Scottish Poverty Information Unit

Gainer, B (1972) *The Alien Invasion: The Origins of the Aliens Act of 1905*, London: Heinemann

Ganz, G (1987) *Quasi Legislation*, London: Sweet & Maxwell, 2nd edn

Gilpin, N, Henty, M, Lemos, S, Portes, J, Bullen, C (2006) *The Impact of Free Movement of Workers from Central and Eastern Europe on the UK Labour Market* (Dept of Work and Pensions: Working Paper 29, 2006

Guild, E, Groenendijk, K, Carrera, S (Eds) (2009) *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*

Holdsworth, Sir W (1938) *History of English Law*, London: Methuen/Sweet and Maxwell (Eds. Goodhart A and Hanury H)

Hollen Lees, L (1998) *The Solidarities of Strangers: The English Poor Laws and the People, 1700-1948*, Cambridge: Cambridge University Press

Home Office (1998) *Fairer, Faster and Firmer - A Modern Approach to Immigration and Asylum* London: Home Office. Stationery Office, Cm 4018

Home Office (2002a) *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* London: Home Office, 2002: Cm 5387

Home Office (2002b) *Statement on Section 55 of the Nationality, Immigration and Asylum Act 2002: Court of Appeal Judgment* London: Home Office, Stat 017/2004

Home Office (2004) *The Impact of EU Enlargement on Migration Flows* London: Home Office (On-line Report 25/03, 2004)

Home Office (2008a) *The Path to Citizenship – Next Steps in Reforming the Immigration System* London: Home Office/Border Agency

Home Office/UK Border Agency (2008b) *Accession Monitoring Report (May 2004-September 2008)*, Joint Report by DWP, HM Revenue & Customs, Department of Communities & Local Government

Home Office/UK Border Agency *Family Migration: A Consultation*, London: Home Office/UKBA, 13 July 2011

House of Lords (2002) Select Committee on the European Union *Fifteenth Report (Session 2001-02)*, 26 February 2002

Independent Asylum Commission (IAC) Report (2008) *Review of the UK Asylum System (Co-Chairs Sir John Waite and Ifath Nawaz): Report & Interim Findings*, London: Citizen Organisation Foundation, March 2008

http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/27_03_08asyluminterimfindings.pdf

Kostakopoulou, D, Carrera, S and Jesse, M (2009) 'Doing and Deserving: Competing Frames of Integration in the EU' (ch.9) in Guild, E, Groenendijk, K, Carrera, S (Eds) (2009) *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*

Kostakopoulou, D (2010) 'The Anatomy of Civic Integration', 73(6) *Modern Law Review* 933-958

Lamb, T 'Britain's Appeal to Migrant Workers', *The Guardian*, 5 September 2006

Lynes, T (1972) *Penguin Guide to Supplementary Benefits*, London: Penguin Books, 1st ed

Macdonald, I and Toal, R (2008) *Macdonald's Immigration Law and Practice*, 7th ed (Vol 1), London: LexisNexis

Macdonald, I and Toal, R (2010) *Macdonald's Immigration Law and Practice*, 8th ed (Vol 1), London: LexisNexis

Martinsen, D (2005) 'Social Security Regulation in the EU: The De-Territorialisation of Welfare?', in De Búrca, G (ed) *EU Law and the Welfare State: In Search of Solidarity*, Oxford: Oxford University Press

McVeigh, R and McAfee, C (2009) 'Za Chleberm: The Impact of the Economic Downturn on the Polish Community in Northern Ireland', Belfast: Northern Ireland Council for Ethnic Minorities (NICEM) and the Polish Association, Northern Ireland, October 2009

Menz, G (2006) 'Useful Gästarbeiter, Burdensome Asylum Seekers, and the Second Wave of Welfare Retrenchment: Exploring the Nexus between Migration and the Welfare State' in Parsons, C and Smeeding, T (eds) *Immigration & the Transformation of Europe*, Cambridge: Cambridge University Press, 2006

Migration Policy Institute (2009) *Migration and the Global Recession*, Washington: Migration Policy Institute, September 2009

Minderhoud, P (2009) 'Access to Social Assistance and Directive 2004/38', ch.12 in Guild, E, Groenendijk, K, Carrera, S (Eds) *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Farnham: Ashgate

Minderhoud, P (2011) 'Directive 2004/38 and Access to Social Assistance Benefits', *Journal of Social Security Law* (2003) 18(4) 153-166

NACAB (1996) *Failing the Test: CAB Clients' Experience of the Habitual Residence Test in Social Security* (Evidence Report), London: National Association of Citizens' Advice Bureaux & Janet Albesson

National Federation of Claimants Unions (1977) *Claimants Handbook*, Birmingham: NFCU/Dame Colet House and ELCU

Ohmae, K (1996) *The End of the Nation State: The Rise of Regional Economies*, London: Harper Collins, 1996

Pannick, D (2005) 'A Century Ago Immigration Control was an Alien Concept - How it has Changed', London: *The Times*, 28 June 2005

Painter, R and Puttick, K (2004) *Employment Rights*, London: Pluto Books, 2004 3rd edn

Peers, S (2011) 'Legislative update EU immigration and asylum law 2010: extension of long-term residence rights and amending the law on trafficking in human beings', *European Journal of Migration Law*, 13(2) 201-218

Portes, J and French, S (2005) *The Impact of Free Movement of Workers from Central & Eastern Europe on the UK Labour Market: Early Evidence* (Department of Work and Pensions: Working Paper 18, 2005)

Prebble, J (1963) *The Highland Clearances*, London: Martin Secker & Warburg

Puttick, K (1988) 'Ministers Hands on the Controls', *The Guardian* 24th October 1988

Puttick, K (1995) 'Welfare Benefits', Birmingham: CLT/EMIS, 1st ed

Puttick, K (1999) 'Welfare Benefits', EMIS/XPL Professional Publishing, 5th ed

Puttick, K (2001) 'Health, Social Services, and 'Inequalities': 'Modernising' Welfare', *Welfare Benefits: Law & Practice ('WB')* 8(6), 29-35

Puttick, K (2001) 'Community Care Services, Mental Health, and Re-Housing Rights - The Limits of Judicial Review', *WB* 2001, 8(6), 13-15

Puttick, K (2006) *Welfare Benefits: Law & Practice* EMIS/XPL Professional Publishing, 9th ed

Puttick, K (2004) 'Social Security & Community Care' in Burton, Sir M (ed) *Civil Appeals* XPL Professional Publishing (2nd ed, Nova Publishing 2012, forthcoming April 2012)

Puttick, K (2004) 'Social Security & Community Care' in *Civil Appeals: Family & Social Welfare*: co-authored with HHJ Sir Michael Burton; HHJ Isobel Plumstead (Family); Lisa Giovanetti and Ashley Underwood QC (Immigration); Zachary Bredemear (Housing), XPL Professional Publishing

Puttick, K (2004) 'Asylum Support and Limbuela: An End (Finally) to Section 55?', *Journal of Immigration, Asylum & Nationality Law* 2004, 18(3), 186-196 ('Work 2')

Puttick, K (2004) 'Towards a Just European Welfare System for Migrants? EU Measures and 'Minimum Standards in Title IV (Arts 61-63) & States' Use (and Abuse) of Welfare and Employment Restrictions', Conference Paper at the WG Hart Legal Workshop *The Challenge of Migration to Legal Systems*, Institute of Advanced Legal Studies, University of London 29 June-1 July 2004

Puttick, K (2005) 'Towards a Just European Welfare System for Migrants?' in Shah, P (ed) *The Challenge of Asylum to Legal Systems*, London: Cavendish Routledge ('Work 1')

Puttick, K (2005) 'Strangers at the Welfare Gate: Asylum Seekers, "Welfare" and Convention Rights after Adam', *Journal of Immigration, Asylum and Nationality Law*, 19(4), 214-234 ('Work 3')

Puttick, K (2006) 'Welcoming the New Arrivals? Reception, Integration and Employment of A8, Bulgarian, and Romanian Migrants', *Journal of Immigration, Asylum & Nationality Law*, 20(4), 238-254 ('Work 4')

Puttick, K (2006) 'Social Security, Tax Credits & Child Support' in Woelke, A *Civil Partnership*, London: Law Society Publishing

Puttick, K (2006-2011) 'State Benefits' in Fotheringham, J (ed) 'Butterworths Family Law & Scottish Family Law Service' (Loose-leaf, with supplements), London: Lexis-Nexis ('Work 8')

Puttick, K (2008) 'Welfare Benefits and Tax Credits: Law & Practice', Welwyn Garden City: XPL Publishing, 9th ed

Puttick, K (2007) 'Kola: Asylum Claimants' Benefits', *Wel & Fam L & P* 2007, 14(4), 12-14

Puttick, K (2008) 'Migrants and 'Earned Benefits': A Something-for-Something Deal?', *Wel & Fam L & P* 2008, 15(2), 45-48

Puttick, K (2008) 'Housing and Welfare Support Post-Separation and Divorce: Non-UK or EU Single Parents and the Right to Reside', *Wel & Fam L & P* 2008 Vol 15(3), 24-31

Puttick, K (2008) 'Recognition of Overseas Unilateral Divorce after K v K: The Implications for Divorced Spouses' and Child Dependants' Financial Support, State Welfare and Public Policy', *Wel & Fam L & P* 2008 15(3), 32-108 ('Work 7')

Puttick, K (2008) 'Precarious Welfare: Access to Benefits and Support by EEA Nationals Residing in the UK', *The Adviser* 130, 6-10 ('Work 5')

Puttick, K (2009) 'Precarious Welfare: Family & Extended Family Members' "Right to Reside", Support, and Work', *The Adviser* 2009 131 (Jan/Feb), 9-16 ('Work 6')

Puttick K (2009) 'Immigration and the Transformation of Europe', *Journal of Immigration, Asylum & Nationality Law*, 23(3), 309-314

Puttick K (2009) 'Reconciling Migrants' Well-being with the Public Interest: Welfare State, Firms & Citizenship in Transition', *Journal of Immigration, Asylum & Nationality Law*, 23(4), 393-396

Puttick, K and Cumino, C (2009) 'Child Poverty in the West Midlands', *European Union/West Midlands Regional Assembly OPEN Seminar Paper*, Birmingham 1st Oct 2009

Puttick, K (2010) 'Europe's New Europeans: Family Migration, Reception and Integration after Lisbon', *Speaker's Paper*, *Conference After Lisbon: The Future of European Law and Policy* EU Jean Monnet European Law & Policy in Context Conference, Birmingham University Institute of European Law, Birmingham University, 23-25th June 2010

Puttick, K (2010) 'Third Country Nationals' Family/Extended Family Members in EU & Host States' Evolving Support Regimes', *Paper for the EU/European Science Foundation Workshop In/Equality for Third Country Nationals: Implementation and Effects of EU Directives on Migration and Asylum*, 28th-30th June 2010, Oxford: Headington Hall

Puttick, K (2010) 'Can She Stay, or Must She Go? Spouses' & Family Members' Retained and 'Derived' Residence rights after Ibrahim and Teixeira', *Conference Paper*, *Society of Legal Scholars Annual Conference*, Southampton University, 14th September 2010

Puttick, K, Lillard M, and Elhassani, I (2006) 'La Dignité des Étrangers? La Réglementation du Contrat d'Emploi de Travailleurs Migrants et les Droits d'Emploi et de Protection Sociale – Une Perspective de Trois Mondes aux Convention et Normes Internationaux de L'Organisation Internationale du Travail', *XVIII World Congress*, *International Society for Labour & Social Security Law*, Paris, September 2006

Puttick, K (2011) 'Discrimination, 'Integration', and the Right to Reside after Patmaliece', *The Adviser* 145, 8-13 ('Work 9')

Puttick, K (2011) 'Paying their Way? Contesting 'Residence', Self-Sufficiency, and Economic Inactivity Barriers to EEA Nationals' Social Benefits: Proportionality and Discrimination', *Journal of Immigration, Asylum & Nationality Law*, 25(3), 280-292 ('Work 10')

Puttick, K (2012) '21st Century Welfare and the Wage-Work-Welfare Bargain', *ILJ Vol 41*, No.1 122

K. Puttick (2012) '21st Century Welfare': Reconstructing the Wage-Work-Welfare Bargain', *ILJ Vol 41(2)* (forthcoming May 2012)

Puttick, K and Carlitz, C (2012) 'Inequalities of Family Members of EU and Non-EU Nationals: Integration, Family Unity and Support in the Post-Lisbon Era' in S Morano-Foadi and M Malena (eds) *Integration of Third Country Nationals in the European Union: The Equality Challenge* (forthcoming, September 2012)

Puttick, K (2012) 'Social Security and Community Care' in Sir M. Burton (ed) *Civil Appeals* London: Nova (forthcoming)

Reid, Lord (1972) 'The Judge as Law Maker', *Journal of Society of Public Teachers of Law*

Rose, M (1971) *The English Poor Law 1780-1930*, New York: Barnes and Noble

Sahlins, M (2004) *Stone Age Economics*, London: Routledge, 2nd ed

Sedley, S Sir (2003) 'Emergency Support for Asylum Seekers': Address to Annual Legal Action Group Annual Conference London: Legal Action Group, 2003

Shah, R (2003) 'A Wrong Righted: Full Status for Britain's 'Other' Citizens', *Journal of Immigration, Asylum and Nationality Law* (2003) 17(1)

Slack, P (1988) *Poverty and Policy in Tudor and Stuart England*, Harlow: Longman

SSAC (2004) 'Social Security (Habitual Residence) Amendment Regulations 2004: Report by the Social Security Advisory Committee and Statement by the Secretary of State for Work and Pensions', London: The Stationery Office, April 2004 (Cm 6181)

Titmuss, R (1971) 'Welfare "Rights", Law and Discretion', *Political Quarterly*, 1971 (April) 113

TUC (2008) *Hard Work, Hidden Lives: The Full Report of the Commission on Vulnerable Employment*, London: Trades Union Congress
http://www.vulnerableworkers.org.uk/files/CoVE_full_report.pdf

Vladychenko, A (ed) (2008) *Reconciling Migrants' Well-being with the Public Interest: Welfare State, Firms & Citizenship in Transition* (Strasbourg: Council of Europe)

Walzer, M (1983) *Spheres of Justice: A Defense of Pluralism and Equality*, Oxford and New York: Martin Robertson/Basic Books

Wayne, N (2003) *Race Inequality in the Benefits System* (Disability Alliance, 2003)

Weiss, A (2010) 'Unqualified Persons: The Lawfulness of Expelling Homeless EEA Nationals from the UK', *Journal of Immigration, Asylum and Nationality Law*, 24(3) 246-256.

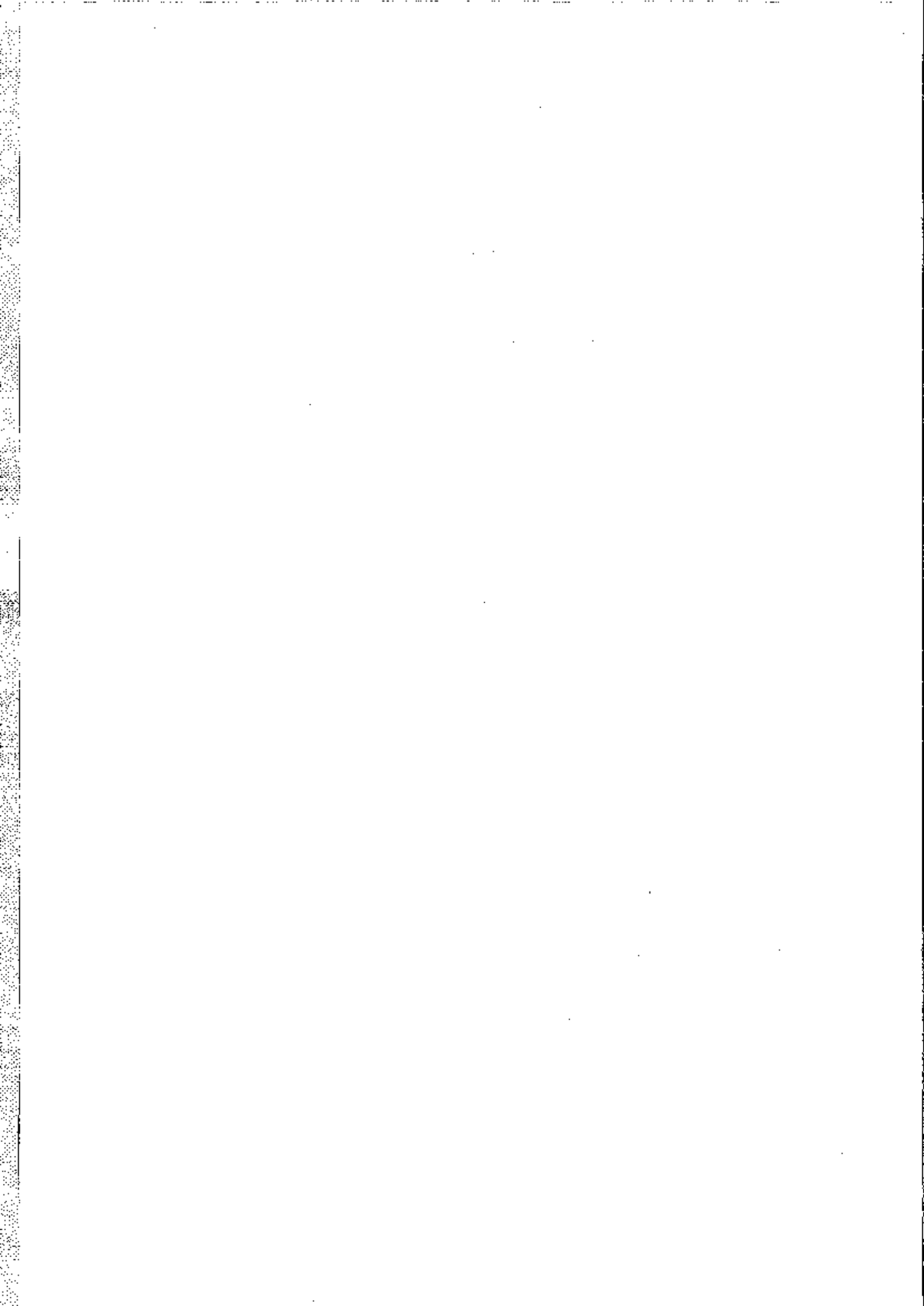
Wikeley, N and Ogus, A (2005) Wikeley, Ogus and Barendt's *The Law of Social Security*, 5th ed, London: Butterworths/Lexis-Nexis Publishers

Willman, S, Knafler, S, Pierce S (2004) *Support for Asylum Seekers*, London: Legal Action Group

Willman, S (2001) 'Who is Responsible for Supporting Asylum-Seekers?', *Welfare Benefits: Law & Practice (WB)* 2001, 8(5), 22

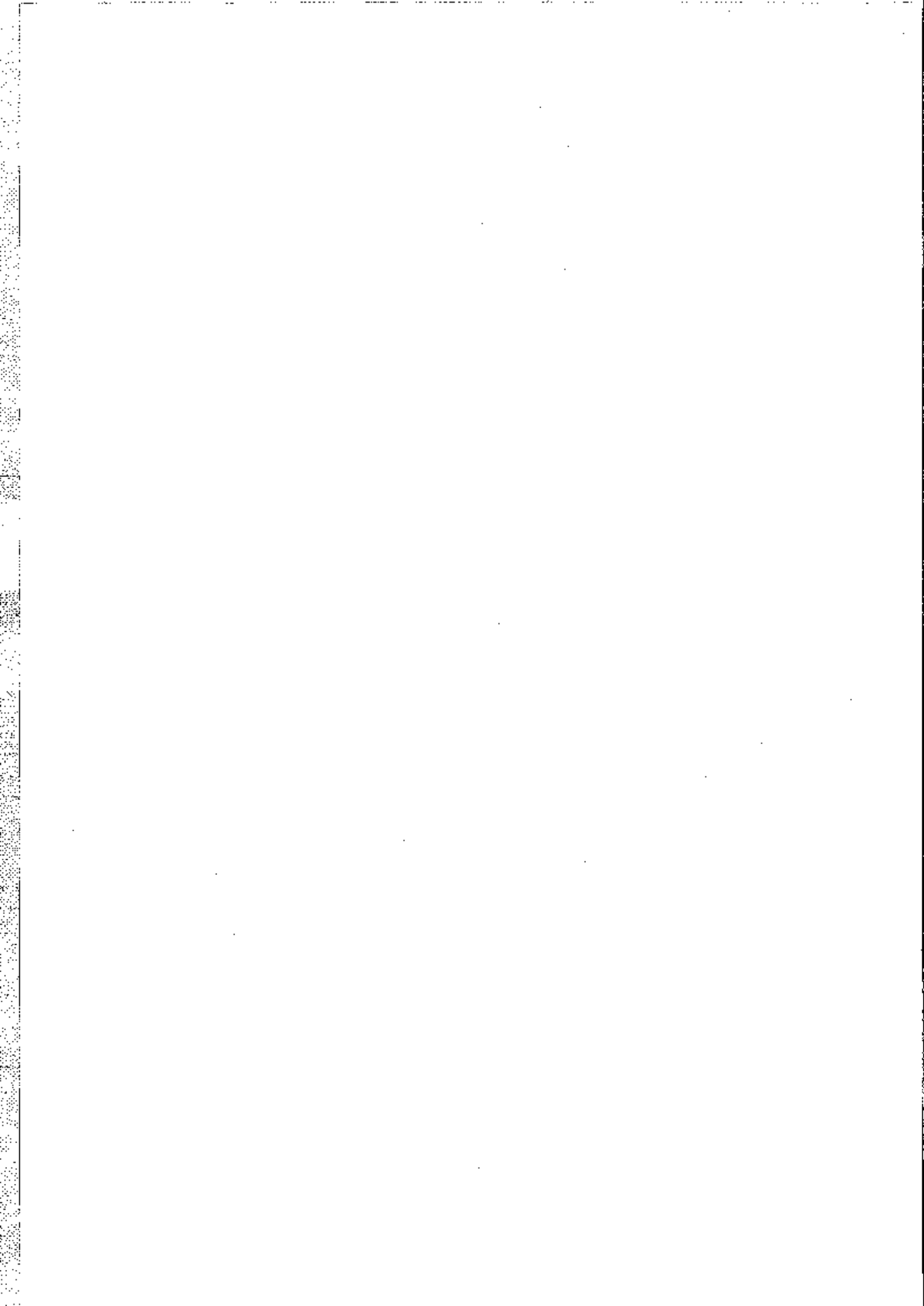
APPENDIX 1

Co-Authors/Managers' Statements



Dr Prakash Shah

Re. K. Puttick 'Towards a Just European Welfare System for Migrants?' in Shah, P (ed) *The Challenge of Asylum to Legal Systems*, London: Cavendish Routledge, 2005 (Work 1)



The Challenge of Asylum to Legal Systems: Keith Puttick's Input

This note describes this publication, and Keith Puttick's input.

The Challenge of Asylum to Legal Systems (Cavendish Publishing, 2005: ISBN -10: 1-85941-981-X) was the product of a series of papers delivered at the WG Hart Legal Workshop held from 30th June to 1st July 2004 at London University's Institute of Advanced Legal Studies. This was convened jointly by me and Prof Werner Menski of the School of Oriental and African Studies, and it was on the theme of *The Challenge of Migration to Legal Systems*. It was the first time that the Hart conference series had featured Immigration law and Policy to any degree. The book was based on some of the papers given.

The workshop had as its main focus the issue of asylum for refugees. A parallel volume concerned other migration and diaspora-related issues. Several events had combined to place migration issues near the top of the political and legal agendas in many countries, especially so-called Euro-American countries. The EU had just expanded in May 2004 to include 10 new Member States, and one of the critical issues of contention was the 'freedom of movement' that the new EU citizens would enjoy; and the EU was engaged in reformulating its migration *acquis*. Above all, though, was the huge debate and ensuing legal changes that had followed the long-term increase in the flow of asylum seekers in Europe, North America, and Australia in the previous 20 or so years.

Keith's paper was on Day 1 of the workshop. The book consists of eleven chapters. The chapter of the book he wrote (chapter 5) was based on his paper, and is entitled 'Towards a Just European Welfare System for Migrants?' It provides a critique of approaches taken by EU States to welfare provision for migrants, in particular by EC Directive 2003/9. After a discussion of measures taken under the EU's Title IV to the Treaty Establishing the European Community (TEC), and art 63 (authorising measures to put in place minimum reception standards for asylum claimants), he notes that this provided the Community with the opportunity to put in place a solution to one of the EU's 'most serious and intractable problems: the need for a uniform, EU-wide system of support for asylum claimants'. In general, his commentary highlights the shortcomings in the provisions put in place. Among other things, he argues that there are still some significant areas of the asylum support system that remain unregulated by EC Law. This has given considerable scope for Member States to act independently and in some cases restrictively, and in ways that are likely to inhibit asylum applications. It also leads to inconsistencies in terms of treatment and the way in which reception is managed across the Union – an issue he also discusses by reference to EU and UK legislative and case-law developments.

He considers, as well, the wide discretion given to Member States in relation to the provision of access to their labour markets (including 'conditioning' aspects), developing themes on which he has published elsewhere, including texts and articles on employment rights and welfare-related aspects of migrants' employment conditions (aspects of immigration in which I know he has well-developed interests). He also comments critically in chapter 5 on the role being played by States like the UK in using the withdrawal of welfare and support from asylum claimants and dependants as what has become, in effect, a 'removal' measure.

Other contributing authors, besides Keith and me, were: Sarah Craig (Stirling University); Maria Fletcher (University of Glasgow); Prof. Colin Harvey (Queen's University, Belfast); Prof Steve Peers (Essex University); Catherine Phuoung (Newcastle University); Valsamis Mitsilegas (Legal Adviser to the House of Lords European Union Committee, and now at

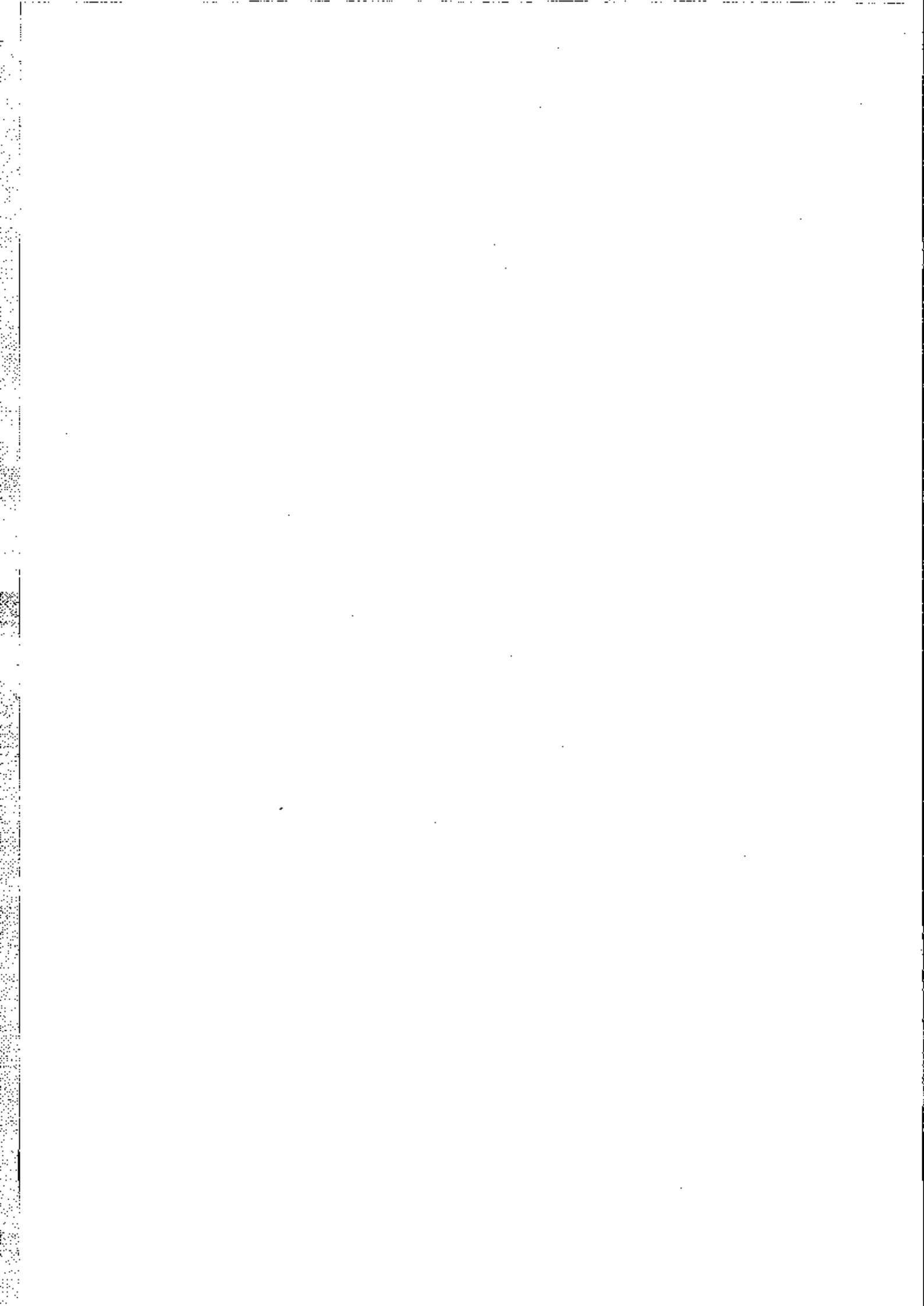
Queen Mary, London); Dallal Stevens (Warwick University); Robert Thomas (University of Manchester); Ernst Wilhelm (Australian National University); Dan Willsher (City University, London); Roxana Rycroft.

Keith provided a valuable input into the conference and the book. As the lead author and editor of the book I would rate his contribution very highly.

Dr Prakash Shah
Department of Law
Queen Mary College, London

Mr John Fotheringham

Re. K. Puttick 'State Benefits' in J. Fotheringham (ed)
Butterworths *Family Law* and Scottish Family Law Service
London: Lexis-Nexis, 2011 (Work 8)



**Re: Butterworths Scottish Family Law & Service (SFLS) & Support for Keith
Puttick's Application**

Butterworths Family Law Service/SFLS (ISBN/ISSN 9780406998811; Publishers: Lexis-Nexis) is a Family Law publication in loose-leaf format. It is produced by a team of authors under the leadership of the editor, John Fotheringham.

It provides a single source of reference to all aspects of the law as it affects married and unmarried partners and their children, concentrating on key issues for practitioners advising on Family Law, and related areas such as social security and taxation. The primary focus is on marriage breakdown, the care of children, distribution of assets, and associated problems with taxation, benefits, tax credits. Its coverage relating to children includes substantial sections on inter alia, adoption, children's hearings and child support. The law and practice of Family Law continue to develop at such a pace that only a looseleaf work like the SFLS can succeed in keeping practitioners up to date. It also allows for sections to be expanded and for new sections to be added as necessitated by changes in the law. Butterworths Scottish Family Law Service is updated at least twice a year, enabling subscribers to keep abreast of all developments in the law.

The readership is, primarily, practitioners and advisers, but the work is also widely read by other user groups including academics. The contributing authors and section editors are specialists in their particular fields, and keep developments in their particular area of responsibility under review. They will research changes in the law, and produce material for inclusion in new issues. In the case of Social Security, the section is dealt with by Keith Puttick, Solicitor Advocate and Principal Lecturer in Law at Staffordshire University. Keith's remit, when appointed by the publishers, was to contribute material to the publication and update it as necessary. Recent aspects of the section on which Keith has worked have included: material on the Welfare Reform Act 2007; the Employment & Support Allowance (that last year replaced Incapacity Benefit and Income Support as it was claimed by disabled and incapacitated claimants); changes to the 'right to reside', a major gateway to social security benefits, linking to issues of residence and migration status; and reforms to lone parent's support (a key group for the purposes of this publication).

Keith's input to the publication is as one of the contributing authors and section editors. Specifically, he is responsible for Section H (State Benefits); and the scope of this is readily apparent from the Contents pages of SFLS.

I fully endorse Keith's application for a doctorate based on his contributions to SFLS. The standard of his contributions has been well up to that standard.

I trust that assists.

John Fotheringham
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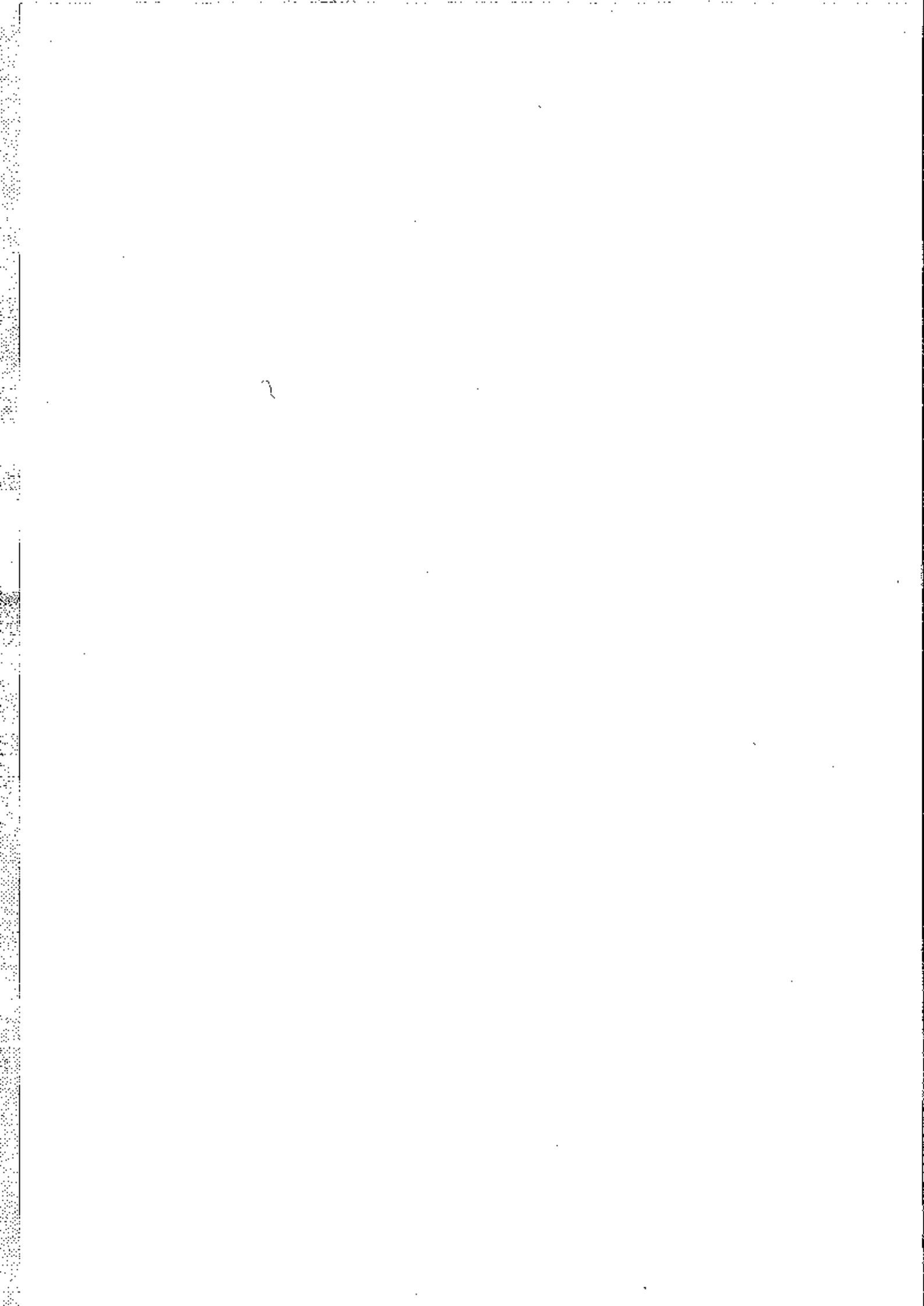
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APPENDIX 2

Declaration & Statement



DECLARATION & STATEMENT

Candidate

Keith A. Puttick

Research Programme/Thesis Title

'Welcoming the New Arrivals? A Critical Analysis of the Impact of 'Europe' on the UK's Welfare Support Regime for Migrants and their Family Members'

Declaration

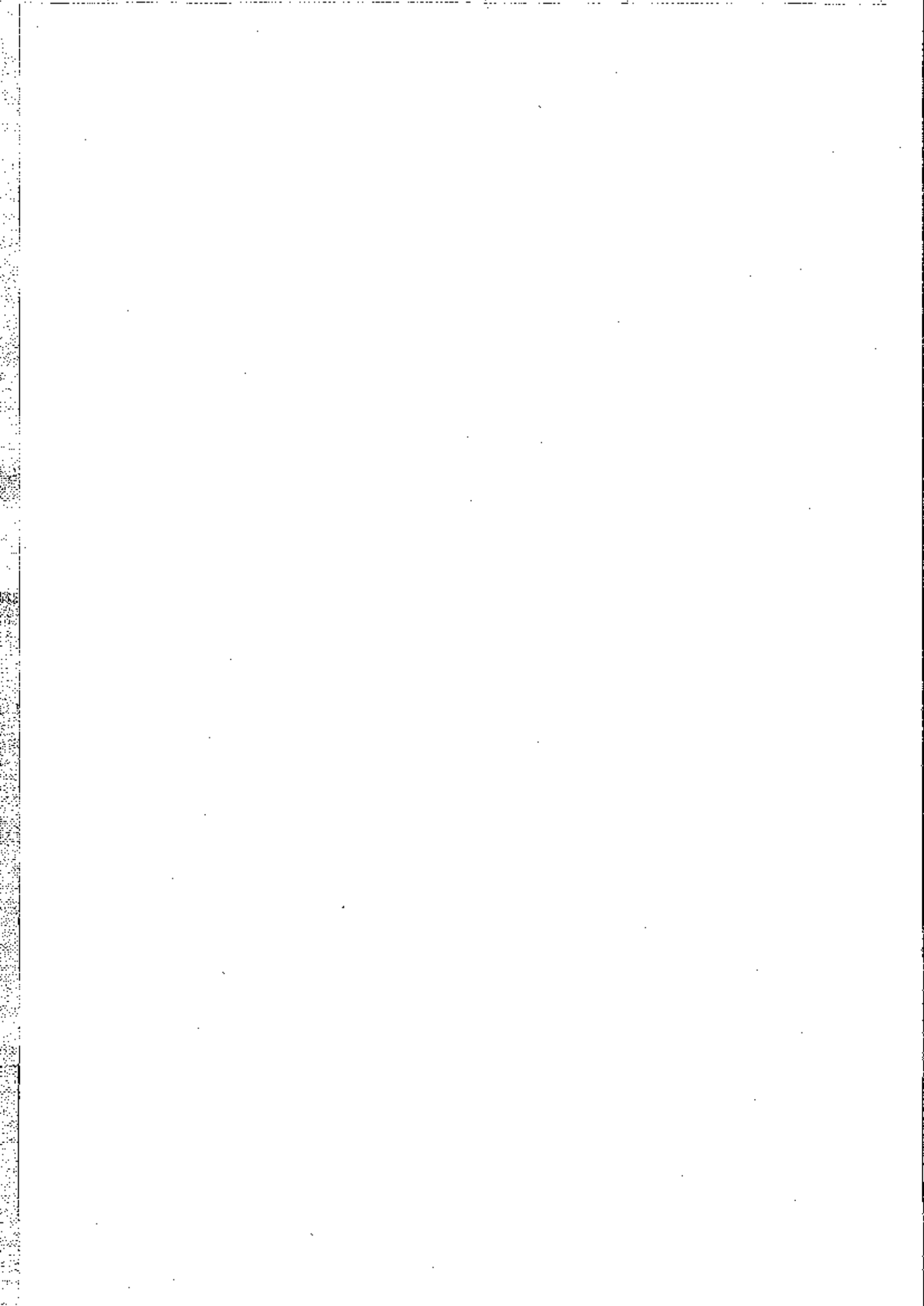
I declare that, while registered as a candidate for a Research Degree, I have not been a registered candidate or enrolled student for another award. I have not submitted material which has been, or is being submitted, in respect of another research degree at this or any other university.

Statement

I confirm that the thesis submitted is the outcome of work that I have undertaken during my programme of study and is all my own work. The research which I have undertaken and which has contributed to the published works was undertaken while a lecturer at Staffordshire University or at my home.

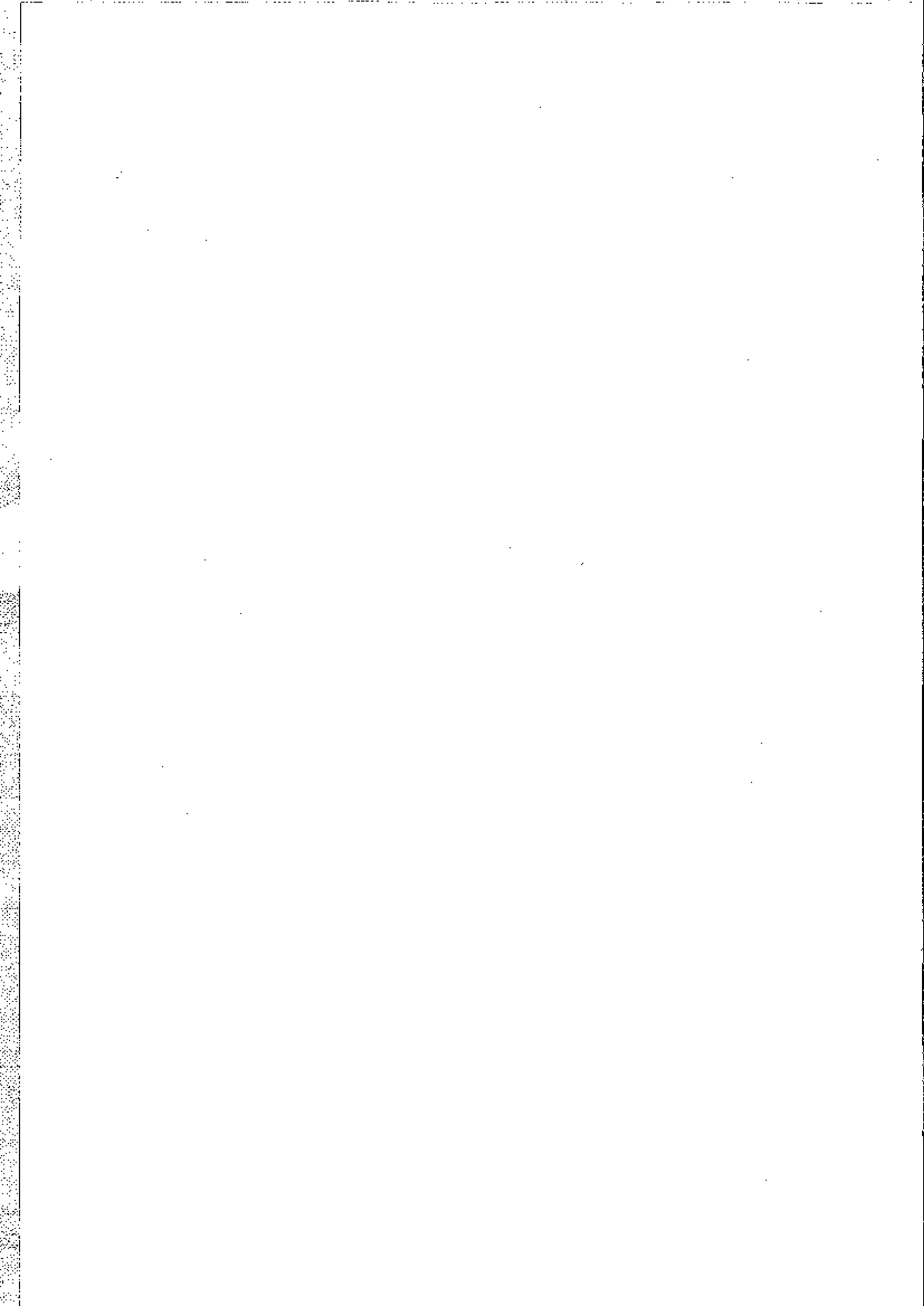
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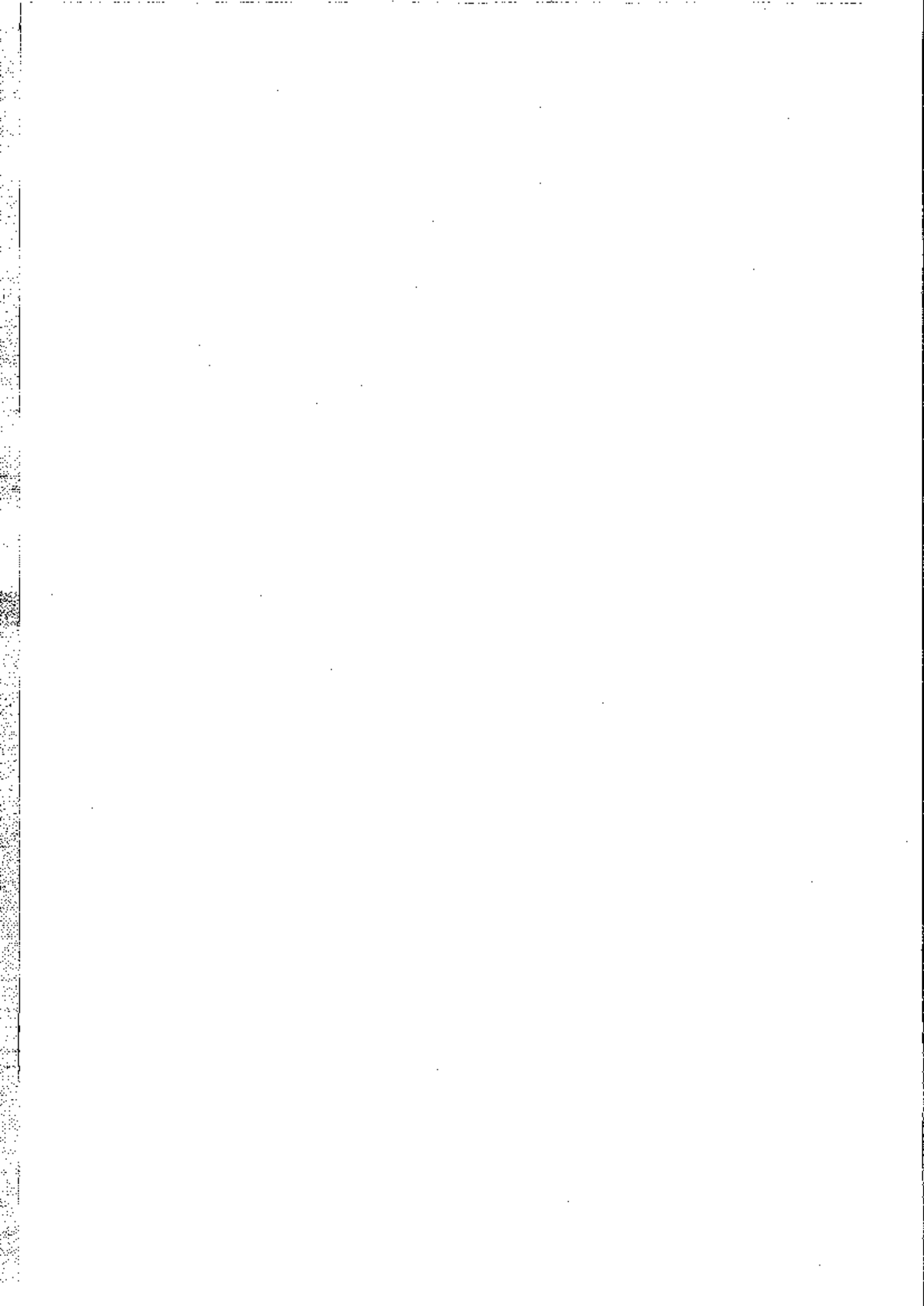
APPENDIX 3

Author's Published Works 1-10

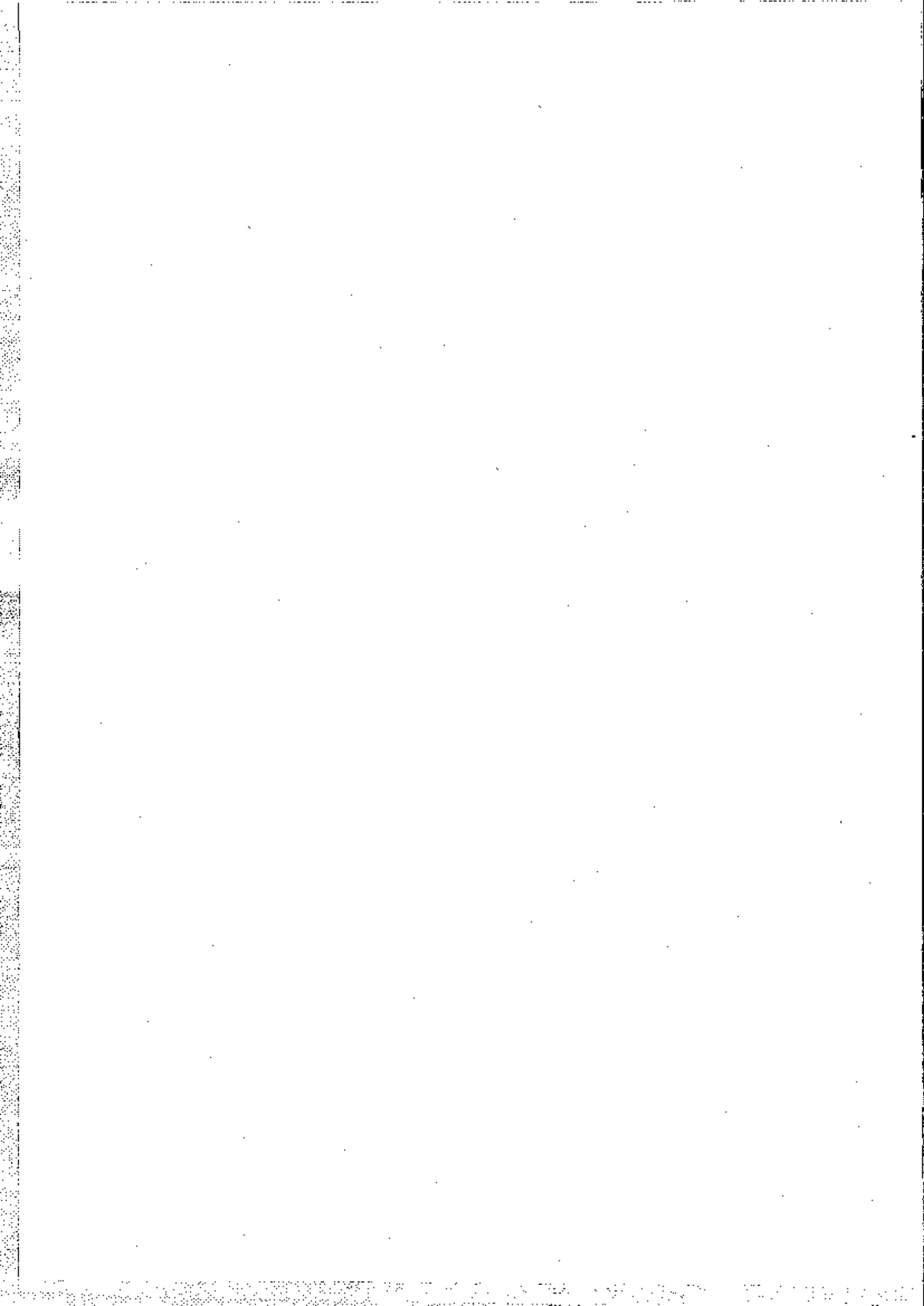


Author's Published Works 1-10

1. K. Puttick 'Towards a Just European Welfare System for Migrants?' in Shah, P (ed) *The Challenge of Asylum to Legal Systems*, London: Cavendish Routledge, 2005 ('Work 1')
2. K. Puttick 'Asylum Support and Limbuela: An End (Finally) to Section 55?', (2004) *Journal of Immigration, Asylum & Nationality Law* 18(3), 186-196 ('Work 2')
3. K. Puttick 'Strangers at the Welfare Gate: Asylum Seekers, 'Welfare' and Convention Rights after Adam', (2005) *Journal of Immigration, Asylum & Nationality Law* 19(4), 214-234 ('Work 3')
4. K. Puttick 'Welcoming the New Arrivals? Reception, Integration and Employment of A8, Bulgarian, and Romanian Migrants', (2006) *Journal of Immigration, Asylum & Nationality Law* 20(4), 238-254 ('Work 4')
5. K. Puttick 'Precarious Welfare: Access to Benefits & Support by EEA Nationals Residing in the UK', (2008) *The Adviser* 130, 6-10 ('Work 5')
6. K. Puttick 'Precarious Welfare: Family & Extended Family Members' 'Right to Reside', Support, and Work', (2009) *The Adviser* 131, 9-16 ('Work 6')
7. K. Puttick 'Recognition of Overseas Unilateral Divorce after K v K: The Implications for Divorced Spouses' and Child Dependants' Financial Support, State Welfare & Public Policy', (2008) *Welfare & Family: Law and Practice* Vol 15.3, 32-108 ('Work 7')
8. K. Puttick 'State Benefits' in Butterworths *Family Law* and *Scottish Family Law Service* (Ed J. Fotheringham), London: Lexis-Nexis, 2011 ('Work 8')
9. K. Puttick 'Discrimination, 'Integration', and the Right to Reside after Patmaliece', (2011) *The Adviser* 145, 8-13 ('Work 9')
10. K. Puttick 'Paying their Way? Contesting 'Residence', Self-sufficiency and Economic Inactivity Barriers to EEA Nationals' Social Benefits: Proportionality and Discrimination', (2011) *Journal of Immigration, Asylum & Nationality Law* 25(3), 280-292 ('Work 10')



WORK 1



Towards a Just European Welfare System for Migrants?
The Challenge of Asylum to Legal Systems, ch.5 pp.108-123
London: Cavendish Routledge, 2005

Keith Puttick

The addition of Title IV to the Treaty Establishing the European Community (TEC), providing for the progressive establishment of 'an area of freedom, security and justice', has been seen as problematic - partly because of the obvious tensions between freedom of movement, immigration, and 'security'.¹ Despite this, Title IV is an important landmark. As well as facilitating incorporation of the Schengen *acquis* into the Treaty on European Union, and the further development of free movement principles, it authorises a wide range of measures on asylum and immigration, including the regulation of third country nationals' ability to enter, work, and reside in the EU, and for safeguarding their rights in the process. By authorising minimum standards for the reception of asylum seekers Art 63 also gave the Community the opportunity for a solution to one of its most serious and intractable problems: the need for a uniform, EU-wide system of support for asylum claimants.

In seeking to improve third country nationals' rights through a new Council Directive on entry and residence for the purpose of employment in the EU (first published in 2001: COM (2001) 386 Final) - an objective which will also address States' problems resulting from demographic changes in the population, declining birth rates, and labour shortages (Art 6 of the Preamble) - reaching agreement was never going to be easy. The project has also proven technically difficult given the complexity of current restrictions on non-EU citizens' accessing work and social protection systems, or simply residing in EU States. This can be seen in the labyrinthine restrictions faced by 'guest workers' from Turkey, or Maghreb countries like Morocco, and under the EU's Euro-Mediterranean association agreements with countries providing such labour. At present there is only limited scope for movement and residence by such workers in parts of the EU in which they are not actually working.² So it has been no great surprise that progressing the scheme, particularly on the contentious issue of aligning employment and social security conditions more closely with those of EU citizens, has been difficult.³ [p. 108] When acceptable

¹ Church, C and Phinnemore, D, *The European Treaties: From Rome to Maastricht, Amsterdam, Nice and Beyond*, 2000, London: Penguin, pp 258-63.

² *Nour Eddine El-Yassini v Secretary of State for the Home Department* [1999] ECR I-1209 EU; Case C-418/96; and van der Mel, AP, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits*, 2003, Oxford: Hart, pp 167-77.

³ Restrictions on social rights have been among the changes made to the Draft Directive, so that these will be 'incremental', linked to 'length of stay', and 'less exhaustive' than measures like Dir. 2003/109 on third-country nationals who are long-term EU residents; Explanatory Memorandum to the Draft, p.14. Directive 2003/109 was accepted, but as the recital indicates only on the basis that 'integration' rights are qualified: and applicants must have adequate resources, including sickness insurance, 'to avoid becoming a burden for the Member State'. However, the Charter of Fundamental Rights of the European Union very explicitly states that 'Nationals of third countries authorised to work in Member States are entitled to working conditions equivalent to those of citizens of the Union'; see Part II, Title 1, Art II-75, para 3, OJ 2004 C310/45, Vol 47 (18 December 2004). A contentious area is whether this should encompass in-work 'welfare' like tax credits, which are essential in supporting low-paid work, but which are not seen by all states as necessary to support segmented markets and low-paid workers as they are in economies like the US and UK; see Alstott, A 'The earned income tax credit and the limitations of tax-based welfare reform' (1995) 108 *Harvard Law Review* 533, pp 534-544; and Puttick, K '2020: A welfare odyssey - a commentary on 'Principles into Practice' and the reform programme' (1999) 28 *Industrial Law Journal* 190, pp 191-94.

arrangements are, in time, agreed (possibly by the end of 2005) the Directive will give important new opportunities and rights for workers from third countries and their family members, and promote key common policies. It should also address the complex integration objectives involved.

Three countries - Denmark, Ireland and the UK - maintain Title IV 'opt-ins' and 'opt-outs'. This is symptomatic of the lack of consensus that persists over Title IV objectives. Whilst these states can accept any specific measures they support - as seen with the UK's support of Directive 2003/9⁴ - the opt-outs, and the numerous protocols and declarations used by states to qualify their support of measures, are indicative of the divisions at and since Amsterdam about *how* Title IV objectives should be progressed.⁵ In a number of cases the concerns highlight some fundamental disagreements, for example over states' commitment to implementing social and economic 'cohesion' objectives, and aligning employment, in-work support, and welfare rights with those of their own nationals. In this chapter paper I consider these points further in the context of the state welfare role in supporting (and regulating) migration and asylum; and then offer a critique of aspects of national measures and EU legislation like EC Directive 2003/9.

MEMBER STATES' SUPPORT FOR 'NEW ARRIVALS'

The idea that income benefits, healthcare, and social services support should extend to new arrivals from outside their territory - and do so as a legal *right* - is [p.109] still unwelcome, even threatening, for some European states and their citizens. This can be seen each time the wrath of the media and popular antipathy falls on new arrivals perceived as 'economic migrants', 'benefits tourists', or 'health tourists'. The destabilising effects of this are most apparent in relation to the asylum seeking process when new arrivals are seen as abusing immigration, asylum, and welfare systems.⁶

In the process of operating immigration controls and status 'gateways' as a condition of State support for non-EU nationals after entry, and despite the EU's developing agenda, Europe is still for the most part a place where Member States are able to make their own rules, and pursue their own social and economic objectives within a 'bounded world' in which members of the political community

⁴ See Preamble, para, 19, of that Directive; and Directive 2003/86, Preamble, para 17. Arguably, such 'cherry-picking' fundamentally weakens the effectiveness of the EU's programme, and undermines the objectives of creating a 'common policy'.

⁵ A 'soft law' approach to harmonising asylum laws, based on lowest common denominators, eg in dealing with asylum applications, is arguably a by-product of this, and has been problematic, as anticipated several years ago in Guild, E 'The Impetus to Harmonise: Asylum Policy in the European Union' in Nicholson, F, and Twomey, P, et al (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge: CUP, pp 334-35.

⁶ States are increasingly restrictive in prescribing approved methods of claiming asylum, usually requiring these to be made at the port of arrival. In-country applications may be possible, as in the UK's case: for example permitting an application for variation of leave to enter and remain; Symes, M and Jorro, J, *Asylum Law and Practice*, 2003, London: LexisNexis Butterworths pp 414-16. To deter in-country applications systems increasingly provide for reduced support, or no welfare support (as with the UK's s.55 of the Nationality, Immigration and Asylum Act 2002). On such differentiation in Australia's reception support arrangements, see Odhiambo-Abuya, E 'Asylum Law: Temporary and permanent protection programs in Australia - solutions or created problems?' (2004) 16(2) *Immigration, Asylum and Nationality Law* 115, p 138.

avoid, if they possibly can, 'sharing with anyone else'⁷ In the case of asylum, the issues are more complex. In addition to national restrictions, cornerstone features of the support system are also rooted in public international law, notably the Refugee Convention 1951. However, the 1951 regime, whilst requiring States to provide support to *refugees* in various ways - including access to wage-earning employment, housing, public relief, social security, and so forth - failed to make explicit provision for *applicants* for such status during the reception phase. As a result, States have been free to develop their own national arrangements, so that their legal systems vary significantly in the levels of support they offer. In turn, countries like the UK with their (relatively) more generous welfare arrangements have been reducing migrants' access to welfare support, partly in order to reduce the perceived 'pull' factor seen as attracting migrants to their territory. The problem has only just started to be addressed at EU level through measures like Directive 2003/9, designed to lay down minimum reception standards.⁸

In operating support systems, governments are clearly influenced by a range of policy concerns including macro-economic 'efficiency' and social justice considerations. Popular hostility towards migrants is clearly another factor, and the [p.110] history plainly shows just how potent this has been in shaping States' regimes.⁹ The reasons for such hostility, and States' readiness to respond to it, are complex. But any anthropology of 'welfare' - i.e. the pooling of risk and resources by the organised community (latterly the State) - is about priorities: and States generally set a higher priority to meeting the needs of 'their own' ahead of the claims of newcomers and 'outsiders'.¹⁰ Reciprocity is also a decisive aspect. In the modern context support is often only provided as a form of 'balanced', or conditional reciprocity.¹¹ Without the newcomer offering something in *return* for the support given by the host community there is no perceptible 'reciprocity'. Such ideas can be seen in

⁷ Walzer, M, *Spheres of Justice: A Defence of Pluralism and Equality*, 1983 Oxford and New York: Martin Robertson/Basic Books, p 31. This has become progressively more difficult in the face of global pressures, labour shortages, and the transfer of welfare costs from employers to the State.

⁸ Controversy surrounds even the existence of such a 'pull' factor, and yet it is a potent factor informing welfare policy, featuring strongly in the dispute between the UK and France over the Sangatte Refugee Centre; see Phuong, C 'Closing Sangatte: the legal implications of the asylum dispute between France and the UK' (2003) 17(3) *Immigration, Asylum and Nationality Law* 157, pp 157-160.

⁹ On 'efficiency' aspects of welfare interventions, see Barr, N, *The Economics of the Welfare State* Oxford: OUP, pp 64-88. Cohen, S, *Immigration Controls, the Family & the Welfare State*, 2001, London: Jessica Kingsley Publishers), pp 181-203, tracks the history of popular hostility to migrants in the UK, and the relationship between immigration control and welfare support, starting with the Aliens Act 1905, the withdrawal of support for aliens in the 1920s, and later defining points.

¹⁰ 'Modern denizens' has also been used to describe this group. When borders are crossed, and they arrive in their new destination, their status transforms to the rather more pejorative 'migrant', with civil, political, and social rights coming under attack after entry; Read, M and Simpson, A, *Against a Rising Tide - Racism, Europe and 1992*, London: Spokesman, p 30.

¹¹ Sahlins, M, *Stone Age Economics*, London: Routledge, pp 191-204. Much of modern welfare is still founded on such principles, and this in turn has led to ECHR jurisprudence characterising contributory benefits, and paid-for services, as a form of 'property' for the purposes of art. 1 of protocol 1 rather than as just distributions out of tax-funded 'schemes of social solidarity'; Lewis, L and Bowers, J 'Article 1 of Protocol 1, ECHR - the peaceful enjoyment of property?' (2000) 7(6) *Welfare Benefits: Law and Practice* 17, pp 18-20; and Bowers QC, J and Lewis, J *Employment Law and Human Rights*, London: Sweet and Maxwell, 2002, p 17-18. Yet non-contributory, unreciprocated welfare distributions such as social housing to the homeless, income support, etc, are essential for the purposes of maintaining social cohesion - especially for groups who are unable to work (or are prevented by State interventions from doing so), and who thus cannot 'reciprocate'. This is now part of what has been called the welfare 'mosaic' (see Barr, N *ibid*, pp 6-8, and it is a form of 'welfare' that is particularly important for groups like new migrants. One of the reasons why New York is one of the few US States to protect, under its constitution, rights to unreciprocated welfare support is due to its location as a first port of call for European migrants - many of whom have had, and still have, significant welfare needs. On the operation of such systems, see Hershkoff, H, and Loffredo, S, *The Rights of the Poor*, 1997, Carbondale and Edwardsville: SIUP/American Civil Liberties Union, 1997, p 3.

action, and transposed to a modern setting, particularly in the context of expectations that migrants should be seen to be giving something *back* to their host communities. In the face of media predictions of a flood of new arrivals from Eastern Europe Accession States after 1st May 2004, the UK government put measures in place to ensure that welfare support would *only* be available to those who 'come here to assist in meeting our skills shortages', and to 'work hard'.¹² Similar considerations [p.111] continue to inform the regime put in place by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, for example using 'integration' loans instead of benefits and social services for refugees (s11); or, by making the provision of accommodation for failed asylum-seekers conditional on participation in unpaid 'community activities'.¹³

In the bigger picture, EU reception regimes can still leave migrants caught between two very hard places, that is, the denial of access to employment (or safe employment) and essential State welfare. This marks them out as having some of the worst living conditions of any social group in the community, and often significantly worse than other claimants living on mainstream State benefits.¹⁴ Despite this, public concerns about migrants' threats to jobs, culture, and welfare systems continue to be an important factor in determining immigration, welfare, and labour laws. In their responses to such pressure, governments may themselves be part of the problem.¹⁵ Indeed, it was government action that precipitated the UK's continuing round of welfare restrictions on asylum seekers and those subject to immigration control. After housing and mainstream benefits were withheld from 'in-country' asylum seekers under the Asylum and Immigration Act 1996 (extending restrictions already in place for those in breach of immigration controls), Sue Willman recalls how advice bureaux and Law Centres like her own were 'overwhelmed by desperate clients who had no food and who in some cases were sleeping in the streets'.¹⁶

This prompted the courts to intervene in *R v Hammersmith and Fulham London Borough Council, ex parte M* (1998) 30 HLR 10, and decide that those 'in need of care and attention' continued to be eligible for help from local authorities under s 21(1)(a) of the National Assistance Act 1948 (NAA). After local authorities then found themselves administering housing and subsistence-level support for

¹² Prime Minister's Official Spokesman, 9th February 2004. These points were then implemented by the Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219, and the Social Security (Habitual Residence) Amendment Regulations 2004, SI 2004/1232, ensuring that all such entrants first obtain a job, register, and complete a year's employment before being able to get benefits, tax credits, social housing, etc. The restrictions have since been seen as counter-productive, as they impede efforts by employers, and government agencies (including those of the DWP and DTI), to attract new skilled staff from Accession States into low wage sectors in high cost areas like London and the South-East: and where transitional support is essential, for example in meeting housing costs.

¹³ Section 4(6)-(9) of the Immigration and Asylum Act 1999, inserted by s10(1) of the 2004 Act. More recently, see the changes in the Immigration and Asylum Bill 2005.

¹⁴ Flaherty, J, Veit-Wilson, J, and Dornan, P, *Poverty: The Facts*, 2004, London: Child Poverty Action Group, pp 199-201; and Palmer, G, Rahman, M, and Kenway, P, *Monitoring Poverty and Social Exclusion*, 2003, York: New Policy Institute/Joseph Rowntree Foundation. Measurement of poverty and social exclusion among migrants may often engage indicators besides low income (Palmer *et al* at 2), include dependency on benefits (at 4, 5); unemployment (at 17); not in education, training or work (at 19); suicide (at 21); mental health (at 32); non-participation in civic organisations (at 40); and housing in temporary accommodation (at 49). The overall effect of this is to massively diminish social rights of the kind envisaged in Marshall, TH, *Citizenship and Social Class* 1950, Cambridge: CUP, and Marshall, TH 'Citizenship' in Marshall TH, and Bottomore, T, (eds) *Citizenship and Social Class*, 1997, London: Pluto. Such principles are evident in Tampere objectives (discussed below) and are informing Title IV objectives seeking to approximate living standards of third country nationals to those of EU citizens.

¹⁵ A strand of 'moral panic' theory focuses on governments' role in mobilizing popular antagonisms; Hall, S *et al* (eds), *Policing the Crisis*, London: Holmes and Meir/Macmillan, pp16-18.

¹⁶ Willman, S, 'Who is responsible for supporting asylum-seekers?' (2001) 8(5) *Welfare Benefits: Law and Practice* 22, pp 22-23. These events undoubtedly marked the start of the present statutory framework; see Willman, S, Knafler, S, and Pierce, S, *Support for Asylum-Seekers*, 2004, London: Legal Action Group, pp 48-55; and Clements, L, *Community Care and the Law*, London: Legal Action Group Publications, pp 147-51.

thousands of people who had nowhere else to turn, the government went into overdrive [p.112] to warn about the country's welfare services being 'overwhelmed', and unable to cope. This continued to be a centrepiece in the case for further rounds of restrictions after 1999; and has been a key element, since 1999, in justifying the progressive removal of the last vestiges of mainstream benefits and Community Care assistance from those subject to immigration control and asylum-seekers.¹⁷

After the mechanism ins.55(1) of the Nationality, Immigration and Asylum Act 2002 was created, whereby support may be withheld from asylum-seekers who do not make their claims as soon as reasonably practicable after arrival in the UK, the support regime entered a new crisis period. This has been punctuated by periodic human rights-led, court interventions to mitigate the worst effects of what, at times, has become a truly oppressive system. An intriguing insight into the scale of the crisis was provided when a Court of Appeal judge, Sir Stephen Sedley, spoke out at the Legal Action Group annual conference in London in 2003. He said that it had only been the combined 'triple effect' of, first, the Human Rights Act 1998, secondly, s55(10) of the Nationality, Immigration and Asylum Act 2002 (which enables support to be given, notwithstanding s.55(1), to avoid a breach of human rights), and, thirdly, the courts' power to make emergency interim orders (requiring support to be given), that was saving many asylum-seekers and their dependants from 'starving in the streets'. More recently, the Court of Appeal in the *Limbuela* utilised Art 3 of the ECHR and what must be seen as a judicially-created 'right to support' - based on principles laid down in *Pretty v United Kingdom* [2002] 35 EHRR 1 - to ensure asylum-seekers receive essential welfare support when other sources of assistance are unavailable.¹⁸ If a definitive history of the period between 1996 and 1999 ever comes to be written it is very likely that government warnings about a crisis in the support system became something of a self-fulfilling prophecy.

GLOBAL MIGRATIONS, LABOUR MARKETS AND 'WELFARE'

Despite the increased use of welfare restrictions to deter unwelcome forms of migration and asylum, and to facilitate removals¹⁹ - a process also evident at present [p.113] in jurisdictions like the Netherlands (directed even at long-standing residents as well as unwelcome new arrivals) - most European States like the UK cannot disregard entirely the welfare needs of migrants entering their territories. In practice the distinction between regular and irregular (or 'atypical') migration also breaks down in the face of the significant and complex needs which new arrivals may have

¹⁷ See *Fairer, Faster and Firmer: A Modern Approach to Immigration and Asylum* (White Paper Cm 4018, July 1998), and *Secure Borders, Safe Haven - Integration with Diversity in Modern Britain* (White Paper, Cm 5387, 2002); and the explanations that preceded s 14(2) of the Homelessness Act 2002 s.14(2) (introducing exclusions of asylum-seekers, and those subject to immigration control, from housing allocations). Residual community care support is still available to meet exceptional needs that go beyond financial destitution, or when NASS support is not provided notwithstanding the 'destitution' requirements added in by s21(1)(1A) by s116 of the 1999 Act; see, for example, *R (Mani) v Lambeth Croydon London Borough Council* [2003] EWCA Civ 836; (2003) 6 CCLR 376, pp 384-87; and cases discussed by Puttick, K 'Social Security and Community Care' in Sir M. Burton *et al.* (eds), *Civil Appeals 2005*, Welwyn Garden City: EMIS, 2004) Vol. II, at Q800-804 and Q1001-1101.

¹⁸ *Secretary of State for the Home Department v Limbuela* [2004] QB 1440; [2004] 3 WLR 581; and see Puttick, K 'Asylum support and Limbuela: an end (finally) to s.55?' (2004) 18(3) *Immigration, Asylum and Nationality Law* 186, pp 191-94.

¹⁹ Sections 9 and 10 of the Asylum and Immigration (Treatment of Claimants) Act 2004. It is not clear, though, how this is necessarily a 'better approach' given the ensuing problems of destitution, the likelihood of claimants going 'underground', and the cost to local authorities' when children are taken into care at public expense, as considered by the HC Home Affairs Committee Fifth Report (2003-04) (at para 40).

at the reception stage, as well as later in time. Apart from reception arrangements, governmental welfare systems are in any case essential in sustaining managed, regular migration, and in order to make a reality of EU freedom of movement principles. A number of factors are at play. But a key one is that third country nationals – whether they are working lawfully or not – often find themselves employed in segmented labour markets where there are poor working conditions and fewer occupational benefits to meet in-work welfare or more general needs. High turnover in such markets often dictates a need for significant levels of income replacement and State welfare assistance between periods of work. Away from employment-related needs, government schemes also play a vital integration role – especially through public sector housing, health and education systems.

In the newer Eastern European EU States, where welfare systems in the post-Communist era are still developing, a number of factors have prompted radical overhauls of State support, especially in response to the needs for a more mobile workforce, and the growth in temporary employment and residence.²⁰ Elsewhere in Europe, other considerations inform migrants' State support arrangements. In countries like Spain, where there is a heavy dependence on seasonal workers from the Maghreb countries, State support systems plays a vital role in facilitating employment, especially given the absence of occupational benefits in low-wage sectors like agricultural and food processing. Even in those parts of Europe where access to the labour market is readily available for new arrivals, and employment law interventions mean that a job (with adequate wages, occupational benefits, etc) is capable of becoming the main source of 'welfare' for the migrant (and any family dependants) – something which Third Way principles dictate is essential to obviate dependency on State assistance²¹ – welfare needs can still remain high.

In practice migrants can experience serious problems in accessing support. There are lots of reasons for this. In the first place the host country may simply not provide [p.114] much in the way of support. France, for example, is not traditionally noted for the quality of its support services for new third country arrivals, whether they are barred from taking up employment or not – which was probably one of the factors informing decisions by new arrivals, including residents at the Sangatte refugee camp, to try to progress on to the UK.²² Other factors go beyond substantive welfare and support rights. I have in mind the problems of discrimination claimants can experience in securing substantive employment rights, access to income support systems like tax credits, and in the adjudication of sickness benefits, maternity-related rights, and so forth, which depend on employer co-operation.²³ In some cases

²⁰ Andor, L *Hungary on the Road to the European Union: Transition in Blue* 2004, New York: Praeger; and Dziewiecka-Bokun, L *Poverty and the Poor in Central and Eastern Europe* in Gordon, D and Townsend, P (eds), *Breadline Europe – The Measurement of Poverty* 2000, Bristol: Policy Press.

²¹ Welfare claimants are urged to 'be independent' of the State, and are promised that legislation will 'make work pay', notably through tax credits and minimum wage interventions; see the *New Welfare Contract* in *New Ambitions for Our Country: A New Contract for Welfare* (March 1998, Cm 3805). UK Third Way approaches, though, are viewed critically elsewhere in Europe; see, for example, Esping-Andersen, G (with Gallie, G, Hemerijck, A and Myles, J), *Why We Need a New Welfare State* 2002, Oxford: OUP, p.5. However, immigrants and asylum claimants are generally kept out of the ambit of Third Way measures, and are often unable to work in order to be independent, and the UK's policy of excluding them from the labour market has been held not to be unlawful or irrational; *R v Secretary of State for the Home Department ex p Jammeh* [1999] Imm AR 1, CA.

²² *Op cit*, Phuong, fn 8.

²³ *Service Delivery to Customers from Ethnic Minorities*, 1997, Benefits Agency; Mason, D *Race and Ethnicity in Modern Britain*, 2000, Oxford: OUP; and Wayne, N *Race Inequality in the Benefits System*, London: Disability Alliance. The Race Relations (Amendment) Act 2000 bars out discrimination in public decision-making (including immigration-related welfare adjudication), but there are limits to how much such legislation can achieve, as considered at a joint conference on the subject *Delivering Race*

welfare provision is simply not geared to the support needs of ethnic minorities - something touched on in discourses on hybridisation and harmonisation of laws - and States' willingness to adjust to pluralizing pressures of the kinds described by Werner Menski and Mathias Rohe.²⁴ In the UK some progress is evident on this, for example in responding to needs of polygamous households (seen in the State Pension Credit Act 2002, and 'polygamy payments' which supplement guarantee credits for additional wives).

For those who are excluded from employment, it is often the case that the combined effects of exclusion from mainstream employment, and inability to access State welfare - barriers linked in each case to immigration status - are contributing factors that prompt migrants to undertake highly-exploitative, and sometimes dangerous, jobs in the most unregulated areas of Europe's labour markets.²⁵

A further negative by-product of labour restrictions, linked to immigration and asylum status, is the difficulty of enforcing employment contracts, and welfare rights that are dependent on lawful employment and 'employee' status. The inadequacy of government measures in the aftermath of tragedies like the deaths of young Chinese cockle-pickers in Morecambe Bay produced outpourings of national rage, some of it directed against the government: and demands for 'action'. The newspapers sported headlines like 'Slavery 2004 - How Migrants are Lured to Britain to Work for 10p a Day and Fed on Dog Food' (*London Evening Standard*, front page, 13 February 2004); and 'MP Pleaded for Action on Cockling Danger' (*The Times*, 12 February 2004). [p.115] Apart from a highly ineffectual licensing measure, the Gangmasters (Licensing) Act 2004, directed at gangmasters who supply labour and employers who use the gangmaster system to recruit (mainly in sectors like agriculture and catering), little has been done to deal with the inherently weak position such workers are in at the private law level viz-a-viz their employers. Nor has action been taken to strengthen the role of regulatory agencies when they become aware of breaches of protective legislation. To do so would, no doubt, draw government agencies closer into the problems of the poor working conditions faced by illegal workers, and to some extent make them complicit. Even when such workers have enforceable rights, for example not to be required to work hours in excess of working time limits, and agencies like the DTI have duties to intervene, the obstacles to the practical realisation of those rights are enormous.²⁶

Yet despite these problems that inhibit State welfare take-up it is generally *only* the State that has sufficient resources to deal with the scale and complexity of welfare needs and support for employment. Modern State welfare systems have now adapted to most of the range of problems produced by the migration process. Although they have not been well-equipped to handle large-scale migrations, recent events, including the mass displacement of sizeable communities in former Yugoslavia, show how European States have *had* to adapt to such scenarios. This fact is now acknowledged by the enactment of Directive 2001/55 on minimum standards of temporary protection. Exceptionally, and in the absence of such State

Equality and Good Race Relations (Commission for Racial Equality and Refugee Council, 24 November 2003).

²⁴ In the volume accompanying the present one (Shah, P and Menski, W (eds), *Migration, Diasporas and Legal Systems in Europe*, forthcoming, London: Cavendish Publishing).

²⁵ *Op cit*, Mason, fn 23, p 30; and Puttick, K 'Atypical and Migrant Workers' in Painter, R and Puttick, K, *Employment Rights 2004*, London: Pluto, Chapter 22. *Op cit*, Symes and Jorro, fn 6, pp 444-45; and *op cit*, Willman, Knafler and Pierce, fn 16, p 37 et seq; discuss the current restrictive procedures regulating access to the UK labour market.

²⁶ *Ibid*, Painter and Puttick, pp 503-05. On bars to welfare support linked to employment and residence status, see Puttick, K, *Welfare Benefits Law and Practice*, 2005 (9th edn), Welwyn: EMIS Publishing, Chapters 2 and 8.

support, communities may be resolute and strong enough - and sufficiently well resourced - to meet their own welfare needs. This was a feature of the support given by the Kenyan Asian community to new arrivals from Kenya in the weeks that followed publication of the Commonwealth Immigrants Bill 1968.²⁷ Quite apart from legal considerations, in the modern context it is not good politics for governments *not* to render assistance - particularly when humanitarian needs dictate that they should, and the plight of newcomers attracts sympathy and media attention. This was amply illustrated when the Australian government was subjected to a barrage of world-wide criticism when it refused to yield to requests to permit refugees sanctuary and enter an Australian port - even after urgent calls for humanitarian support and safe haven.²⁸ [p.116]

The truth of the matter is that most national frameworks maintain tight control over their welfare schemes and access to their labour markets. In doing so, they are able to utilise a range of status measures, even as a means of preventing their own nationals accessing State support - as can be seen in the use of the 'habitual residence' rule.²⁹ To that extent, for some claimants citizenship and nationality may be becoming less significant in terms of access to social rights than their ability to assist host States in meeting their labour needs - particularly during periods of skills shortages. This is one reason why current initiatives to extend entry rights to third country nationals have become such a priority. However, the perceived need among States to preserve some semblance of differentiation, particularly in the areas of employment and social rights, is another factor prompting them to preserve control over their welfare systems. In combination with the ability to bar out employment, such control also provides a potent means of *removing* those no longer welcome.

Given that this is something which Member States are unlikely to be willing to want to change, and because the EU is currently unable to insist on what Tamara Hervey has called 'top-down' regulation of national security schemes or 'replacement with a European-level social security regime', the best that can be expected for the time being is 'voluntary convergence' of EU support systems. This does not add up to much of a European policy, let alone substantive rights³⁰; and even the less ambitious objective of agreeing 'transnational citizenship rights' and 'common principles' in this area is proving elusive.³¹

POST-TAMPERE: A CHANGING POSITION?

Disputes like Sangatte, and altercations between Germany and Italy after Kurdish refugees landed on the Italian coast, crossed Italy, entered Bavaria, and made asylum and welfare claims in Germany, plainly acted as a catalyst to develop

²⁷ That community 'rose to the challenge' of what became known as 'the Exodus', and organised the assistance required; Shah, R *A wrong righted: full status for Britain's 'other' citizens* (2003) 17(1) *Immigration, Asylum and Nationality Law*, p 5.

²⁸ Wilhelm, E *MV Tampa: the Australian response* (2003) 152 *Immigration, Asylum and Nationality Law*, p.159; and see also Shah, P *Australian immigration and asylum Law: an outsider's perspective* (2004) 18(1) *Immigration, Asylum and Nationality Law* 49 on the factors precipitating Australians' concerns about arrivals on their Northern shores.

²⁹ This can prevent UK citizens obtaining welfare support until habitual residence is established after an 'appreciable period of residence'; *Gingi v Secretary of State for Work and Pensions* [2002] 1 CMLR 20, CA, applying *Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937, HL; and holding that there was no 'rule' on free movement established by the ECJ in *Swaddling v Adjudication Officer* (C90/97) [1999] All ER (EC) 217 which prevents the UK imposing such requirements.

³⁰ Hervey, T, *European Social Law and Policy* 1998, London: Longman, pp 82-83.

³¹ Baubock, R, *From Aliens to Citizens - Redefining the Status of Immigrants in Europe* 1994, Aldershot: Avebury. On new welfare models, giving EU-wide rights on a more qualified basis, see Esping-Andersen, G *Why We Need a New Welfare State*, at 1-25.

common policies. In the latter case Gunther Beckstein, Bavaria's Interior Minister was reported by the *Financial Times* on 8 January 1998 as saying (at p.2) that 'More than half of all people who come to Europe want to live in Germany because the law is more liberal and welfare payments are higher than in other countries'. The flows of refugees into EU countries in the aftermath of the break-up of Yugoslavia and from war zones like Afghanistan also prompted action, and led the special meeting of the European Council in Tampere in October 1999 to lay down principles for working towards a Common European Asylum System. [p.117] The focus was not just on giving meaning and legal effect to the principle of non-*refoulement*. Acceptable conditions of support, primarily to enable refugees to remain in the country in which refugees arrive, were also seen as a priority.

The Tampere 'conclusions', and later initiatives at the Laeken, Seville, and Lisbon European Councils, also sought to translate some of the more aspirational aspects of the EU Charter of Fundamental Rights, and non-discrimination principles in public international law, into positive obligations on Member States - an objective made clear in the preamble to Directive 2003/9, para 6. But how far have measures like Directive 2003/9 succeeded in *delivering* on such objectives? The Directive offers important insights into the way EU common policy objectives in Art 63 are being implemented, and so a more detailed consideration of the scheme is merited.

DIRECTIVE 2003/9: COMMENTARY ON SPECIFIC REQUIREMENTS

The purpose of the Directive was to lay down minimum standards for the reception of third country nationals and Stateless persons who make an application for asylum at States' borders or in their territories as asylum seekers. Family members, treated as such according to national law rather than under the Directive, are also in the scope of the measure (Arts 1-3). In order to maintain subsidiarity principles in Art 5 of the Treaty, considerable discretion has been left to Member States on implementation, and the Directive expressly preserves Member States' ability to introduce more favourable provision (Art 4). This could, in time, prove problematic as all the indicators, to date, suggest that rather than such diversity what is needed is uniform provision consistently applied in all EU States. In the lead up to the implementation date 6th February 2005 it is already clear that some States, including the UK and the Netherlands, are introducing some significant 'conditioning' on take-up of reception support. This appears to be permitted, albeit implicitly. In the UK's case, despite setbacks in the *Limbuela* case, the government has made it clear that it intends to 'stand by' the policy objectives underpinning s.55 of the NIA so that support can be withheld from applicants who do not make asylum claims as soon as reasonably practicable after their arrival.³²

Given the way immigration and asylum controls are inextricably linked to welfare support, some of the Directive's measures are particularly helpful. For example, documentation provisions in Art 6 mean that within three days of an application being lodged with the competent authority, certification of 'asylum seeker status', and confirmation of permission to stay on the receiving state's territory pending applications being examined, must be given. This is likely to be important in the UK's context given the delays claimants can experience in getting the documentation needed to facilitate support, as highlighted in the *Mersin* and *Arbab* cases.³³ [p.118]

³² Statement on S.55 of the Nationality, Immigration and Asylum Act 2002: Court of Appeal Judgment 21st May 2004 (Home Office, Stat 017/2004).

³³ *R v Secretary of State for the Home Department, ex p Mersin* [2000] INLR 511, where it was noted that the Home Office is 'habitually guilty of unreasonable and unlawful delays in the dispatch of status

Conditions that require recipients of support must remain on the territory of the host state are linked to reception requirements. This was one of the outcomes sought by the UK and other countries experiencing the problem of arrivals by migrants passing through other EU States' territory, for example in the Bavaria-Italy dispute. It is only when there are 'serious humanitarian reasons' that require an asylum applicant's presence in another State that the host State is authorised to provide travel documents to facilitate such travel (Art 6(5)). Freedom of movement is closely regulated in accordance with Tampere principles, and this includes restrictions by which claimants can be confined within the territory of the host State, and within 'an area assigned to them by that State' as long as the assigned area does not 'affect the unalienable sphere of private life', and permits 'sufficient scope for guaranteeing access to all benefits' under the Directive. Article 7 contains important powers of States to decide on residence, notably for reasons of public interest, public order, or the 'swift processing and effective monitoring' of an application'. For 'legal reasons', or reasons of public order, an applicant can be confined to a particular place (Art 7(3)); and provision of material conditions may be made conditional on complying with residence conditions. The Directive does not bar out detention, though, even for families. Although an appeal opportunity is given by Art 21 to contest a detention decision, the Directive does not regulate the detention process according to any specific standards; and this is likely, in most EU jurisdictions, to leave intact the discretionary powers of individual Immigration Officers.³⁴ Another area in which the Directive seems deficient, relates to families, and the obligations on states to ensure that provision, including adequate accommodation, is provided for applicants and dependent family members.

Although states are obliged (by Art 8) to maintain 'as far as possible' family unity, and it is stated that the 'best interests of the child is to be the primary consideration', there is then a surprising lack of specificity when it comes to detailed requirements for *realising* these important objectives. In the UK context, especially in areas where there may be shortages of adequate and suitable housing stock [p.119] (particularly in London and the South-East), it is likely to continue to be difficult in practice to achieve practical implementation of the family unity principle. For that reason it becomes necessary to see what the permitted fall-back positions can be - for example when there are delays in being able to meet special needs housing requirements during the reception stage. In practice, even when local authority social services have assessed families as having special needs for support under s.17 of the Children Act 1989, or when special needs legislation like the National Assistance Act 1948 is engaged for adult claimants, courts are often reluctant to make mandatory orders which have the effect of displacing local authorities' day-to-day management of the allocation of housing, particularly when this means asylum-seekers and others are seen to 'jump' waiting lists and accorded higher priority than

letters'; and see *R (Ali Mohamed Al Haj Arbab) v. Secretary of State for the Home Department* [2002] EWHC 1249; [2002] Imm AR 538. If such delays result in benefits or other welfare support being withheld, damages for breach of duty of care can be awarded; *R (Kanidagli) v Secretary of State for the Home Department* [2004] EWHC 1585.

³⁴ On UK powers of detention in Sched 2, para 16, and Sched 3, para 2 of the Immigration Act 1971; and s.62 of the Nationality, Immigration and Asylum Act 2002 (NIA), see, generally, *op cit*, Symes and Jorro, in 6, pp 18-35; and on the controversies involved, see Cole, E, 'The Detention of Asylum-Seeking Families in the UK' 17(2) *Immigration, Asylum and Nationality Law* 94. On the inadequacy of effective appeal and review routes as an EU-wide concern, and detention as a disproportionate administrative measure, see Boeles, P, Brouwer, E, Woltjer, A, Alfenaar, K *Border Control and Movement of Persons: Towards Effective Legal Remedies for Individuals in Europe*, 2003, Utrecht: Standing Committee of Experts in International Immigration, Refugee and Criminal Law, pp12-14.

others. However, there are important exceptions and precedents like the *Batantu* case in which a mandatory order was granted.³⁵

A further problem, in this context, is that the scheme appears to do very little to regulate accommodation and support rights after applications for asylum status have *failed*; or when the person is not in the asylum claims system at the point their needs fall to be assessed. When asylum seekers' application fail, the extent to which States are obliged to maintain support will, it seems, remain primarily a matter for their own immigration, welfare and asylum systems under the Directive. This is a seriously problematic area in the UK, and the Directive's failure to regulate the process more effectively is very unfortunate. For the foreseeable future, national law and priorities will continue to prevail. The courts, for their part, have been increasingly careful not to interfere unduly in Home Office powers: and this can make litigation particularly difficult. Even the priorities of children and the family appear, at times, to rank lower in the pecking order than Home Office powers of removal.³⁶

Despite the emphasis on family unity principles, the Directive has plainly not done much to slow down government plans to ratchet up restrictions in the support regime for withdrawing support from failed asylum seekers and their family members. [p. 120] This much is clear from the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. The government sees this as entirely consistent with the spirit and letter of the Directive, which is why that Act was able to add a fifth class of claimant ('failed asylum seeker with family') to those rendered ineligible for support under the NIA Schedule 3, para. 1. The Directive's failure to do more to regulate removal powers is very surprising, particularly given the serious concerns there must be about any further extension of States' use of powers to withdraw essential day-to-day welfare support to effect removals. In debates on the 2004 Act, there were doubts expressed about how such powers would be exercised in practice, and whether they can be fairly used without running the risk of engaging art. 8 Convention rights. The Home Affairs Committee was assured that immigration officers would receive 'guidance' to ensure assistance is not withdrawn until after interviews, and decisions would be based on 'clear evidence' that the criteria for withdrawal are met. Nevertheless, such guidance is expected to be mainly non-statutory and 'non-binding'.³⁷

³⁵ *R (Batantu) v Islington LBC* [2001] 33 HLR 76; (2001) 4 CCLR 445, where the claimant, a refugee from the Congo, with exceptional leave to remain in the UK, had severe mental health problems, and lived with his wife and four children in high rise accommodation; and see *R (Wahid) v London Borough of Tower Hamlets* (2001) 4 CCLR 455; [2001] EWHC Admin 641, discussed in 'Community care services, mental health, and re-housing rights – the limits of judicial review' (2001) 8: 6 Welfare Benefits: Law and Practice 14.

³⁶ There is currently no automatic eligibility for support – either from NASS, the benefits system, or a local authority, particularly for those not co-operating with removal directions (given the restrictions in Sched 3 of the NIA). Support is largely discretionary, although the regime gives a strong steer in identifying the circumstances in which support should *not* be withdrawn without other arrangements being put in place; see, for example, NIA s.18(1)(e), (2) which treats a failed asylum seeker as *still* an 'asylum seeker' for the purposes of support, even after a claim has been determined, if the claimant's household includes a dependent child under 18. Section 17 of the Children Act 1989 assessments for children in needy migrant households must have regard to ECHR art. 8 requirements, and take account of the child's needs, and links with UK-based family members; *R (M) v Islington LBC* [2003] 2 FLR 903, pp 918-920; reversed [2004] 2 FLR 867, pp 883-885, 892, CA; and see Coker, J, Finch, N and Stanley, A, *Putting Children First*, 2002, London: Legal Action Group Publications, pp 42-76.

³⁷ HC Home Affairs Committee, First Report of Session 2003-04, para 82; and see the Fifth Report, paras 42 and 43 and concerns about whether the removal of support would be a proportionate response as a means of facilitating removal, and providing 'incentives' to leave.

Access to employment

In what is one of the most important elements in the legislation, Member States' authorities are again given wide discretion; in this case to determine the period, starting with the date an application for asylum is lodged, during which applicants will not have access to the labour market; art. 11. It is only after a decision is *not* taken within a year, and if the delay cannot be attributed to the applicant, that the State must then decide the conditions for granting the applicant access to employment: art. 11(2).³⁸

This has been interpreted to confer a 'right to work' from that point, but this must be doubted - especially as conditioning processes remain largely unregulated. The best that can be said is that once conditions are set and work is permitted, access cannot be withdrawn - at least until a negative decision on the asylum claim (and appeal) is notified. During appeals, access to employment may not be withdrawn, at least where an appeal against a 'negative decision' has 'suspensive effect' (and, of course, it may not). [p.121]

Welfare support and housing

Member States are required by the Directive to ensure 'material reception conditions' are in place to assist applicants from the point they make their application in accordance with national procedures and to 'ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence' under art. 13. Means-testing is permitted, something which is already a feature of NASS support arrangements in the Immigration and Asylum Act 1999, Part VI, the Asylum Support Regulations 2000, SI 2000/704, and in measures in the NIA 2002 (primarily within the definitions of 'destitution'). What the Directive does not do, however, is regulate the support claims, adjudication, and appeals process with any great specificity - something which is bound to be problematic in some EU jurisdictions.³⁹ Although the UK's housing and other forms of social security provision have been characterised as 'largely discretionary', public law principles assisted by ECHR requirements apply to decisions refusing or withdrawing it. If appeal rights are not available (and in the UK they are very tightly restricted) and support is *withdrawn* unlawfully the decision can be quashed in judicial review proceedings.⁴⁰ Test cases litigation, which has

³⁸ The UK position, despite being characterised as 'discretionary', is already seen as largely compliant. The Immigration Minister, Beverly Hughes, in July 2002 indicated that the UK practice (after February 2005) would be to permit employment if a determination is not made within a year; see the note 'Asylum Seekers Working Concession' in 18(1) Immigration, Asylum and Nationality Law 54. The courts are reluctant to interfere in employment restrictions; see the *Jammeh* case (fn 21, above).

³⁹ Article 21 leaves the process of contesting decisions to 'procedures laid down in national law': so it does nothing to improve the highly restrictive asylum support appeals regime in NIA ss.103, 104 and Schedule 10. With Community Care, which delivers most of the assistance required by the more vulnerable asylum applicants, and dependants with special needs, the absence of appeal rights in most aspects of the system means that disputing decisions is largely relegated to judicial review or administrative complaints territory; see *op cit*, Puttick, fn 17, pp Q800-804; and *op cit*, Clements, fn 16, pp 531-542.

⁴⁰ See *R (Hamid Ali Husain) v Asylum Support Adjudicator and Secretary of State for the Home Department* [2001] EWHC Admin 852, Times 15 November 2001. Despite the way enabling powers in s.95(1) and Part VI of the 1999 Act are couched in discretionary and permissive terms, some commentators do regard the scheme as, in practice, providing 'entitlements'; see, for example Billings, P

highlighted some of the more negative aspects of the UK's support regime, including the 'dispersal' policy, has generally been unsuccessful - even when the circumstances indicate that ECHR rights are clearly in issue after applicants are placed in poor quality, unsuitable accommodation.⁴¹

In one particularly important area of the scheme, the Directive requires States to meet the requirements of those with special needs (Arts 13(2), 17). The general principle in Art 17(1) is that States must take into account 'the specific situation' of vulnerable people such as minors, unaccompanied disabled people, the elderly, pregnant women, single parents with minor children and people who have been subjected to torture, rape or other forms of serious psychological, physical or sexual violence. [p.122] In the UK context, including those cases where NASS does not deliver support, this does not, in fact, add anything to the qualitative aspects of the assessment and delivery process. Special needs over and above those delivered through NASS will generally trigger a right to a Community Care assessment: and unless the procedures adopted meet Public Law standards it is likely that review rights will be triggered, as they would be if agencies delay or fail to implement them. The point has been illustrated by cases like *Bafantu* when the Administrative Court made a mandatory order requiring suitable accommodation to be provided after delays in re-housing.⁴²

CONCLUSIONS

The new reception standards in Directive 2003/9, and other measures taken under Art 63, such as the family reunification procedures in Directive 2003/86 and Directive 2001/55 on temporary protection for displaced persons, and Directive 2004/85 on minimum standards for determining the status of third country nationals and refugees (which also clarify the extent of rights to social protection and 'welfare' such groups should be afforded), are important steps in establishing an EU-wide support system for new arrivals, including support arrangements for third country nationals. However, in key areas Directive 2001/9 has not delivered what was needed.⁴³ In particular, there are significant aspects of the asylum support process which remain unregulated, leaving considerable scope for Member States to act independently. In some cases this has plainly left the door open to national measures. Some of these, I suggest, are inherently objectionable - particularly in their use of welfare restrictions as a means of introducing disincentives for those who may well be genuine asylum-seekers seeking to make *bona fide* asylum applications; institutionalising the withdrawal of welfare support from needy people as a 'removal' measure; and otherwise undermining welfare universality principles. In the latter respect, there is surely a moral deficit created when essential welfare support is differentiated according to nationality and migration status, rather than on the basis of need. To date, EU legislation, and the emerging blue-print for new initiatives in respect of third country nationals entering the EU, fall well short of the 'active and dynamic welfare

and Edwards, R, 'Safeguarding asylum seekers' dignity: clarifying the interface between Convention rights and asylum law' (2004) 11(2) *Journal of Social Security Law* 83, p 84.

⁴¹ In one case a family was dispersed to a notoriously dangerous and racist housing estate, but whilst confirming that Art 3 of the ECHR could be engaged, the court declined to intervene after concluding that the level of state protection required had to be commensurate with the degree of 'risk' in each case; *R (Mehmet Gezer) v Secretary of State for the Home Department* [2003] EWHC 860; [2003] HLR 64.

⁴² *Op cit*, fn 35.

⁴³ On implementation in the UK, see the Asylum Seekers (Reception Conditions) Regulations 2005, SI 2005 No. 7; Part 11B of the Immigration Rules (HC 395); and the Asylum Support Regulations 2000, SI 2000 No. 704, as amended.

State' and 'sustainable social justice' ideas mooted at Tampere, and which informed Lisbon European Council's conclusions in March 2000.⁴⁴

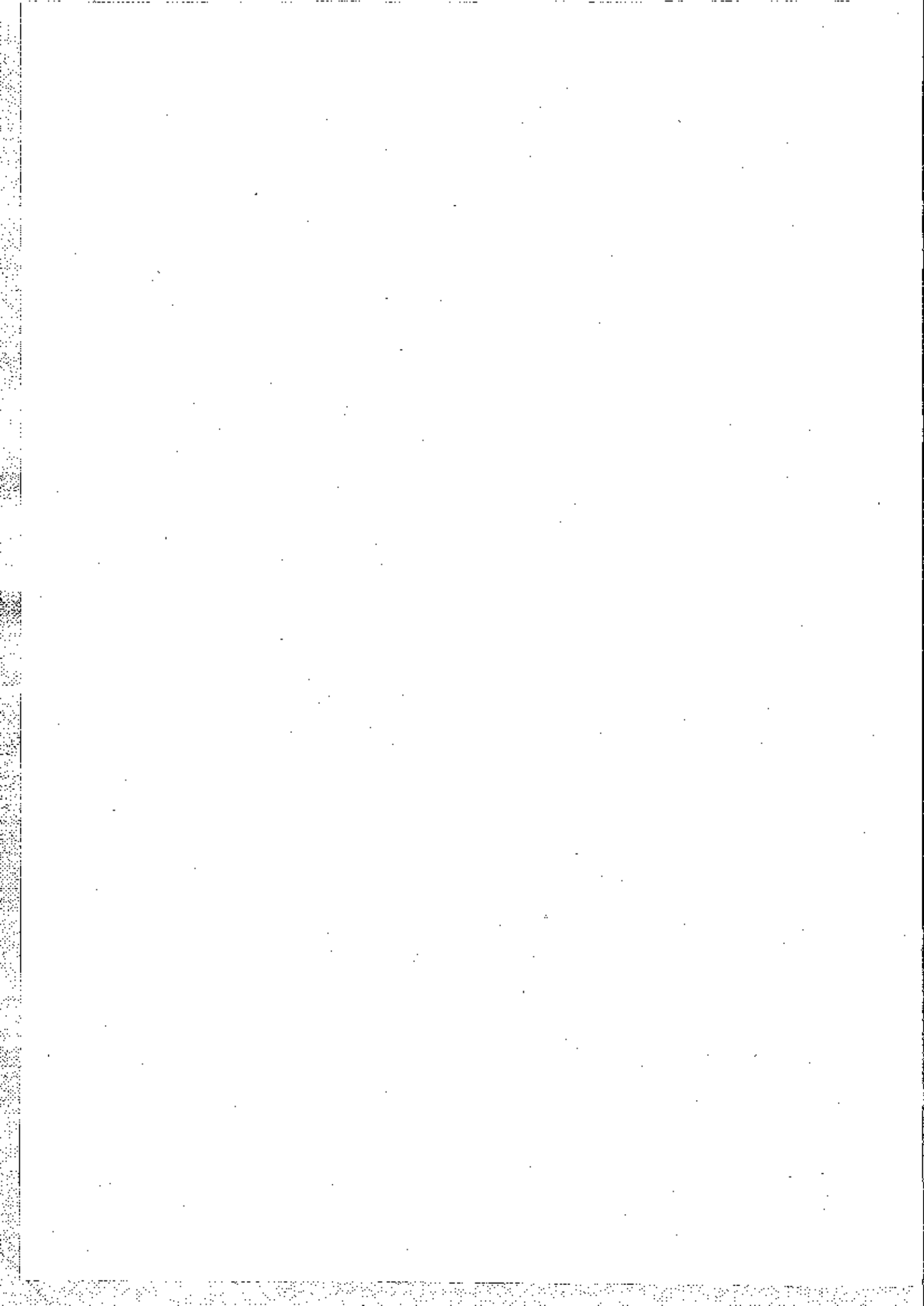
These shortcomings are already proving to be problematic in some EU States. In the face of global pressures, and continuing migration into the Community, the need for improved social protection systems, consistently applied across the EU, [p.123] is not simply going to go away. One predictable corollary of having inadequate welfare support arrangements and a bar on access to safe, well-rewarded employment, is the risk that a sizeable proportion of all new arrivals will continue to work in the informal economy, and be exploited in some of the worst, most unregulated sectors of Europe's labour market. Concerted measures on this are well within the EU's area of legislative competence and should, arguably, be treated as 'cornerstone' Title IV and Employment and Social Policy objectives'. As with other aspects of the common policy, though, action is well overdue.

Critical Appraisal: Author's Note

References to the pages of the work in the original Routledge text have been added. For example, [p.109], added to the second page, indicates where p.109 in the original work begins.

⁴⁴ Esping-Andersen, G, (2002) *Why We Need a New Welfare State* (Oxford: Oxford University Press) developing earlier themes In Esping-Andersen, G Esping-Andersen, G (1990) *The Three Worlds of Welfare Capitalism* Cambridge: Polity; on the EU's future role in developing new welfare initiatives see the observations of Frank Vandenbroucke, Minister for Social Affairs and Pensions, Belgian Federal Government, in his Foreword, at x-xxiv.

WORK 2



Asylum support and Limbuela: an end (finally) to section 55?

Keith Puttick

At a glance

Immigrants in the UK who claim to be refugees and a range of other non-citizens are currently playing a vital safety net role in maintaining essential support for migrants. Even when they are present in the UK illegally, and do not also fall within applicable provisions for whom statutory restrictions prevent assistance. Most recently, in the *Limbuela* case, the Court of Appeal has utilised Article 3 of the European Convention on Human Rights as a means of ensuring that needy claimants do receive assistance, notwithstanding that decision-makers had determined that asylum was not claimed as soon as reasonably practicable after arrival in the UK. A judicially created right to support has often been all that stands between such claimants and complete destitution, particularly given the problems faced by voluntary organisations and charities in meeting demand for assistance.

However, as it is a highly contentious one, not least due to the strong dissenting judgement in the *Limbuela* case, and the likelihood of an appeal to the House of Lords. There are also continuing doubts as to whether Article 3 can be used in this way in cases of official rejection (as opposed to non-refugee status) and legal what-if-*not* Article 3 can be used. The Board of Immigration and Naturalisation (BIA) in the USA has recently stated that asylum reception standards for asylum seekers arriving in Member States with which Member States must comply from 1 February 2005, expressly prohibits Member States to withhold support from asylum claimants who make so-called 'late claims'.

Introduction

Although most of the present legal framework for welfare support for asylum applicants and migrants subject to immigration control has been with us since the enactment of Part VI (ss 94–127) of the *Immigration and Asylum Act 1999* (IAA 1999),¹ Part 3 of the *Nationality, Immigration and Asylum Act 2002* (NIAA 2002) has added important elements to the system. In particular, Part 3 now enables (and in some cases requires) state support to be withheld or withdrawn from a number of groups.

The restrictions are mainly in sections 54 and 55 of, and Schedule 3 to, NIAA 2002. To appreciate the package holistically, it is necessary to first consider section 54.

The restrictions found in section 54, in combination with Schedule 3, are mainly directed at four 'classes' of ineligible person, namely: asylum seekers who may already have refugee status

1. On the operation of the 1999 Act support regime, see S Willman, S Knafler and S Pierce *Support for Asylum-Seekers* (London: Legal Action Group, 2001); and on the problems in accessing support after restrictions were imposed by the *Asylum and Immigration Act 1996*, and after leading cases such as *R v Hammersmith and Fulham London Borough Council, ex parte M* (1998) 30 HLR 10 decided that those 'in need of care and attention' continued to be eligible for help from local authorities under the *National Assistance Act 1948*, s 21, see S Willman 'Who is Responsible for Supporting Asylum-Seekers?' in Vol 8, Issue 5 *Welfare Benefits Law and Practice* 22.

abroad; nationals of an EEA State; failed asylum seekers; and people who are illegally in the UK (NLAA 2002, Sch 3 paras 4-7).

The people particularly targeted by the Government and policy-makers in section 54, however, are failed asylum applicants, notably when they do not co-operate with removal directions. The withdrawal of support also extends in most cases to dependants. Like other Part 3 restrictions, however, there are important limitations. For example, support or assistance can still be given to a child under one of the lead exceptions, paragraph 2(1)(b) of Schedule 3, and otherwise as a means of avoiding a breach of the European Convention on Human Rights ('ECHR') or EC Treaty requirements. Other exceptions are set out in regulations made under the Schedule, including powers to provide temporary accommodation for those who have with them a dependent child (NLAA 2002, Sch 3 para 9). These provisions are intended, primarily, to enable the National Asylum Support Service ('NASS') and local authorities delivering social services and other Community Care support to stay within EU and ECHR obligations. Among other things, this means welfare agencies are obliged to respect, and give practical effect to, 'family unity' principles.² This is set to become an even more significant factor in the context of new EU minimum standards for reception of asylum applicants under Directive 2003/9 and the emphasis they give to family unity and the interests of children in Articles 13-16.

This particular part of NLAA 2002's scheme was quickly seen by the Home Office as inadequate as a means of securing the removal of failed asylum seekers - which is why the *Asylum and Immigration Act 2004* (which received Royal Assent on 22 July 2004) has meant yet another round of restrictions to add to the current panoply of limitations.

Unlawful presence in the UK

Apart from failed asylum seekers, Part 3 focuses on withholding assistance from those who are present in the UK 'in breach of the immigration laws' within the meaning of section 11 of NLAA 2002. Although most of the litigation in Part 3 cases has focused on section 55 and asylum cases, this area of the scheme has also entailed considerable controversy - and has been the subject of important test cases with significant implications, particularly for local authorities asked to give housing and other welfare assistance when children are involved. Thus, in *R (M) v Islington London Borough Council and the Secretary of State for the Home Department (Interested Party)*³, a national from Guyana was unlawfully in the UK after her visitor's visa expired. She married an Antiguan national, who had indefinite leave to remain in the UK, and had a daughter by him who was a British citizen by virtue of sections 1(1)(b) and 50(2) of the *British Nationality Act 1981* - but they then separated. As she had few resources, and was in need of assistance (and could not provide for the child), the local authority assessed the child's need for the purposes of the *Children Act 1989*. However, it decided that the need could be met by providing the claimant and child with tickets to return to Guyana. The claimant contested the decision, arguing that Islington should accommodate her, at least until the outcome of legal proceedings, including an appeal against refusal of her application for indefinite leave to remain.

The issue, of course, highlighted the complex inter-action of Community Care legislation and restrictions in the immigration law regime which limit support, particularly after it becomes clear that a person is unlawfully in the UK (as the claimant was). In particular, the position in the claimant's case was affected by paragraphs 1, 2(1) and 3 of Schedule 3 to NLAA 2002, regulations 3

2. On children's rights in the immigration and asylum process, see J Coker, N Finch and A Stanley *Putting Children First* (London: Legal Action Group, 2002).
3. *R (M) v Islington London Borough Council and the Secretary of State for the Home Department (Interested Party)* [2004] EWCA Civ 235; 7 CCLR 230 (June 2004).

and 4 of the *Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002* (SI 2002/3078) and the Community Care legislation, notably sections 17, 23C, 24A and 24B of the *Children Act 1989*.

At first instance, Wilson J concluded that it would be unlawful for the local authority, under the Regulations, to accommodate a person unlawfully present in the country for anything more than a short period prior to removal. However, the decision made by the authority was flawed. It had not carried out the assessment process properly. In particular, contact between the child and her father had not been adequately considered (and prospects for the child's welfare provision in Guyana had not been adequately assessed). The Court of Appeal, however, allowed the local authority's appeal (Buxton LJ dissenting). Among other things, local authorities had a power to accommodate under the Regulations at least until they fail to comply with removal directions, although not necessarily a duty – and to that extent the position remains discretionary rather than mandatory.

However, in practice, the 'power-duty' distinction may be less significant than it seems as the exercise of the power might only lead to one appropriate outcome, ie that the authority must provide accommodation and otherwise meet the needs of a properly conducted assessment – especially once Convention rights to support are engaged. This can be assisted in particular by Article 8 of the ECHR and family life and 'family unity' principles.

Section 55 and 'late claims'

A pivotal part of the Part 3 scheme has been section 55. This was intended to deal with so-called 'late claims' for asylum, ie claims that are not made on arrival or 'as soon as reasonably practicable after the person's arrival'. As Nadine Finch observed in her commentary in 'Support provisions within the Nationality Immigration and Asylum Act 2002' (see (2003) Vol 17, No 1 IANL 32–36 at 35) on the legislative history of the provision, section 55 of NIAA 2002 forms part of a package of measures introduced after the House of Lords Committee stage of the Bill, and builds on earlier distinctions made in 1996 between 'at port' and 'in country' applications. Unlike earlier versions of such legislation, section 55(1) was intended to be, and is, mandatory in its terms. As well as barring support by NASS, the provision must be read in conjunction with other restrictions on support in LAA 1999 (and in NIAA 2002, Pr 3). These have generally succeeded in curtailing most forms of support that would otherwise be available through the state benefits and Community Care systems – either through specific restrictions or in legally binding 'guidance' to local authorities on the use of their powers and duties. Judicial construction of the scope of the 1999 Act's restrictions has assisted in preserving a degree of residual support, particularly, for groups with special needs, as illustrated by early leading cases like *R v Wandsworth LBC, ex parte O*.⁴ The construction given in that case to restrictions made by LAA 1999 on support through the Community Care system, and in particular section 21 of the *National Assistance Act 1948* (after the addition of restrictions in section 21(1A)), was greatly assisted by the common law notion of the 'law of humanity', expounded as a principle in *R v Inhabitants of Eastbourne*.⁵ A useful history of the restrictions from 1996 is provided by Hale LJ in her judgment. The totality of support restrictions must also be read in the context of other, more specifically targeted limitations, in other social welfare provision – for example housing under the homelessness legislation. Thus asylum seekers and those subject to immigration control are now almost completely excluded from local authority powers to make housing allocations by section 14 of the *Homelessness Act 2002* (through a restriction added to the *Housing Act 1996* as section 106A). This was, in fact, one of the factors that prompted Shelter and other charities working in the housing and homelessness sector, to support test cases on section 55.

4. *R v Wandsworth LBC, ex parte O* [2000] 1 WLR 2539.

5. *R v Inhabitants of Eastbourne* (1803) 4 East 103.

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Although residual support is still, exceptionally, available to meet certain types of special needs, particularly when NASS does not, or cannot, deliver the support needed (as illustrated by more recent cases such as *Westminster City Council v National Asylum Support Service*⁶ and *R (Mani) v Lambeth London Borough Council and Secretary of State for the Home Department*⁷), in practice, claimants' ability to access this and other welfare support has been much curtailed.⁸ Notwithstanding these important judicial interventions, the wide variations in availability of services and levels of support between different areas at the local level make the process of claiming something of a lottery.

As far as section 55(1) is concerned, the section provides, specifically, that the Secretary of State may not provide support to a person under the asylum support powers in LAA 1999 (mainly sections 4, 95 and 98) or under the newer accommodation centre powers (in sections 17–24 of NLAA 2002 itself) if, after a person's asylum claim is recorded, the Secretary of State is not satisfied that the claim was made 'as soon as reasonably practicable after the person's arrival in the United Kingdom'. The comprehensive nature of the ban on support for this group is underlined still further by section 55(4) and (5). This bars the use by local authorities of powers to provide accommodation to asylum seekers while appeals or review applications are being heard. For completeness, it prevents use by authorities of section 2 of the *Local Government Act 2000*. Among other things, this empowers them to promote the 'well-being' of people in their area – a measure which by section 2(4)(f) can extend to the provision of services or accommodation 'to any person'.

Once a determination has been made that a claimant has not made a claim for asylum as soon as reasonably practicable after the person's arrival in the UK – after a process that includes an initial screening interview at Lunar House in London (or at regional centres) based on a pro forma set of questions) – it is not possible to contest that decision by appeal. Any appeal opportunity was removed as part of the scheme. This was achieved in a rather convoluted way by stipulating that a decision of the Secretary of State that he is prevented from providing or arranging support to a person is 'not a decision that the person does not qualify for support for the purpose of the appeal provisions in section 103 of the 1999 Act' (NLAA 2002, s 55(10)).

The ouster is now generally seen as legally effective, and Article 6 compliant, following Court of Appeal guidance in *R (On the Application of Q and Others) v Secretary of State*.⁹

Section 55 and Convention rights

An important part of the scheme, in section 55(5) of NLAA 2002, is designed to maintain power to provide assistance to avoid breaches of claimants' Convention rights. It also preserves the ability to direct assistance at children and those under the age of 18. The key provision is section 55(5)(a) which stipulates that the section does not prevent the exercise of a power by the Secretary of State to the extent necessary for the purpose of avoiding a breach of a person's Convention rights (within the meaning of the *Human Rights Act 1998* – HRA 1998).

Notwithstanding this safety net, critics warned during the passage of this part of the legislation through Parliament that the scheme was nevertheless bound to prove problematic in its practical operation. In particular, the concern was that section 55(5) was cosmetic, as, in practice,

6. *Westminster City Council v National Asylum Support Service* [2002] 4 All ER 654, HL.

7. *R (Mani) v Lambeth London Borough Council and Secretary of State for the Home Department* [2003] EWCA Civ 836.

8. On state benefits, see K Pustick *Welfare Benefits Law and Practice* (9th edn, Welwyn Garden City: EMIS, 2004), Ch 9; and on Community Care support for asylum seekers, see L Clements *Community Care and the Law* (London: Legal Action Group, 2004). On appeals and review of decisions relating to social security and Community Care for those subject to immigration control and asylum claimants, see K Pustick 'Social Security and Community Care' in Sir M Burton (ed) (Foreword by Lord Woolf LCJ) *Civil Appeals* (Welwyn Garden City: EMIS, 2004), Ch 41 at Q802–Q804 (social security and NASS assistance) and Q1411, Q1600 *et seq* (Community Care determinations and assessments).

9. *R (On the Application of Q and Others) v Secretary of State* [2003] EWCA Civ 364; [2003] 2 All ER 905.

NASS decision-makers, having determined that section 55(1) applied and barred support (or the continuation of any support that had been provided while interviews and 'profiling' took place), would then simply proceed to conclude that no Convention rights were engaged which authorised them to provide assistance.

This has, indeed, proved to be the pattern in most cases. It was therefore not very long before high-profile test cases like *Q* were started, with claimants asserting that their Convention rights had been infringed after support was withheld.¹⁰ It also started to become clear that once an ECHR Article could successfully be engaged, the combined effect of section 55(5) of NLAA 2002 and section 6(1) of HRA 1998 – which makes it 'unlawful for a public authority to act in a way which is incompatible with a Convention right' – meant that a coach and horses was liable to be driven through the scheme at any time. The only real question to be determined as this was far from clear under existing European Court of Human Rights and UK precedents, was whether Article 3 could be engaged by the withholding of state welfare support. If so, at what point could this happen, for example in the context of depriving a person of access to accommodation, healthcare or income to pay for food. Could such state action, or inaction, ever be characterised for Article 3 purposes as a form of 'treatment' so as to trigger section 55(5) – particularly as it was plain that the legislature had quite purposefully endorsed the Government's policy of utilising welfare restrictions as a means of dissuading asylum claimants from delaying asylum claims after their arrival?

By this stage, there were clear indications that section 55 was causing significant problems, particularly in areas like London. It was also apparent that the absence of any kind of statutory welfare support for 'late' claimants – a problem exacerbated by charities' and voluntary organisations' increasing inability to cope with the demands on their services – was forcing advisers to utilise emergency applications. This had often become the only means of getting any kind of assistance for their clients. A judicial insight into the problem, and the use of interim orders as a means of providing what can be seen as a judicial 'right to support' and welfare safety net, was provided when a Court of Appeal judge, Sir Stephen Sedley, observed at the Legal Action Group annual conference in London in 2003 that it had only been the combined 'triple effect' of (a) HRA 1998, (b) section 55(5) of NLAA 2002, and (c) the courts' power to make emergency interim orders (requiring support) that was saving many asylum seekers and their dependants from 'starving in the streets'.

At the end of May, however, the Court of Appeal made its decision in *Secretary of State for the Home Department v Limbuela*.¹¹ For the Home Office, this was its most serious set back yet in relation to section 55. Depending on whether the Home Secretary can mount a successful appeal, the majority's decision in *Limbuela* may well prove those commentators right who have always maintained that the scheme, and the policies on which it is based, are hopelessly flawed.

Limbuela – facts and issues

Mr Limbuela, an Angolan national, arrived in the UK on 6 May 2003 and claimed asylum the next day. He was provided with NASS accommodation. Ten days later, however, the Secretary of State determined that he was not satisfied that Mr Limbuela had made his claim for asylum 'as soon as reasonably practicable' after arrival. In accordance with section 55(1) of NLAA 2002, accommodation and support (that would otherwise have continued under section 95 of LAA 1999) thereupon stopped.

10. For a valuable analysis and discussion of section 55, and the implications of the *Q* case on the operation of the legislation, see R. Thomas 'Asylum Seeker Support' (2003) 10 *Journal of Social Security Law*, Issue 4, 163. On later case developments, see P. Billings and R. Edwards 'Safeguarding Asylum Seekers' Dignity: Clarifying the Interface Between Convention Rights and Asylum Law' (2004) 11 *Journal of Social Security Law*, Issue 2, 83.
11. *Secretary of State for the Home Department v Limbuela* [2004] EWCA Civ 540.

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Mr Limbuela spent a period sleeping rough and begging without success. He had no money, access to food or washing facilities. Accommodation from a charity ended after four days. The Secretary of State did not accept that this amounted to violations of Article 3 or 8 of the ECHR, which required him to use his power under section 55(5) to resume support.

On 28 July 2003, however, Eady J granted an interim injunction against the Secretary of State. Pending disposal of the claim or further order, he ordered that the Secretary of State should provide accommodation and support for the claimant's essential living needs. In the meantime, on 10 June 2003, Mr Limbuela's asylum claim was rejected, and the adjudicator dismissed an appeal on 1 September 2003. However, the Immigration Appeal Tribunal gave leave to appeal and remitted the case for re-hearing before a different adjudicator. Accordingly, further proceedings were still pending by the time permission for a judicial review of the refusal of support was given in October 2003.

Judicial review proceedings

When the case came before Mr Justice Collins in *R (On the Application of Limbuela) v Secretary of State for the Home Department*,¹² he considered, in particular, two leading Court of Appeal cases, including *R (On the Application of Q and Others) v Secretary of State*.¹³ This was an appeal from a decision of Collins J himself, and the court rejected the test he had applied to the application of Article 3 of the ECHR, which was whether there was a 'real risk' that there would be a breach, and, if so, whether it was sufficient to grant relief. The Court of Appeal held that there had to be a condition which 'verged on the degree of severity capable of engaging Art 3', described in the case of *Pretty v United Kingdom*.¹⁴ In particular, paragraph 52 of the *Pretty* judgment was relevant in its consideration of the types of 'treatment' within Article 3. Among other things, this could include 'ill-treatment' that 'attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering'. In addition, where treatment humiliated or debased an individual, showing lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it could be characterised as 'degrading'. The suffering which flowed from naturally occurring illness, physical or mental, could also be covered by Article 3 'where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible'.

The second case considered by Collins J was *R (On the Application of T) v Secretary of State for the Home Department*.¹⁵ In that case, the court had declined to lay down any one 'simple test', saying that each case had to be judged in relation to 'all the circumstances which were relevant to it'. On the evidence, Article 3 was not engaged, and his circumstances did not verge on the 'inhuman' or 'degrading'.

After considering Mr Limbuela's position, Collins J found against the Secretary of State, concluding that in his particular circumstances, were he to be deprived of support, he would have no access to overnight accommodation and his chances of obtaining food and other necessary facilities during the day would be remote. He would be 'reduced to begging or tramping around London in the hope of finding somewhere which might provide him, perhaps irregularly, with some degree of assistance'. That, in the judge's judgment (at para 41), particularly in winter time, was 'quite sufficient to reach the *Pretty* threshold'.

12. *R (On the Application of Limbuela) v Secretary of State for the Home Department* [2004] EWHC 219 (2004 WL 62102, QBD).

13. *Supra* n 9.

14. *Pretty v United Kingdom* [2002] 35 EHRR 1.

15. *R (On the Application of T) v Secretary of State for the Home Department* [2003] EWCA Civ 1285.

In reaching this decision, Collins J declined to accept submissions based on the approach taken in *R (On the Application of Zardashi) v Secretary of State for the Home Department*.¹⁶ In that case, Newman J had indicated (at para 12) that being destitute for weeks would not necessarily verge on a breach of Article 3, given the obligation on an applicant to clearly establish that charitable support had not been provided and that he was incapable of fending for himself.

Court of Appeal

The Secretary of State appealed, and the appeal in *Limbuella* was conjoined with two similar cases, *Adam* and *Tesema*.¹⁷

In dismissing the appeal, the majority of the court (Laws LJ dissenting) concluded that the failures in each of the cases appealed could, indeed, constitute 'inhuman or degrading treatment' under Article 3 of Part I of Schedule 1 to HRA 1998.

The issue posed for Lord Justice Carnwath, 'in its starkest form', was:

'... to what level of abject destitution such individuals must sink before their suffering or humiliation reaches the "minimum level of severity" to amount to "inhuman or degrading treatment" ...?'

He called this 'the Article 3 threshold'.

After considering the *Q* and *T* cases, he noted that the court in *Q*, having accepted the *Pratty* formula, was also faced with the separate question of whether the state's function could simply be 'to wait and see' until that threshold was crossed – or whether it must take 'preventative action'. The court asked:

'... is it compatible with Art 3 of the Convention to provide no assistance to those who are destitute on the basis that Art 3 will not be engaged unless and until that destitution results in ill-health or some other similarly severe adverse consequence?'

In *Q*, the term 'verging on', said Carnwath LJ, seemed to have been 'designed to mitigate the worst effects of a pure "wait and see" approach'.

He noted that the court had also said in *Q*:

'It is not unlawful for the Secretary of State to decline to provide support *unless and until* it is clear that charitable support has not been provided and the individual is incapable of fending for himself. That is what section 55(1) requires him to do. He must, however, be prepared to entertain further applications from those to whom he has refused support who have not been able to find any charitable support or other lawful means of fending for themselves. The Attorney-General indicated that is always open to asylum seekers who have been refused support to re-apply for this.' (at para 63 – emphasis added)

As Carnwath LJ understood that passage, it was not necessary for the claimant to show the *actual* onset of severe illness or suffering, particularly if the evidence established clearly that charitable support in practice was not available, and that he had no other means of 'fending for himself' – the presumption would be that severe suffering would imminently follow. At that point, the claimant had done enough to show that he was 'verging on' the necessary degree of severity, and Article 3 was accordingly engaged.

16. *R (On the Application of Zardashi) v Secretary of State for the Home Department* [2004] EWHC 91.

17. [2004] EWHC 354 and [2004] EWHC 295, respectively.

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Carnwath LJ concluded by noting that, before the decision in *Q*, there were three possible approaches to Article 3 in such cases:

- (a) that it had no application because the conditions of the claimants were not the result of state 'treatment';
- (b) that its application was confined to the specially vulnerable (eg pregnant woman or the elderly);
- (c) that it was of general application, provided the circumstances of an individual applicant were sufficiently serious.

In *Q*, (a) and (b) had been excluded. As there was no appeal, the state, in consequence, had to be taken to have accepted responsibility for taking 'measures' to ensure that individuals who qualified for help under the test established by *Q* would obtain it.

He could see no reason to interfere with the conclusions of the judges in each of the cases appealed.

At that point, Carnwath LJ could have concluded his judgment and rejected the appeal on those grounds alone. However, he considered that this would have been 'too narrow an approach', particularly given the way in which the appeals had been presented, and the request made to the court for 'guidance'. The court also had to look, he said, at 'the overall position in current circumstances', and to 'take account of the realities'.

Having had the benefit of interim relief, he assumed that none of the appellants was currently 'verging on' Article 3 suffering. However, he thought that if the appeal were to be allowed it could be anticipated that they, and up to 600 others, would then become dependent on charitable support. The court had heard no evidence from the Secretary of State as to how, in practice, he expected that sudden influx to be handled, or that he had policies in place adequate for the purpose.

On the evidence presented by Shelter and others, there was not simply a 'real risk', but a 'practical certainty' that the charitable agencies would be unable to cope with such an influx.

The reasoning of Jacob LJ

Lord Justice Jacob agreed that the appeals should be dismissed. However, there are a number of important elements in his judgment which bring into even more stark relief the weaknesses in the Home Secretary's position; and there are key points in the judgment which put the scheme, and much of the policy underpinning it, in doubt. Indeed, he describes 'current policy' as unlawful.

'Overshadowing' the facts of the three cases, he said, was the fact that there were 666 others in a similar position. He wondered what was to be done about destitute people in this position. He described the 'verging on' test as 'abhorrent, illogical and very expensive', and he was not surprised that some judges could not accept that it was correct, even though it might follow from the court's decision in *Q*, in that the 'real risk' test had been rejected. 'Verging on', he said, seemed to be 'the only next logical stopping place'.

He went on to consider the level of available sources of accommodation and other support for asylum seekers, and concluded that it was evident that the established charities could not feed or support them. There was a 'near certainty' that a substantial proportion would fall below the Article 3 threshold. He continued:

'Of course some might, to survive, resort to theft, prostitution, or illegal working (very likely for so-called "gangmasters"). But all these forms of survival would not pass the Art 3 threshold and cannot be prayed in aid by the State - which, to be fair, it does not seek to do.'

He added that:

'... although one may not be able to say of any particular individual that there is more than a very real risk that denial of food and shelter will take that individual across the threshold, one can say that collectively the current policy of the Secretary of State will have that effect in the case of a substantial number of people. It seems to me that it must follow that the current policy (which includes having no policy save in the case of heavily pregnant women) is unlawful as violating Article 3. And it follows that the treatment of the particular individuals the subject of these appeals in pursuit of that policy is also unlawful.'

The dissenting judgment

In his dissenting judgment, Laws LJ pointed out the lack of consistency that had been present among the judges of the Administrative Court, despite two 'substantial' judgments in the Court of Appeal. He thought the relevant principles in this area were 'more than usually elusive'. After considering the distinctions between two types of breach of Article 3 of the ECHR which emerged from the case law (ie (a) violence by state servants, and (b) acts or omissions by the state which exposed claimants to suffering inflicted by third parties or 'by circumstance'), the thrust of his judgment was that section 55(5) of NIAA 2002 did not operate to oblige the Secretary of State to ensure that asylum seekers had support. In effect, this approach, unlike the majority judgments, does not require preventative or pre-emptive action. Indeed, Laws LJ preferred a construction based on a 'wait and see' approach, and did not think it was for the courts to try to widen the scope of Article 3. This, of course, stands in clear contrast to the judgments of the majority which can be seen as construing the legislation in a way that satisfies the ECHR obligation to 'take measures' to secure that Convention rights enjoyed by everyone in the state's jurisdiction; and as requiring more than just the provision of a 'long stop', particularly once it becomes plain that other sources of assistance (ie charities or family support) is not available.

In a particularly telling passage, Laws LJ commented that:

'We cannot don the mantle of the statute's practical administrators. We certainly cannot do so (and I do not suggest that my Lords have any such thing in mind) in order to save section 55 from excoriation in the moral and political arena. In particular we cannot strain and extend the obligations of the United Kingdom under the ECHR Art 3 beyond what, judicially, we conceive to be their proper limits.'

On the proved or admitted facts, none of the cases, he said, exhibited 'exceptional features so as to require the Secretary of State to act under section 55(5)' (at para 81).

Appeal to the Lords

The Secretary of State has been given leave by the Court of Appeal to appeal to the House of Lords, but at the time of writing it is not clear if this will go ahead. A Home Office press release suggests, however, that it will. If an appeal does, indeed, proceed to the Lords, it would be unwise to try to anticipate the likely result. This is especially so in the face of the strong dissenting opinion from Laws LJ, and continuing doubts about the precise scope of application of Article 3 in cases founded on no more than official inaction by state welfare agencies. That said, it is difficult to see what viable alternative tests or guidance their Lordships could provide to the approaches carefully constructed in the *Q* and *Limbuella* cases. If they do elect to depart from those decisions (whether

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or not in doing so they allow an appeal), their likely starting point would almost certainly be the discord that is apparent among judges in the Administrative Court concerning how the section 55 scheme can map on to current Article 3 jurisprudence from the European Court of Human Rights, and the principles laid down in *Pretty*.

Most neutral advisers would consider that Carnwath LJ probably got it right in his assessment of the 'verging on' test. Whatever its inadequacies, that test was plainly devised as a means of mitigating the worst effects of a pure 'wait and see' approach.

On the other hand, there are other factors which the Lords may wish to take into account, including one which has not been addressed to date. It is that the EC legislation on minimum reception standards expressly permits Member States to do just what section 55(1) of NIAA 2002 does – see Article 16(2) of EC Directive 2003/9. That said, decisions must be taken individually, objectively and impartially, and 'reasons' must be given (Art 16(4)). An important caveat, also in Article 16(4) is that decisions must not only be based on the 'particular situation of the person concerned' – especially with regard to people assisted by Article 17 (a group that includes vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and those who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence) – they must also take into account the principle of proportionality. In any case, the obligation to make healthcare accessible is absolute.

Arguably, the Lords are not constrained by the terms of the Directive, particularly as it sets minimum standards as opposed to definitive rules; and compatibility with EC law does not obviate the need for ECHR compliance. However, consistency is bound to be an important factor, and arguably requires a construction which assists the UK to stay in line with the EC law regime as it is evolving with regard to measures made under Title IV of the EC Treaty.

For a variety of reasons, Directive 2003/9 falls well short of what is currently required to address the shortcomings in, and disparities between, Member States' support systems.¹⁸ Among other things, the combined effect of Article 11, authorising the applicants to be barred from the labour market for at least a year, and Article 16(2), enabling essential support to be withheld (even from those with potentially viable asylum claims), makes such new arrivals, when working illegally, easy prey to exploitation in Europe's worst, most unregulated employment sectors.¹⁹

Commentary and conclusions

Groups such as the Refugee Council and Shelter are, needless to say, generally very happy with the *Limbuela* result. Both organisations have been among the Government's most vociferous critics of Part 3 of NIAA 2002, and particularly section 55.

In welcoming the decision, the Refugee Council's Chief Executive, Maeve Sherlock, asked Ministers, instead of pursuing an appeal, to ensure that the support regime protects asylum seekers with the 'basic essentials to enable them to get by'. She considered that section 55 had

18. K. Pattick 'Towards a Just European System for Migrants?', WG Hart Legal Workshop 2004, Institute of Advanced Legal Studies, London University (June/July 2004).

19. R. Painter and K. Pattick *Employment Rights* (3rd edn, London: Pluto, 2004), Ch 22 at pp 503–505. Conclusions reached at the Tampere European Council in October 1999, and after the European Council at Lisbon in March 2000, held out the promise of rather more effective welfare support arrangements, with principles that would assist groups like asylum applicants; and led to expectations which are not, at present, being delivered. These included 'sustainable social justice' objectives and more 'inclusive' arrangements for atypical groups dependent on state welfare support—see, generally, G. Goesta Esping-Andersen (with G. Galie, A. Hemerijck and J. Myles; Foreword by F. Vandebroucke) *Why We Need a New Welfare State* (Oxford: Oxford University Press, 2002). On the EU's future role in developing such welfare systems, see, in particular, the observations of Frank Vandebroucke, Minister for Social Affairs and Pensions, Belgian Federal Government, in his Foreword at pp x–xxiv.

been the cause of 'widespread misery and destitution among people who deserve protection', as the organisation had concluded in its report *Hungry and Homeless – The Impact of the Withdrawal of State Support on Asylum Seekers, Refugee Communities, and the Voluntary Sector*.²⁰ It had been administratively cumbersome, she said, and 'Home Office time and resources could be better spent on improving the quality of asylum decisions'.

Shelter, which played a prominent part in the proceedings, called on the Government to undertake the 'thorough review' of section 55 which has already been proposed by the Commons Home Affairs Select Committee. Shelter's Director, Adam Sampson, said the judgment was 'a victory for very vulnerable people who are in desperate need with nowhere to turn'. Section 55, he said, 'had threatened to greatly increase the number of homeless people on the streets, undermining the government's success in tackling rough sleeping'.

Indications from the Home Office to the Refugee Council and to voluntary support organisations following the judgment were that basic levels of support for asylum claimants eligible for such support, including those who would normally be at risk of losing such support because of a 'late claim', would be maintained. This was then confirmed on 28 June 2004 in Home Office instructions. The effect of these, basically, is that it will only be where a person has no alternative sources of support, including accommodation and access to basic amenities and food, that assistance will be denied, even when conditions for engaging section 55(1) appear to have been met. In a press release on 21 May 2004,²¹ the Home Office confirmed that it would be seeking leave to appeal to the House of Lords. It also said that it was 'considering the full implications of the court's decision and examining the options for the future'.

Interestingly, although some important (albeit very late) changes to the asylum support system were introduced into the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* before it received Royal Assent on 22 July 2004 (well after the *Limbuella* judgment was handed down) – and these were significant enough to mean the Bill had to be 're-committed' – there were no Home Office moves to deal specifically with section 55 aspects of the support regime. The changes made relate, in the main, to provisions dealing with withdrawal of support from failed asylum seekers. Among other things, they have introduced requirements for claimants to 'pay their way' if they are to continue to receive assistance after their claims have failed under the new streamlined appeals structure – for example by engaging in 'community activities'. There are also some novel ways by which claimants can contribute to the costs of their integration, for example through 'integration loans'.²²

The likeliest scenario following *Limbuella* is that the Government will simply adopt a 'wait and see' approach in the lead up to a Lords appeal. It would be surprising, however, if contingency plans are not being made in case of a Lords appeal failing; and if longer-term ideas, even if only to modify rather than completely overhaul section 55, are not already starting to be hatched ...

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20. Refugee Council, April 2004.

21. Home Office, *Statement on Section 55 of the Nationality, Immigration and Asylum Act 2002: Court of Appeal Judgment* (Stat 017/2004).

22. See sections 9, 10 and 13. It is not clear, though, how the withdrawal of essential welfare support is necessarily a 'better approach' in facilitating removals – as the Government has asserted – especially given the ensuing problems of destitution, the likelihood of claimants going 'underground', and the cost to local authorities when children are taken into care at public expense. Such points were considered by the HC Home Affairs Committee Fifth Report (2003–04) at para 40.

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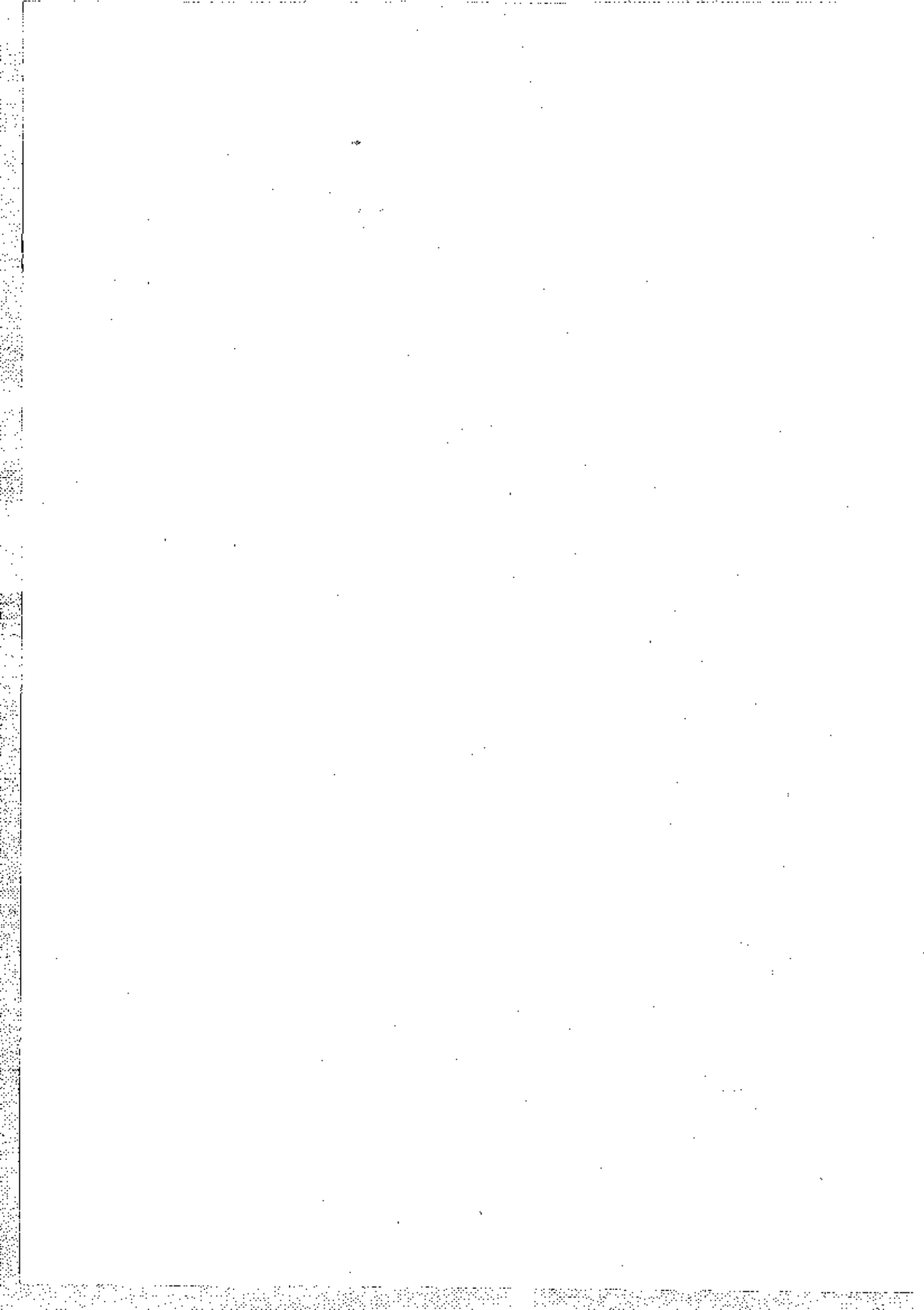


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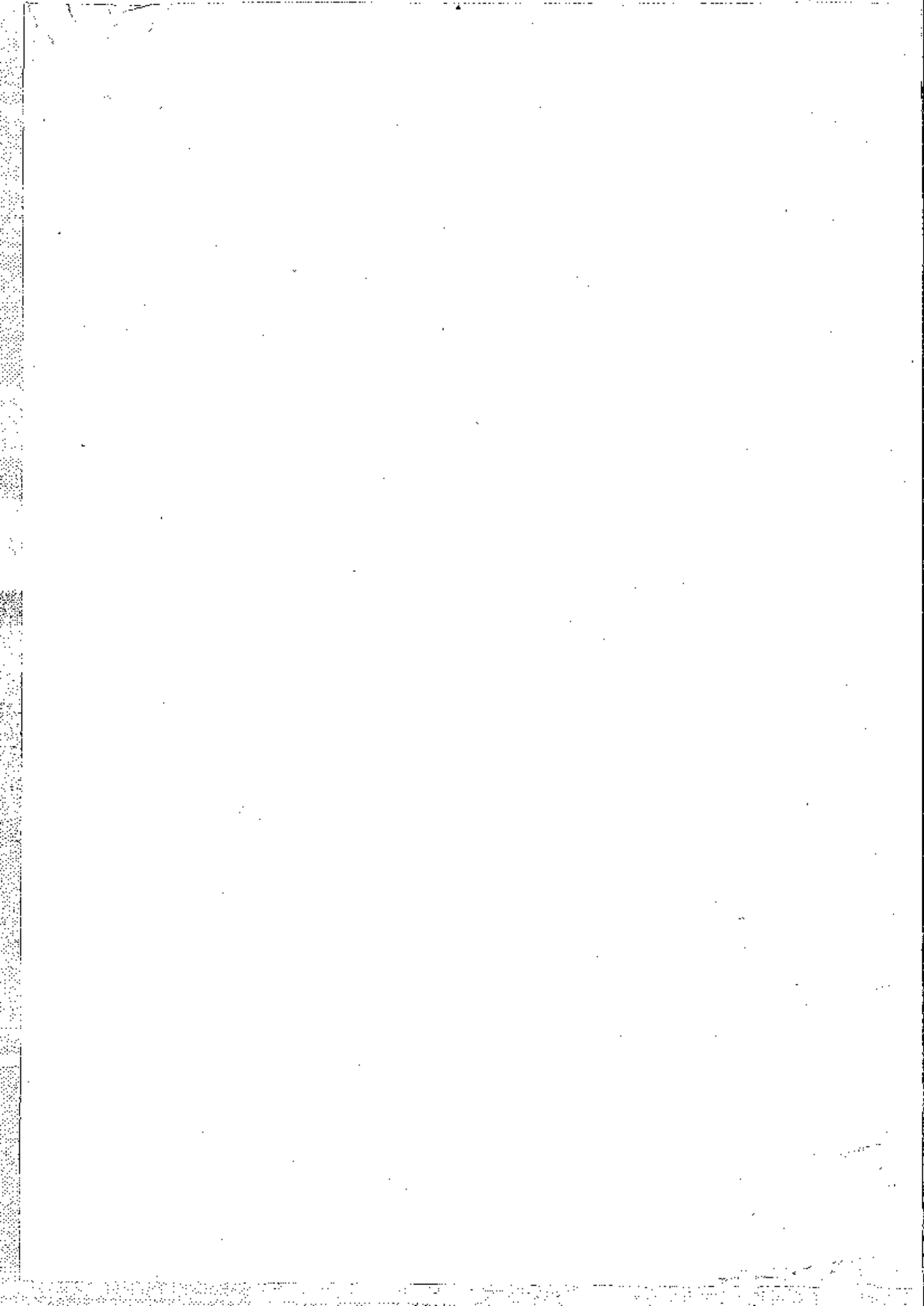
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WORK 3



Strangers at the Welfare Gate Asylum Seekers, "Welfare" and Convention Rights after Adam

Keith Puttick

At a glance

The decision of the House of Lords in *R v Secretary of State for the Home Department, ex parte Adam and Others* has clarified the circumstances in which the withdrawal of state welfare support amounts to 'treatment' that infringes a claimant's rights under Article 3 of the European Convention on Human Rights, rendering such action unlawful in terms of section 6 of the *Human Rights Act 1998*. In the bigger picture, *Adam* and other recent court decisions considered in this article highlight how access to even 'the most basic necessities of life' (as Lord Bingham described them in *Adam*¹) will continue to depend on a strict construction by judges of statutory limitations on such support, or the deployment of key Convention articles - something which has been essential in the face of an increasingly restrictive statutory regime. Whilst the result in *Adam* plainly assists in the maintenance of a right to basic social protection for asylum claimants and dependants, the integrity of the UK's asylum system and claimants' ability to pursue claims, the precise scope of this judicially protected 'right' is uncertain. Apart from anything else, its future deployment will depend on its application to particular circumstances on a case-by-case basis. Nor is it entirely clear whether the imprecision of the principles established in *Adam* opens up opportunities in the future for courts to develop and deploy controversial judicial approaches such as the 'spectrum analysis' as a means of denying or withdrawing support for claimants. That analysis was adopted at the Court of Appeal stage of the case, with support by the majority of the court - and despite its obvious lack of authority from Convention jurisprudence, the concept was used again by that court in support of the decision in the disturbing case of *R (Gezer) v Secretary of State for the Home Department*.

Introduction

As in other countries, the UK continues to ratchet up restrictions on access to its welfare support systems, including benefits, healthcare and Community Care services, as a means of managing migration and asylum, and facilitating removal.² In the pursuit of those objectives, eligibility for *I.A.N.L. 215* support has become inextricably linked to immigration status.³ What is less clear, however, is whether the paradigm is still a guarantee of a minimum floor of support for all entrants to the UK, including those awaiting a decision on their application for 'refugee' status - but within a radically reconfigured and restrictive support regime.⁴ Or whether the agenda has moved on, so that it focuses on an altogether different 'perspective' described by one senior judge as 'can we reduce the number of arrivals by building disincentives into the provision of support[?]', with an emphasis on 'control of numbers' (what he described as an essentially 'political goal').⁵

In the UK, the use of immigration status in both these ways is a relatively new phenomenon. Until recently, there were few legal constraints on take-up of benefits and services linked to nationality or immigration status. Such restrictions as there were generally focused on National Insurance contributions for contributory benefits, and 'ordinary residence' or 'presence' in Great Britain as the main criteria for eligibility for non-contributory or means-tested benefits⁶ - rather than nationality, citizenship or status requirements. This prompted one commentator to observe that

immigration law impinged 'hardly at all on the provision of benefits and services in the UK' and that 'the post-war Welfare State doctrine of Beveridge, Bevan and Butler was one of equal access to benefits and services for all those in need regardless of immigration status'.⁷

The first serious inroads into this position came with restrictions in the *Income Support (General) Regulations 1987 (SI 1987/1967)*, which enabled benefits to be reduced or withheld for illegal entrants and 'overstayers', and when 'habitual residence' status was superimposed by a change to *regulation 21(3)* of those Regulations. The latter is a requirement which in practice has seemed, mainly, to affect UK nationals, those with a right of abode in the UK,⁸ and those from ethnic minority communities [or groups] - especially after they leave the country for familial visits and are told on their return that they have lost UK 'residence'.⁹ Habitual residence and a more recent variant, the 'right to reside', remain problematic in other contexts, for example for EU citizens from the new Accession States seeking support from the benefits system while they look for work, or while they are working in low-paid work during the minimum period of continuous employment required before they can establish eligibility.¹⁰

Restrictions in primary legislation

Major restrictions in primary legislation - directed at a new class of entrants 'subject to immigration control' - came with the *Asylum and Immigration Act 1996*. As well as making it an offence to employ a person in that category (s 8) and limiting access to local authority accommodation (s 9), the Act authorised regulations to be made barring out asylum claimants from Income Support (although preserving in *section 11* an underlying entitlement if the person then went on successfully to gain 'refugee' status). In the first of a series of important judicial interventions attempting to preserve a minimum level of support while applicants were in the UK to pursue asylum claims, regulations to restrict asylum claimants' access to Income Support made in 1996 were treated as *ultra vires* soon after.¹¹ Whilst the majority of the court in the *JCI* case acknowledged that restrictions on state welfare were a legitimate means of discouraging 'economic migrants', the court held (Neill LJ dissenting) that the changes interfered with a person's ability to assert an effective asylum claim, and the ability to utilise appeal rights under the *Asylum and Immigration Appeals Act 1993*. Had the regulations been maintained, the court considered that the right to claim asylum would have become 'nugatory'¹² and would have rendered claimants' rights to proper consideration of their asylum claims in the UK 'valueless in practice by making it not merely difficult, but totally impossible for them to remain here to pursue their claims'.¹³ The current position is that Income Support can still be claimed by asylum seekers (under *regulation 21ZB* of the *Income Support (General) Regulations 1987*) once a claim for refugee status has been recorded. However, if refugee status is then established there will be a deduction from the award for any support given under the *Immigration and Asylum Act 1999 (IAA 1999)* scheme to meet the claimant's 'essential living needs' up to that point.

The major change which has produced the current, and altogether more restrictive, regime came in *Part VI* of *IAA 1999*. This built on the original distinction made by the *Immigration Act 1971* between people with a 'right of abode' and those whose right to live, work or settle in the UK is regulated by that Act. Under the 1971 system, a person subject to immigration control became subject to requirements on 'leave to enter' and 'leave to remain'. However, by 1999 the meaning of 'subject to immigration control' in the context of the 1971 Act's regulatory scheme had become different from the definition of a 'person subject to immigration control' in the 1999 Act. The critical

change came when section 115(9) of IAA 1999 excluded anyone within that new descriptor from most forms of UK social security.¹⁴

Social security benefits were not the only casualty, however. Community Care rights were also removed from such claimants (IAA 1999, s 116). In particular, a new section 21(1A) of the *National Assistance Act 1948* barred out (and still bars out) claims for residential accommodation and services. This now applies to anyone with a need for care and attention arising solely:

'(a) because he is destitute; or
(b) because of the physical effects, or anticipated physical effects, of his being destitute.'

Like social security, such support, together with state education, healthcare and Community Care parts of the UK welfare system, remained generally 'open' and universally accessible until *I.A.N.L. 217* the 1999 changes - and assisted people on the basis of need, while imposing minimal requirements in terms of immigration status or nationality pre-conditions. Under the post-Second World War welfare system, access was universal, in the sense of being readily available to all who were present in the UK on the basis of need for that service. In creating the new regime in 1999, the Government declared that it was seeking to create 'a new safety net support scheme' for asylum seekers, but one based on *genuine* need. The change was also needed, it said, as a means of 'lifting the current burden on local authorities'.¹⁵ More recently, in proposals to introduce restrictions on access to healthcare by overseas visitors, the Government has reiterated that the NHS 'is a national institution and not an international one', and that '[i]t is there to provide free treatment for those who live here and not for those who do not'.¹⁶ The Joint Council for the Welfare of Immigrants ('JCWI'), however, has been critical of aspects of the proposals, seeing them as posing a risk to the health of undocumented migrants and failed asylum seekers, and risking discrimination against UK people in the settled immigrant communities.¹⁷

Legal challenges to the restrictions

Inevitably, legal challenges to test the scope of the restrictions, and in particular the amended section 21 of the *National Assistance Act 1948*, followed soon after. The Court of Appeal in *R v Westminster City Council and Others, ex parte M, P, A, and X* had already held that that destitute asylum seekers, deprived by the *Asylum and Immigration Act 1996* of all benefit entitlement, could nevertheless be assisted by local authorities under the section,¹⁸ but it remained to be seen, in the face of an apparently clear, pervasive bar in section 21(1A), whether any *residual* support was still available under the section (eg for a claimant with significant health needs).

In *R v Wandsworth LBC, ex parte O; R v Leicester City Council, ex parte Bhikha*,¹⁹ the answer was a resounding 'yes', at least for a person with serious healthcare needs in the form of physical as well as psychiatric problems. The claimant had overstayed her leave and was subject to deportation. Her lawyers had been pressing for exceptional leave to remain ('ELR') so that she could be treated for her medical problems - especially as she would not have been able to get such help if she were to be returned to Nigeria where her mental health would have deteriorated rapidly. Giving the leading judgment, Simon Brown LJ preferred the contention of the appellants, which was that if an applicant's need for care and attention was to any material extent made more acute by circumstances other than the mere lack of accommodation and funds, then despite being subject to immigration control he or she still qualified for assistance. Such 'circumstances' obviously included the factors

referred to expressly in *section 21(1)*, including age, illness and disability. If, for example, an immigrant, as well as being destitute, was old, ill or disabled, he was likely to be yet more vulnerable and unable to survive than if he were merely destitute. He considered that the word 'solely' was a 'strong' one, and that its purpose was 'evident'. He added (at 599) that:

* *I.A.N.L. 218* 'Assistance under the Act of 1948 is, it need hardly be emphasised, the last refuge for the destitute. If there are to be immigrant beggars on our streets, then let them at least not be old, ill or disabled.'

Later in his judgment (at 603), Simon Brown LJ made it clear that unlawful presence in the UK should not be a bar to a local authority providing support. This was a clear departure from the approach of Moses J in *R v Brent London Borough Council, ex parte D*.²⁰ This case looked to the common law concept of the 'law of humanity' for the principal means of preserving a duty to support. However, it also allowed 'exceptions', and for several years this had been of great assistance to local authorities in section 21 cases when they came under pressure to deliver assistance. Specifically, even if it could be shown that the needs of a claimant *did* go beyond mere 'destitution' (eg when seeking ELR on healthcare grounds), assistance could be refused on the basis that the claimant had the option of leaving the country. In a particularly significant part of the decision, however, Simon Brown LJ rejected this approach, and he went on to conclude that local authorities had 'no business' with an applicant's immigration status when their role was to assess needs and welfare support, observing (at 603) that:

'... it should be for the Home Office to decide (and ideally decide speedily) any claim for ELR and to ensure that those unlawfully here are promptly removed, rather than for local authorities to, so to speak, starve immigrants out of the country by withholding last resort assistance from those who today will by definition be not merely destitute but for other reasons too in urgent need of care and assistance.' Supporting this important aspect of the judgment, Hale LJ commented that the *National Assistance Act 1948* was about 'needs, not morality' (at 604).

Ex parte O remains a key benchmark for determining if there is a residual eligibility for health, Community Care and other welfare services for asylum seekers and others subject to immigration control when they have special needs. What is more, it is clear that local authorities retain duties under the 1948 Act and other Community Care legislation, notwithstanding *IAA 1999*'s restrictions. Such eligibility may also displace the lead responsibility and support normally provided by NASS (the National Asylum Support Service). Thus, in *R (On the Application of Westminster City Council) v National Asylum Support Service*,²¹ the House of Lords concluded that whilst the NASS scheme had displaced mainstream benefits and Community Care support services for the 'able-bodied' claimant, *section 21(1A)* had not relieved NHS and local authority duties to those who were 'destitute' and infirm when they had other unmet special needs. Although *IAA 1999*, including *section 95*, was drafted sufficiently widely to enable NASS to accommodate all destitute asylum seekers - able-bodied or infirm - NASS was entitled to take into account the availability to claimants of other sources of 'support' (as made clear by the *Asylum Support Regulations 2000 (SI 2000/704)*). This not only confirmed that claimants in such situations could look to the local authority for assistance, it had the further consequence that it relieved central government and NASS of legal duties once that parallel duty could be demonstrated. Similarly, in the later case of *R (On the Application of Mani) v I.A.N.L. 219 Lambeth LBC*,²² the claimant, who suffered from a congenital abnormality in his leg as well as mental health problems, succeeded in asserting a right to local authority accommodation relying on the approach adopted in

ex parte O. He was able to do it despite refusing an earlier offer of NASS accommodation. The local authority's duty of support remained, notwithstanding *section 21(1A)*, said the court, and this would apply equally to asylum seekers as it would to others *not* seeking asylum. Clearly this is a position that is set to continue, at least until the House of Lords or Parliament decide otherwise, or Parliament legislates to change the balance of responsibility between NASS and local authorities.

Human Rights Act 1998, s 6

The duties of NASS and local authorities are now supplemented by a pervasive requirement in *section 6* of the *Human Rights Act 1998 (HRA 1998)*, which makes it 'unlawful for a public authority to act in a way which is incompatible with a Convention right'. Consequently, when Parliament enacted the *Nationality, Immigration and Asylum Act 2002 (NIAA 2002)*, it specifically addressed this requirement by ensuring that the Secretary of State and local authorities retained a power to provide support to avoid a potential breach of *HRA 1998* requirements. In the event, this has proved to be a timely and necessary additional factor in the equation. Indeed, a Court of Appeal judge, Sir Stephen Sedley, pointed out at the Legal Action Group's annual conference in London in 2003 that it had *only* been the combined 'triple effect' of (a) *HRA 1998*, (b) *section 55(10)* of *NIAA 2002* (enabling support to be given despite the bar in *section 55(1)* on supporting 'late' applicants, to avoid a breach of human rights), and (c) the courts' power to make emergency interim orders, that was saving many asylum seekers and their dependants from 'starving in the streets'.

Impact of HRA 1998 on IAA 1999 and NIAA 2002

Under *section 54* of and *Schedule 3* to *NIAA 2002*, restrictions on giving support are directed at four 'classes' of ineligible person, namely (a) asylum seekers who may already have refugee status abroad; (b) nationals of an EEA State; (c) failed asylum seekers; and (d) people who are illegally in the UK (*Sch 3 paras 4-7*). *Section 55* then provides that the Secretary of State may not provide support to a person under the asylum support powers in *IAA 1999* (mainly *sections 4, 95 and 98*), or under the newer accommodation centre powers (in *sections 17 to 24* of *NIAA 2002* itself), if, after a person's asylum claim is recorded, the Secretary of State is not satisfied that the claim was made 'as soon as reasonably practicable after the person's arrival in the United Kingdom'. Restrictions are then underlined by *section 55(4)* and (5) which bar out the use by local authorities of powers to provide accommodation to asylum seekers while appeals or review applications are being heard. *Section 55(5)*, however, confers a residual power to provide assistance to a claimant and children under the age of 18 to avoid a breach of a claimant's rights under the European Convention on Human Rights ('ECHR'), and *paragraph 3* of *Schedule 3* makes similar provision for local authorities.

Cases started to come before the courts to test the legality of the policy behind *section 55*. In particular, attention focused on Article 3 of the ECHR, which prohibits states from subjecting people within their jurisdiction to torture, or inhuman or degrading treatment or punishment. Given the scale of deprivation experienced by growing numbers of people regarded as 'late' claimants - who had then been refused support or had support withdrawn - the argument **I.A.N.L. 220* started to crystallise that such action was (a) 'treatment' for the purpose of Article 3, and (b) sufficiently serious, at least in its effects, to put the Home Office and other agencies refusing

support in breach of the Article. The absence of any kind of statutory welfare support for such claimants - a problem exacerbated by charities' and voluntary organisations' inability to cope with the sudden demand on their services, particularly in London - was forcing advisers, as a last (or only) resort to emergency applications in the High Court. This was plainly the *only* means of getting any kind of basic assistance. In two cases which came before the Court of Appeal, the court had been asked to consider whether Article 3 was even capable of being engaged.

In *R (On the Application of Q and Others) v Secretary of State for the Home Department*,²³ the court accepted that the withdrawal by NASS of basic support was capable of being inhuman or degrading 'treatment'. The question was then at what point did the claimant's needs, following the withdrawal of support, put the Secretary of State in breach of Convention requirements?

After rejecting the approach adopted at first instance which was to ask whether there was a 'real risk' of a breach, the Court of Appeal concluded that there had to be a condition of deprivation which 'verged on the degree of severity capable of engaging Art 3', as described in *Pretty v United Kingdom*.²⁴ In principle, according to *Pretty*, 'treatment' by state officials could include 'ill-treatment' if it 'attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering', or where it humiliated or debased an individual, showing lack of respect for, or diminishing, his or her human dignity. If it aroused feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it could be characterised as 'degrading'. The suffering which flowed from naturally occurring illness, physical or mental, was also potentially covered by Article 3 'where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible'.

In the second case, *R (On the Application of T) v Secretary of State for the Home Department*,²⁵ the court had declined to lay down any one 'simple test'. It said the reality was that each case had to be judged in relation to 'all the circumstances which were relevant to it'.

Despite these two Court of Appeal decisions, it was clear that there was ongoing uncertainty about the scope of Article 3 - and there were continuing divisions, especially among judges in the Administrative Court, on the issue.

Subsequently, the *Limbuela* case came on appeal before the Court of Appeal.²⁶ Mr Limbuela, an Angolan national, had arrived in the UK on 6 May 2003. He claimed asylum the next day and was provided with NASS accommodation. Ten days later, however, the Secretary of State determined that he was not satisfied that Mr Limbuela had made his claim for asylum 'as soon as reasonably practicable' after arrival. Using the power in section 55(1) of *NIAA 2002*, the accommodation and support provided under section 95 of *IAA 1999* was withdrawn. Mr Limbuela then commenced a period of 'sleeping rough' and begging, but without much success. Accommodation from a charity was provided briefly, but this ended after four days. An application was made in the Administrative Court for an order requiring support to be reinstated, in the course of which proceedings the Secretary of State did not accept that the action taken amounted to treatment infringing Mr Limbuela's Convention rights under Articles 3 and 8 **L.A.N.L. 221*, and he declined to use his power under section 55(5) to resume support. Eady J granted an interim injunction against the Secretary of State, and pending disposal of the claim or further order, he ordered that the defendant should provide accommodation and support for the claimant's essential living needs. In the meantime, Mr Limbuela's asylum claim had been rejected, and the Adjudicator had dismissed an appeal. However, at that point

the Immigration Appeal Tribunal, after granting leave to appeal, remitted the case for re-hearing before a different Adjudicator. So further proceedings were still pending by the time permission for a judicial review of the refusal of support was given in October 2003.

Limbuela: the Court of Appeal decision

The majority of the court (Laws LJ dissenting) rejected the appeal in all three cases, holding that the withdrawal of support constituted 'inhuman or degrading treatment' under *Part 1, Article 3 of Schedule 1 to HRA 1998*. What is more, Carnwath LJ, after considering the reasoning in the Q case, concluded that it was not necessary for the claimant to show the *actual* onset of severe illness or suffering, particularly if the evidence established clearly that charitable support in practice was not available and that a claimant had no other means of 'fending for himself'. The presumption would be that severe suffering would imminently follow, and at that point he had done enough to show that he was 'verging on' the necessary degree of severity to engage Article 3.

His Lordship noted (at 72) that before the decision in Q there were three possible approaches concerning Article 3 in such cases:

- (a) that it had no application because the conditions of the claimants were not the result of state 'treatment';
- (b) that its application was confined to the specially vulnerable (eg pregnant woman or the elderly);
- (c) that it was of general application, provided the circumstances of an individual applicant were 'sufficiently serious'.

In Q, it was clear that (a) and (b) had been excluded. As there had been no appeal, the state, in consequence, had to be taken to have accepted responsibility for taking 'measures' to ensure that individuals who qualified for help under the test established by Q *could* obtain it. Carnwath LJ saw no reason to interfere with the conclusions of the judges in each case.

Concurring with that judgment, Jacob LJ went a lot further and also characterised the *policy* on which the withdrawal of assistance in each case as 'unlawful'. After considering the level of available sources of accommodation and support for asylum seekers, it was evident, he said, that the established charities could not feed or support them. There was a 'near certainty' that a substantial proportion would fall below the Article 3 threshold. He observed (at 74):

'Of course some might, to survive, resort to theft, prostitution, or illegal working (very likely for so-called "gangmasters"). But all these forms of survival would not pass the Art 3 threshold and cannot be prayed in aid by the State - which, to be fair, it does not seek to do.'

He added:

'It follows that although one may not be able to say of any particular individual that there is more than a very real risk that denial of food and shelter will take that individual across **I.A.N.L. 222* the threshold, one can say that collectively the current policy of the Secretary of State will have that effect in the case of a substantial number of people. It seems to me that it must follow that the current policy (which includes having no policy save in the case of heavily pregnant women) is unlawful as

violating Art 3. And it follows that the treatment of the particular individuals the subject of these appeals in pursuit of that policy is also unlawful.'

In a robust dissenting judgment, Laws LJ construed *section 55(5)* of *NIAA 2002* in a way that did not oblige the Secretary of State to ensure that asylum seekers had support by way of preventative or pre-emptive action - and he preferred a 'wait and see' approach. Among other things, in the course of his judgment, he sought to draw a distinction between what he described as breaches of Article 3 resulting from violence by state servants (which he called 'category (a)'), and breaches which consist of acts or omissions by the state which expose the claimant to 'suffering' inflicted by third parties or by 'circumstances' ('category (b)'). He recognised that the distinction which he was drawing was not the same as that which exists between positive and negative obligations, but considered that, whereas state violence other than in the limited and specific cases allowed by the law is always unjustified, acts or omissions of the state which expose persons to suffering other than violence - even suffering which may in some instances be as grave from the victim's point of view as acts of violence which would breach Article 3 - were 'not categorically unjustifiable'. His Lordship added, in fact, that they could be 'capable of justification if they arise in the administration or execution of government policy'.

In an important part of the judgment, later relied on and applied in the Court of Appeal case of *Gezer* (see below), Laws LJ introduced what was later to be dubbed the 'spectrum analysis'. He said (at 53):

'In my judgment the legal reality may be seen as a spectrum. At one end there lies violence authorised by the State but unauthorised by law. This is the worst case of category (a) and is absolutely forbidden. In the British State, I am sure, it is not reality, only a nightmare. At the other end of the spectrum lies a decision made in the exercise of lawful policy, which however may expose the individual to a marked degree of suffering, not caused by violence but by the circumstances in which he finds himself in consequence of the decision. In that case the decision is lawful unless the degree of suffering which it inflicts (albeit indirectly) reaches so high a degree of severity that the court is bound to limit the State's right to implement the policy on Article 3 grounds.' (emphasis added)

Later in the judgment, his Lordship said that the point on the spectrum which marked the dividing line was at the place between cases where government action is justified notwithstanding the individual's suffering and cases where it is not (at 53). He also considered that a person was not degraded in the particular, telling sense, if his misfortune was no more and no less than suffering (not violence) by the application of government policy, commenting (at 56):

'I do not mean to sideline such a person's hardships, which may be very great. I say only that there is a qualitative difference, important for the reach of Article 3, between such a case and one where the State, by the application of unlawful violence, treats an individual as a thing and not a person.'

In his conclusions of principle on Article 3, Laws LJ said that where the Article was deployed to challenge the circumstances of lawful government policy whose application consigned an *'I.A.N.L. 223* individual to circumstances of serious hardship, the Article was no more nor less than 'the law's last word'. It operated as 'a safety net, confining the State's freedom of action only in exceptional or extreme cases' (at 56).

In conclusion, on the proven or admitted facts, Laws LJ could not accept that any of the cases being appealed exhibited 'exceptional features' that were sufficient to require the Secretary of State to act under *section 55(5)(a)*.

The 'spectrum analysis' and Gezer

There are a number of criticisms and concerns which can be raised against the 'spectrum analysis'. First, as a means of limiting the application of Article 3 of the ECHR in cases that bring into question the adequacy of state support for claimants still pursuing asylum claims, it can be criticised for the same reasons on which the withdrawal of benefits in the *JCWI* case (discussed under *Restrictions in primary legislation* above) was held to be *ultra vires*. Its effect, if deployed against a person who has fallen foul of section 55(1) of *NIAA 2002*, is to inhibit the asylum claims process by, in effect, making it impossible to continue pursuing an asylum claim in the UK. Secondly, a distinction between state violence which is 'always unjustified' because it is 'violence', and 'acts or omissions' which are *not* 'violence' because they merely inflict suffering in other ways, including the withdrawal of state welfare, is clearly problematic and untenable. It is also a rather dubious means of trying to open the door to legitimising such acts or omissions by the state as 'justifiable' - particularly when it seeks to rely on the fact that such acts or omissions are taken by officials acting within their remit, and in pursuit of government policy. The whole purpose of the Convention, surely, is to subject states' governmental policies to scrutiny against human rights norms which can transcend the legitimacy which they might otherwise derive from states' domestic laws. Needless to say, the analysis has little or nothing to commend it in terms of ECHR case law.²⁷ But this, in itself, would not prevent government agencies, including NASS and local authorities administering Community Care services (often within tight limits on their resources), from deploying it as a means of promoting government objectives. Unfortunately, it is this point which highlights the way implementation of Convention rights at the state level (in the immigration and asylum context, as in others) is always vulnerable to judicial re-engineering, particularly in pursuit of domestic agendas. In this respect, refugee support systems are often as problematic as the refugee law regime itself, given that their implementation, including administration of support arrangements before applicants can gain 'refugee' status, is delegated to individual states and their courts.²⁸

The problem, however, is that in *Limbuella* both Carnwath and Jacob LJ agreed with the 'spectrum analysis'. Indeed, it is possible to read the majority's judgment as simply differing from that of Laws LJ in determining the point along the spectrum line at which they placed the appellants' cases. Carnwath LJ, for example, after acknowledging 'with gratitude' the 'illumination provided by Laws LJ's powerful discussion of the scope of Article 3', agreed with him that 'the legal reality is a spectrum' (at 67). For that reason, the Court of Appeal was again able to deploy the concept when determining the scope of an asylum claimant's Convention rights in the disturbing case of *R (Gezer) v Secretary of State for the Home Department*.²⁸

***I.A.N.L. 224** In *Gezer*, the appellant appealed against the decision of the Administrative Court refusing his application for judicial review of a decision of NASS to 'disperse' him and his family to a council estate in Glasgow (and a later decision to return them there). After Mr Gezer and his family claimed asylum he was diagnosed with psychotic depression, and NASS were aware of this. Nevertheless, he was offered accommodation on a council estate in Glasgow pursuant to its dispersal programme. It was made clear that if the offer was declined all financial support would be taken away. So the family moved there. In the event, they were subjected to racial abuse and harassment, including an attack on their accommodation. After a return to London, NASS again offered them accommodation (again in the Glasgow dispersal area). When the family declined, their support was withdrawn. Proceedings in the courts continued (although NASS later withdrew the decision). In particular, the case raised important questions about the extent of the state's 'duty to protect', especially when the likely danger was the result of the action of the state itself.

Among other things, Mr Gezer argued that Article 3 was engaged at the point when he faced a risk of ill-treatment. In addition, he argued that NASS should have appreciated that his mental state rendered him vulnerable, and that it should have made enquiries to ensure that he was not exposed to the treatment that he and his family had suffered. In the event, the case failed but was then appealed.

In dismissing the appeal (Laws LJ giving the leading judgment), the Court of Appeal concluded that Mr Gezer had a 'choice' whether or not to accept the offer of housing on the estate (despite the fact that financial support would have been withdrawn if he had declined). This meant that a compulsory result had not been 'imposed' on him - and this assisted in the conclusion that the case fell at the less serious end of the spectrum of potential Article 3 cases, as considered by the court in *Limbuela*. The court was not prepared to accept that NASS was obliged to look into the conditions on the estate to see if Mr Gezer would be harmed - a finding assisted by the fact that the Secretary of State had wide powers and discretion in administering support under section 95 of IAA 1999, and could not be expected to ensure accommodation was 'suitable' for a particular asylum claimant. In any case, by withdrawing a requirement that the family return to the same address in Glasgow, any 'duty to protect' had been satisfied and there was therefore no violation of Article 3.

Adam: the House of Lords judgment

Not long after the *Gezer* decision was handed down, the joined appeals of the Secretary of State in *Adam*, *Limbuela* and *Tesema* were heard by the House of Lords.³⁰ Immediately, the case became a high-profile one, with significant levels of media coverage and public interest. No doubt the court was aware of this, and of the difficulties it would create for the Government, policy-makers and the legislature if the court rejected the appeals, given that this would drive a coach and horses through the policy underlying section 55 of NIAA 2002. Indeed, it is a striking feature of the Lords' judgment (which did reject the appeals) that they went to a lot of trouble to stress that their decision focused on the law, and not 'politics'. Lord Craig said as much when he commented that 'the question whether, and if so in what circumstances, support should be given at the expense of the state to asylum-seekers' was 'an intensely political issue', but that (at para 14):

'It is important to stress at the outset, however, that engagement in this political debate forms no part of the judicial function.'

I.A.N.L. 225 Baroness Hale, at the start of her speech, was at pains to say (at para 75):

'... we are respecting, rather than challenging, the will of Parliament.'

Lord Brown later contributed the remark (at para 85) that:

'... there can be no question here of the court by its decision thwarting the will of Parliament.'

No doubt such nervousness was due, in part, to the recent propensity of some ministers to attack the judiciary, often unfairly, on immigration and asylum issues, and to portray the judiciary as interfering excessively in government 'policy' and what they see as discretion given to decision-makers by Parliamentary laws. Given the importance of the judicial role in identifying the limits of such discretion, however, and

maintaining effective judicial scrutiny of refugee law, it is not unreasonable for our top court to remind the Government periodically of the discrete roles played by the courts and executive.³¹

Lord Bingham's reasoning

The context in which *section 55* had been passed was explained by Lord Bingham of Cornhill at the outset of the first speech in the judgment in which he rejected the appeals. After referring to 'the very sharp rise in the number of applications for asylum over the last decade or so', he said that the legislative response of successive governments has been founded on two premises, namely that while some asylum applications were made by 'genuine refugees', a majority were not and were being made by so-called 'economic migrants' seeking a higher standard of living than in their home countries; and that the UK was an 'attractive destination', as it treated, or was widely believed to treat, applicants more generously than other countries. He considered that the legislative provisions had been enacted:

...with the object, first, of encouraging applicants to claim asylum very promptly. This is because it is thought that claims made promptly are more likely to be genuine, because such claims are easier to investigate, and because if claims are made promptly and are judged to be ill-founded, the return of the unsuccessful applicant to his country of origin is facilitated. It has also been sought, secondly, to restrict the access of asylum applicants to public funds. The object is to reduce the burden on the public purse; to restrict public support, so far as possible, to those who both need and deserve it; to mitigate the resentment widely felt towards unmeritorious applicants perceived as battenning on the British taxpayer; and to discourage the arrival here of economic migrants by dispelling the international belief that applicants for asylum are generously treated.'

Lord Bingham did not consider that 'the policy and purposes' underlying the legislation were in issue, as they represented 'a legislative choice'. The issue for him turned on the application of the Parliamentary enactments, including *section 95* of *IAA 1999*, and *section 55* of *NIAA 2002* which 'revoked' that authority where a person had made a recorded claim for *V.A.N.L. 226* asylum but the Secretary of State was not satisfied that 'the claim was made as soon as reasonably practicable after the person's arrival in the UK. Each of the three respondents had made such claims, either on the day of arrival in the UK or the day after. He went on:

'If the legislation ended there, it would be plain that the Secretary of State could not provide or arrange for support of the respondents, even if he wished, and however dire their plight.'

After noting that in *section 55(5)*, Parliament had recognised that the prohibition in *section 55(1)* could lead to a breach of an applicant's Convention rights, which public authorities including the Secretary of State and courts were obliged to respect (under *section 6* of *HRA 1998*), Lord Bingham pointed out that the Secretary of State was only authorised to provide support to a 'late applicant' for asylum to the extent needed to avoid a breach of that person's Convention rights. His freedom of action was 'closely confined'. He considered the scope of Article 3, identifying the focus as being on 'inhuman and degrading treatment'. He thought that it was 'plain' that 'treatment' could include actions taken as part of the regime imposed on late applicants, especially as *section 55(1)* prohibited the Secretary of State from providing or arranging accommodation 'and even the barest necessities of life'. Interestingly, he then linked this to the bar on access to the labour market -

something that had been achieved by section 8 of the *Asylum and Immigration Act 1996*, the *Immigration (Restrictions on Employment) Order 1996 (SI 1996/3225)*, and standard conditions which were included in the applicant's notice of temporary admission, a breach of which may lead to his detention or prosecution. This combined to prevent his undertaking any work, paid or unpaid, without permission, which could not be given unless his application had been under consideration for twelve months or more.

Lord Bingham was in no doubt that such treatment could be 'inhuman or degrading'. Indeed section 55(5)(a) assumed that it may - an assumption that was 'plainly correct' since the judgment in *Pretty*, where the European Court of Human Rights ('ECtHR') had described the general nature of treatment falling within Article 3. He added that the description was 'in close accord with the meaning one would naturally ascribe to the expression', adding his understanding of the point at which the Article was engaged:

'Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one.'

He accepted that a 'general public duty to house the homeless or provide for the destitute cannot be spelled out' from Article 3. But he had no doubt that the threshold *could* be crossed if a late applicant, with no means and no alternative sources of support, unable to support himself, was, by the deliberate action of the state, 'denied shelter, food or the most basic necessities of life'. He considered that the Secretary of State's duty under section 55(5)(a) arose:

'... when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health *I.A.N.L. 227* and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation.'

Before the end of his judgment, Lord Bingham concluded that it was not possible to formulate any 'simple test' for all cases. Instead, he thought that if there was:

'... persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed.'

He did not regard *O'Rourke v United Kingdom*³² as authority to the contrary. He observed that if in that case the predicament of the applicant had been the result of state action 'rather than his own volition', and if he had been ineligible for public support (which he was not), the court's conclusion that his suffering did not attain the requisite level of severity to engage Article 3 would have been 'very hard to accept'.

The other Lords' reasoning

The other Law Lords reached similar conclusions to Lord Bingham, but with some important differences in terms of reasoning and emphasis.

Lord Hope

After summarising the facts of each of the three cases, based on the judgments at first instance and the agreed Statement of Facts and Issues, Lord Hope considered what he described as 'the plight in which asylum-seekers find themselves' and the context of the legislative scheme which denied them access to the labour market. He noted that there is provision now in paragraph 360 of the Immigration Rules (giving effect to Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers), whereby an asylum seeker who has been waiting for twelve months for an initial decision can apply for permission to take up employment. However, he also noted that for twelve months asylum seekers and their dependants are prohibited from earning money to maintain themselves. He might have added that, despite that change, the system remains discretionary in that conditions can be imposed.³³ He went on to consider the impact of the introduction of the *NIAA 2002* regime, and in particular the requirement of *section 55(1)* on the support regime in *Part VI* of *IAA 1999*, noting that statistics provided during the appeal indicated that although 30 per cent of asylum claimants made claims at their port of entry, 70 per cent did not, and their claims were made 'in-country'. The significance of that was that such claims were likely to be regarded as 'too late'. Interestingly, as Lord Hope pointed out, a Parliamentary committee had identified the potential problem, in ECHR terms, *'I.A.N.L. 228* while the Bill was being considered by the Joint Committee on Human Rights. The committee had found it 'difficult to imagine a case where a person could be destitute ... without giving rise to a threat of violation of articles 3 and/or 8 of the Convention'.³⁴

In Lord Hope's view, the key to 'a proper understanding' of *section 55(5)(a)* lay in its use of the word 'avoid' in the phrase 'avoiding a breach'. Stringent though the new test was no doubt intended to be, the application of *section 6(1)* of *HRA 1998* to the acts and omissions of the Secretary of State as a public authority had to be recognised - and the purpose of *section 55(5)(a)* in this context was to enable the Secretary of State to exercise his powers to provide support under provisions in *IAA 1999* and *sections 17* and *24* of *NIAA 2002* before the ultimate state of inhuman or degrading treatment was reached. Once that stage was reached, he said, the Secretary of State was at risk of being held to have acted in a way that was incompatible with the asylum seeker's Convention rights, contrary to *section 6(1)* (and with the potential consequences that this could produce as a result of *sections 7(1)* and *8(1)* of *HRA 1998*). However, *section 55(5)(a)* enabled the Secretary of State to step in *before* that could happen, so that he could 'avoid' being in breach. He then went on to address two issues of Convention law: first, 'the absolute nature of the prohibition in article 3'; and secondly, the adjectives 'inhuman or degrading'. On the first, he considered that:

'The prohibition is in one sense negative in its effect, as it requires the state - or, in the domestic context, the public authority - to refrain from treatment of the kind it describes. But it may also require the state or the public authority to do something to prevent its deliberate acts which would otherwise be lawful from amounting to ill-treatment of the kind struck at by the article.'

He pointed out, however, that the fact that an act of a positive nature was required to prevent the treatment from attaining the minimum level of severity which engaged the prohibition did not alter 'the essential nature of the article'. The injunction which it contained was prohibitive - and the prohibition was *absolute*.

Lord Hope was one of the two judges (the other being Baroness Hale) who plainly did not accept the concept of the 'spectrum analysis' developed at the Court of Appeal stage of the appeal and deployed since then. He said:

'I must confess to a feeling of unease about this analysis. It has no foundation in anything of the judgments that have been delivered by the European Court and it is hard to find a sound basis for it in the language of article 3.'
After considering *Pretty*, he stated that:

'Where the inhuman or degrading treatment or punishment in question results from acts or omissions for which the state is directly responsible there is no escape from the negative obligation on states to refrain from such conduct, which is absolute. In most cases, of course, it will be quite unnecessary to consider whether the obligation is positive or negative. The real issue, as my noble and learned friend Lord Brown of Eaton-under-Heywood has indicated, is whether the state is properly to be regarded as responsible for the conduct that is prohibited by the article.'

V.A.N.L. 229 But the ECtHR, he said, had all along recognised that ill-treatment had to attain a minimum level of severity if it was to fall within the scope of 'inhuman or degrading treatment or punishment', as could be seen from four leading cases.³⁵ After observing that it was impossible to by a simple definition to embrace all human conditions that will engage Article 3, he thought the 'exercise of judgment' was:

'... required in order to determine whether in any given case the treatment or punishment has attained the necessary degree of severity. It is here that it is open to the court to consider whether, taking all the facts into account, this test has been satisfied.'

Lord Hope thought that it would be wrong to lend any encouragement to the idea that the test was more exacting where the treatment or punishment which would otherwise be found to be inhuman or degrading was the result of what Laws LJ had referred to at the Court of Appeal stage as 'legitimate government policy'. That, he said would be to:

'... introduce into the absolute prohibition, by the backdoor, considerations of proportionality.'

These, he said, might be relevant when an obligation to do something was implied into the Convention, in which case the obligation of the state was *not* absolute and unqualified. But proportionality, which gave a margin of appreciation to states, had no part to play when conduct for which it was directly responsible resulted in inhuman or degrading treatment or punishment. The obligation to refrain from such conduct was *absolute*.

Applying these principles to the appeal, Lord Hope concluded that the decision to withdraw support from someone who would otherwise qualify for it under *section 95* of *IAA 1999* was an intentionally inflicted act for which the Secretary of State was directly responsible. He was also directly responsible for all the *consequences* that flowed from it, bearing in mind the nature of the regime which had removed from asylum seekers 'the ability to fend for themselves by earning money while they remain in that category'. What is more, when deciding at what point the Secretary of State should intervene, Lord Hope considered that the wording of *section 55(5)(a)* showed that its purpose was to prevent a breach from taking place - not to wait until there was a breach and *then* address its consequences.

Lord Scott

This was a view shared by Lord Scott, who pointed out that the statutory reference to 'avoiding', rather than to 'remedying' or 'remedying as soon as practicable' or to other

like words, indicated that the Secretary of State was expected to take action *before* a breach of the Convention right occurred. Earlier in his judgment, he had agreed with Counsel for the Secretary of State, Mr Giffin QC, that a failure by the state to provide an individual within its jurisdiction with accommodation and the wherewithal to acquire food and the other necessities of life could not by itself constitute 'treatment' for Article 3 purposes. It was not the function of Article 3 to prescribe a 'minimum standard of social support' for those in need.³⁶ That, he said, was a matter for the social legislation of each signatory state. Just as there was no ECHR **I.A.N.L. 230* right to be provided by the state with a home, so too there was no ECHR right to be provided by the state with a minimum standard of living.

The situation, he said, was 'quite different' if a statutory regime were to be imposed on an individual, or on a class to which he belonged, barring that individual from basic social security and other state benefits to which he or she would, were it not for that statutory regime, be entitled. The social legislation in the UK *did* make provision for accommodation and welfare benefits to be made available to asylum seekers who would otherwise be destitute. In a key passage, he pointed out that it was necessary for provision to be made because asylum seekers were, by the conditions on which they were permitted temporary residence in this country, barred from working, and so could not 'by their own efforts obtain the funds by means of which to support themselves'.

Baroness Hale

In common with Lord Hope, Baroness Hale was 'uneasy' with the 'spectrum analysis' developed by Laws LJ and developed in *Gezer*, saying that it 'invited fine distinctions' which had 'no basis in the Convention jurisprudence'.

That jurisprudence, she said, was quite clear in recognising two situations in which the state could be held responsible for somebody's suffering. The first was when the state had itself subjected that person to such suffering. The second was when the state should have intervened to protect a person from suffering inflicted by others. Different considerations, she said, arose in the second type of case. Nevertheless, she was clear that the cases being appealed were in the first category, adding:

'The state has taken the Poor Law policy of "less eligibility" to an extreme which the Poor Law itself did not contemplate, in denying not only all forms of state relief but all forms of self sufficiency, save family and philanthropic aid, to a particular class of people lawfully here. We can all understand the reasons for doing so. But it is of the essence of the state's obligation not to subject any person to suffering which contravenes article 3 that the ends cannot justify the means.'

The only question was whether the degree of suffering endured or imminently to be endured by claimants reached the degree of severity prohibited by Article 3. It was 'well known' she said, that a 'high threshold' was set, but it could vary with the context and the particular facts of the case, and there were 'many factors to be taken into account'. After observing that the UK was not a country in which it is generally possible to live off the land 'in an indefinite state of rooflessness and cashlessness', she went on to make some important points on the theme of 'degradation', and introduced a gender factor into the judgment. In a key passage, she said:

'It might be possible to endure rooflessness for some time without degradation if one had enough to eat and somewhere to wash oneself and one's clothing. It might be possible to endure cashlessness for some time if one had a roof and basic meals and hygiene facilities provided. But to have to endure the indefinite prospect of both,

unless one is in a place where it is both possible and legal to live off the land, is in today's society both inhuman and degrading. We have to judge matters by the standards of our own society in the modern world, not by the standards of a third world society or a bygone age. If a woman of Mr Adam's age had been expected to live indefinitely in a London car park, without access to the basic sanitary products which any woman of that age needs, and exposed to *I.A.N.L. 231* the risks which any defenceless woman faces on the streets at night, would we have been in any doubt that her suffering would very soon reach the minimum degree of severity required under article 3? I think not.'

While there could be 'no hard and fast rules', Baroness Hale supported the practical guidance given by Lord Bingham in his judgment.

Lord Brown

Lord Brown agreed that the appeals should be rejected. However, in reaching that conclusion, he was less dismissive of the 'spectrum analysis' approach, saying that he found much of Laws LJ's analysis 'useful' - not because he thought it helpful to try to place each Article 3 complaint on a spectrum (an exercise which he said 'invited needless comparisons with other cases'), but rather because it highlighted what he described as 'the many different considerations in play' and the need 'in all but the clearest cases to look at the problem in the round'.

This was an approach which he had adopted in *N v Secretary of State for the Home Department (Terrence Higgins Trust Intervening)*, a case concerned with whether the UK could lawfully deport an AIDS-affected complainant, and which he said involved deciding whether the state was obliged to continue her expensive treatment here.³⁷ Clearly, Lord Brown was also concerned about the position of the respondents and interveners in categorising state obligations in every Article 3 case as either 'negative' or 'positive'. After agreeing that in torture cases there could be 'no room there' for any policy justification, and that prohibition against such action was 'absolute and unqualified', he did not share the analysis of the respondents to other Article 3 cases. He continued, in an important passage:

'But insofar as the respondents and/or interveners contend for the need in every article 3 case first to categorise the state's obligation as either negative or positive, only in the latter cases having regard to proportionality or indeed anything other than whether the victims' suffering is sufficiently severe to meet the article 3 threshold, I cannot agree.

Take the case of *N* itself where the question whether the UK could lawfully deport the AIDS-afflicted complainant realistically involved deciding whether the state was obliged to continue her expensive treatment here. Or, indeed, take the present case which could similarly be analysed as a complaint of failure to take positive action by way of support. True it is that the legislative regime here in force not only denies support but also prohibits asylum seekers from working, an important factor in the Court of Appeal's decision in *Q* to regard the case as one of "positive action ... not ... mere inaction". But assume the ban on working were to be lifted and a complaint then made by someone obviously unemployable. Surely the approach would not be fundamentally different.

I repeat, it seems to me generally unhelpful to attempt to analyse obligations arising under article 3 as negative or positive, and the state's conduct as active or passive. Time and again these are shown to be false dichotomies. The real issue in all these

cases is whether the state is properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim.'

This seemed to Lord Brown to be a better approach in cases like the present appeals where the essence of the complaint was that the victims had been subjected to 'degrading treatment', a concept which, he said, had been 'authoritatively explained' in *Pratty*. In such cases, he thought **I.A.N.L. 232* the 'subjective intention of those responsible for the treatment (whether by action or inaction) will often be relevant'.

Later in the judgment he made important observations about the role of policy, and the legal implications of singling out particular groups for treatment that left them 'utterly destitute':

'It seems to me one thing to say, as the ECtHR did in *Chapman*,³⁸ that within the contracting states there are unfortunately many homeless people and whether to provide funds for them is a political, not judicial, issue; quite another for a comparatively rich (not to say northerly) country like the UK to single out a particular group to be left utterly destitute on the streets as a matter of policy. In 1999, in a foreword to a government paper, "Coming in from the Cold: the Government's Strategy on Rough Sleeping", the Prime Minister wrote:

'On the eve of the 21st century, it is a scandal that there are still people sleeping rough on our streets. This is not a situation that we can continue to tolerate in a modern and civilised society.'

The paper, of course, was directed rather to the indigenous population, and in particular groups such as care-leavers, ex-servicemen and ex-offenders, than to asylum seekers (who were not mentioned). But asylum seekers, it should be remembered, are exercising their vital right to claim refugee status and meantime are entitled to be here. Critically, moreover, unlike UK nationals, they have no entitlement whatever to other state benefits.'

Lord Brown said that he did not wish to 'minimise the advantages which the government seek to gain from their policy towards late claimants'. Nor, he thought, should these be 'overstated', as 'in reality it was unlikely that many claims would be made earlier as a result of it'. Nor, he thought, did the statistics suggest that late claimants made a disproportionate number of the 'unmeritorious claims'. For him, what was more important was that:

'... the policy's necessary consequence is that some asylum seekers *will* be reduced to street penury. This consequence must therefore be regarded either as intended, in which case it can readily be characterised as involving degrading treatment, or unintended, involving hardship to a degree recognised as disproportionate to the policy's intended aims. Either way, in my opinion, street homelessness would cross the threshold into article 3 degrading treatment.'

In terms of the test to be applied in section 55 cases, he suggested that 'imminent street homelessness' would of itself trigger the Secretary of State's requirement under *section 6* of *HRA 1998* to provide support (if only by way of night shelters and basic sustenance). He acknowledged that 'degrading treatment' could be avoided by the provision of less even than the modest support available under *section 95* of *IAA 1999*. Otherwise, he was content to adopt the approach proposed by Lord Bingham, and he, too, would dismiss the appeals.

The post-Adam position

Adam has undoubtedly been a major set-back to the Government's asylum and immigration policies. The fall-out, politically, was immediate. Shelter's Director, Adam Sampson, called for the removal of what he described as 'this inhumane and degrading piece of legislation', and Maeve Sherlock of the Refugee Council said it was 'disgraceful' that the legislation had meant *I.A.N.L. 233* 'vulnerable refugees were left to starve on the streets'. In a letter to *The Times*, Dr John Sentamu, Archbishop of York and 44 bishops and other church leaders, supported a call by Church Action on Poverty 'to change policies that leave people seeking asylum homeless and destitute' and use 'the threat of destitution' as a 'way of pressurising refused asylum seekers to leave the country'. They demanded that the Government should 'allow people seeking asylum to sustain themselves and contribute to wider society through paid work', and where this was not possible, to 'reinstate refused asylum seekers' entitlement to benefits until such time as they may be removed'.³⁹

The Government, however, has been characteristically bullish. Immigration Minister, Tony McNulty defended the Government's policies, but conceded that he would have to 'consider changing the rules'. He said, 'The judgment leaves intact a fundamental principle within our approach to asylum which is that people should claim as soon as they arrive in the country,' and added that, 'The Law Lords have recognised that there are difficult decisions to be made and each case has to be judged on its individual merits.' He added that a new 'crackdown' could be expected:

'We are adopting tough new means to crack down on opportunistic behaviour. In particular, we are setting up tightly managed new processes for handling late and opportunistic claims. The impact of this will be that those who seek to play the system will receive a very quick asylum decision and so will, in reality, have very limited access to benefits.'⁴⁰

Given that EC legislation⁴¹ appears to explicitly permit Member States to do the very thing that section 55(1) of *NIAA 2002* does - as pointed out at the time it was enacted⁴² - the Minister's position on the 'fundamental principle' does, indeed, seem to be intact, and the government, on the face of it, continues to enjoy powerful support from EC Law. A more careful and contrary analysis, however, is that EC provisions which appear to authorise the withdrawal of reception support do *not*, in fact, do so, at least not in a completely unregulated way. Certainly, it does not authorise a blanket policy permitting the removal of all support from all 'late applicants', and without regard to their particular needs. To the extent that EC law does permit this, then it is plainly incompatible with key provisions of the ECHR such as Articles 3, 8 and 14.⁴³

Conclusions

Some uncertainty remains about aspects of the way Convention rights are being deployed since *Adam*, including the current status of the 'spectrum analysis'. In particular, the *Adam* judgment may, perhaps, have left the door open to the development of similar judicial approaches to it in *I.A.N.L. 234* the future. The problem in this respect is that on a judicial head-count, of the eight judges in the Court of Appeal and the House of Lords, three had nothing specific to say about such an analysis. One saw aspects of it which were 'useful', and three were in favour. Only two were explicitly critical of the analysis. Nevertheless, the headline point is that section 55 of *NIAA 2002* no longer provides a reliable basis for excluding 'late' asylum claimants from welfare support, at least once it is obvious that a claimant 'faces an imminent prospect of serious suffering caused or materially aggravated by

denial of shelter, food or the most basic necessities of life'.⁴⁴ In more general terms, the judges have (once again) stepped in to prevent the core objective of the asylum process being thwarted by the removal of welfare support for claimants. As several of the Lords remind us, claimants are here lawfully and to assert a legal right which is underpinned by the UK's public international law obligations. Despite the result in *Adam*, many negative features of the support regime for asylum seekers and dependants continue. This is especially so in the period after an asylum claim has been lodged, and while a determination is awaited and appeals are being heard. During this 'reception' phase the level of support available is minimal, and opportunities to contest adverse decisions by NASS, local authorities and other welfare agencies are very limited.⁴⁵

The principles laid down in the *Adam* case have wider ramifications. Among other things, they reinforce the existence of a judicially created, Convention-based safety net that is likely to have to be deployed in a potentially wide range of scenarios in the future, not just for asylum claimants, but for other groups affected by the creation of future immigration status 'gateways' to welfare support. At the time of writing, it is already apparent that the Immigration, Asylum and Nationality Bill 2005, currently before Parliament, will incorporate further amendments that are set to impact on new entrants' access to state benefits, local authority support and the labour market. Consequently, it is not difficult to envisage situations in which migrants and their dependants will continue to be caught between two very hard places - a bar from employment opportunities and a removal of state welfare support - as a result of such 'new generation' restrictions. It is also unlikely that the present situation, whereby exceptions to Community Care bars, created on the back of judicial decisions like *ex parte O*, and which assist claimants with special needs, are going to continue forever, untouched by new primary legislation. If the legal position in such cases were to change, Convention rights from that point would probably become the sole basis on which welfare support would be available.

Finally, as problematic, too, are those cases involving children and other vulnerable dependants who now have to look to local authorities for support (as a result of the changes made by section 54 of and Schedule 3 to *NIAA 2002*) when it becomes apparent that their continued presence in the UK is unlawful.⁴⁶ Again, it is only key Convention articles like Articles 8 and 14, which are ensuring that there is still a residual safety net.

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1. *Per* Lord Bingham of Cornhill in *R v Secretary of State for the Home Department, ex parte Adam and Others* [2005] UKHL 66 at para 7: 'I have no doubt that the [Article 3] threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life.'

2. Sections 9 and 10 of the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004*, removing support from failed asylum claimants and dependants, is a recent example.

3. A Pieter van der Mei *Free Movement of Persons within the European Community* (Oxford: Hart Publishing, 2003) at p 7; and W Brubaker 'Membership without Citizenship: The Economic and Social Rights of Non-Citizens' in W Brubaker (ed) *Immigration and the Politics of Citizenship in Europe and North America* (Lanham: University Press of America, 1989).

4. An approach that is more consistent with EC policy objectives for a Common European Asylum System, ensuring that a minimum level of benefits and social protection is available in all Member States for those with 'subsidiary protection status' as well as 'refugee' status - EC Directive 2004/83/EC. Such measures fall well short of guaranteeing social protection for *all* new entrants to the Community, and are primarily designed to reduce 'secondary movements' by asylum applicants between Member States caused by 'differences in legal frameworks' (Directive 2004/83/EC, Preamble, para 7).

5. Lord Justice Maurice Kay in 'Immigration and Social Welfare' 8 CCLR Sept 2005, 305.

6. Nick Wikeley and Anthony Ogus 'Wikeley, Ogus and Barendt's *The Law of Social Security* (5th edn, London: Butterworths LexisNexis, 2002) at p 232.

7. Hugo Storey 'United Kingdom Immigration Controls and the Welfare State' [1984] JSWL 14, cited by Hale LJ in her analysis of the system in *R v Wandsworth LBC, ex parte O* [2000] 4 All ER 590 (CA).

8. Case C-90/97 *Swaddling v Adjudication Officer* [1999] All ER (EC) 217 (ECJ) clarified exceptions to the rule in cases where state benefits facilitate 'free movement' of workers and jobseekers within the Community; and Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703; [2004] 2 CMLR 8 (ECJ) set limits on its use to 'protect the labour market'. Nevertheless, the 'habitual residence' rule remains problematic for many entrants and 'returners' to the UK - as shown by cases such as *Nessa v Chief Adjudication Officer* [2001] 1 CMLR 20 (HL); and *Gingi v Secretary of State for Work and Pensions* [2001] 1 CMLR 20 (CA).

9. J Albesson *Failing the Test: CAB Clients' Experience of the Habitual Residence Test in Social Security* (Evidence Report) (London: National Association of Citizens' Advice Bureaux, 1996).

10. *Social Security (Habitual Residence) Amendment Regulations 2004* (SI 2004/1232). The Regulations were the subject of a partially successful judicial review in *R (H and D) v Secretary of State for Work and Pensions* [2004] EWHC 1097; [2004] 3 CMLR 11.

11. *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants*; *R v Secretary of State for Social Security, ex parte B* [1996] 4 All ER 385 (CA).

12. *Ibid*, per Simon Brown LJ at 401.

13. *Supra* n 10, per Waite LJ at 402.

14. S Willman, S Knafler and S Pierce *Support for Asylum-Seekers* (2nd edn, London: Legal Action Group, 2004) at p 9.

15. White Paper 'Fairer, Faster and Firmer - A Modern Approach to Immigration And Asylum' (Home Office, 27 July 1998); and Explanatory Notes to IAA 1999, para 13. The 'burden' was, in fact, the direct result of restrictions introduced since 1996 - see Willman et al, supra n 13, at pp 48-55.
16. Foreword by the Minister of State for Health, John Hutton (now Secretary of State for Work and Pensions), to 'Proposals to Exclude Overseas Visitors from Eligibility to Free NHS Primary Medical Services' (Dept of Health, May 2004), published shortly after the *NHS (Charges to Overseas Visitors) Amendment Regulations 2004 (SI 2004/614)* had already removed free hospital treatment for failed asylum seekers, those in the UK unlawfully, and other 'visitors'.
17. JCWI 'Response to the Consultation Paper on Proposals to Exclude Overseas Visitors from Eligibility to Free NHS Medical Services' (Aug 2004).
18. *R v Westminster City Council and Others, ex parte M, P, A, and X* (1997) 1 CCLR 85. Among the reasons given by Lord Woolf (at 94-95) was that 'the longer the asylum seekers remain in this condition the more compelling their case becomes to receive assistance under the subsection'.
19. *R v Wandsworth LBC, ex parte O; R v Leicester City Council, ex parte Bhikha* [2000] 4 All ER 590 (CA).
20. *R v Brent London Borough Council, ex parte D* (1997) 31 HLR 10.
21. *R (On the Application of Westminster City Council) v National Asylum Support Service* [2002] 4 All ER 654. Since then, the case has been followed in later important cases such as *R (M) v Slough BC* [2004] EWHC 1109; [2004] BLGR 657, concerning a Zimbabwean asylum seeker suffering from HIV/AIDS, where the court made it clear that the authority's duties arose immediately and that it was not necessary to wait until a risk to the person's health materialised before action had to be taken.
22. *R (On the Application of Mani) v Lambeth LBC* [2004] HLR 5; [2004] HLR 50 (CA).
23. *R (On the Application of Q and Others) v Secretary of State for the Home Department* [2003] 2 All ER 905 (CA).
24. *Pretty v United Kingdom* [2002] 35 EHRR 1 (ECtHR).
25. *R (On the Application of T) v Secretary of State for the Home Department* [2003] EWCA Civ 1285.
26. *R (On the Application of Limbuela) v Secretary of State for the Home Department* [2005] 3 All ER 29 (CA), joined with the appeals in *Adam and Tesema*. See K Puttick 'Asylum support and Limbuela: an end (finally) to section 55?' (2004) Vol 18, No 3 IANL 186.
27. As pointed out in the course of *Adam* in the House of Lords by Baroness Hale (at para 77) - discussed below.
28. Colin Harvey *Seeking Asylum in the UK: Problems and Prospects* (London: Butterworths, 2000) at p 27.

29. *R (Gezer) v Secretary of State for the Home Department* [2004] EWCA Civ 1730 (CA) [2005] Imm AR 131; [2005] HLR 16.

30. *R v Secretary of State for the Home Department, ex parte Adam and Others* [2005] UKHL 66.

31. In some contexts this becomes even more important, for example when debates on asylum and counter-terrorism policy get intertwined - see Colin Harvey 'Judging Asylum' in Prakash Shah (ed) *The Challenge of Asylum to Legal Systems* (London: Cavendish Publishing, 2005) at p 170.

32. *O'Rourke v United Kingdom* (App No 39022/97, 26 June 2001, unreported, ECtHR).

33. See 'Asylum seekers working concession' in (2005) Vol 18, No 1 IANL 54. The change can hardly be seen as conferring an assured 'right to work', even after a twelve-month wait, given that claimants are still barred out of self-employment, business or professional activity, and given that conditioning processes can still regulate take-up of employment - see K Puttick 'Towards a Just European Welfare System for Migrants?' in Prakash Shah (ed) *The Challenge of Asylum to Legal Systems* (London: Cavendish Publishing, 2005) at p 120. On wider concerns about policies that exclude claimants and migrants in general from the labour market for protracted periods, see R Painter and K Puttick *Employment Rights* (3rd edn, London: Pluto, 2004) at pp 503-505.

34. Session 2001-2002 (HL Paper 176: HC 1255), 23rd Report, para 8.

35. *Ireland v United Kingdom* (1978) 2 EHRR 25 at 80, para 167; *A v United Kingdom* (1998) 27 EHRR 611 at 629, para 20; *V v United Kingdom* (1999) 30 EHRR 121, para 71; and *Pretty v United Kingdom* 35 EHRR 1 at 33, para 5.

36. Cf *Chapman v United Kingdom* (2001) 33 EHRR 399.

37. [2005] 2 AC 296 at 329, para 88.

38. *Supra* n 35.

39. 'We Must Change the Policies that Victimise Asylum Seekers' in *Letters to the Editor, The Times*, 3 December 2005.

40. 'Lords Throw Out Key Asylum Rule', *BBC Report*, 3 November 2005, available at <http://news.bbc.co.uk/1/hi/uk/4402596.stm>.

41. Directive 2003/9/EC, Art 16(2): 'Member States may refuse conditions in cases where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State.'

42. D Stevens 'The Nationality, Immigration and Asylum Act 2002: Secure Borders, Safe Haven?' (2004) 67(4) MLR 616 at 620.

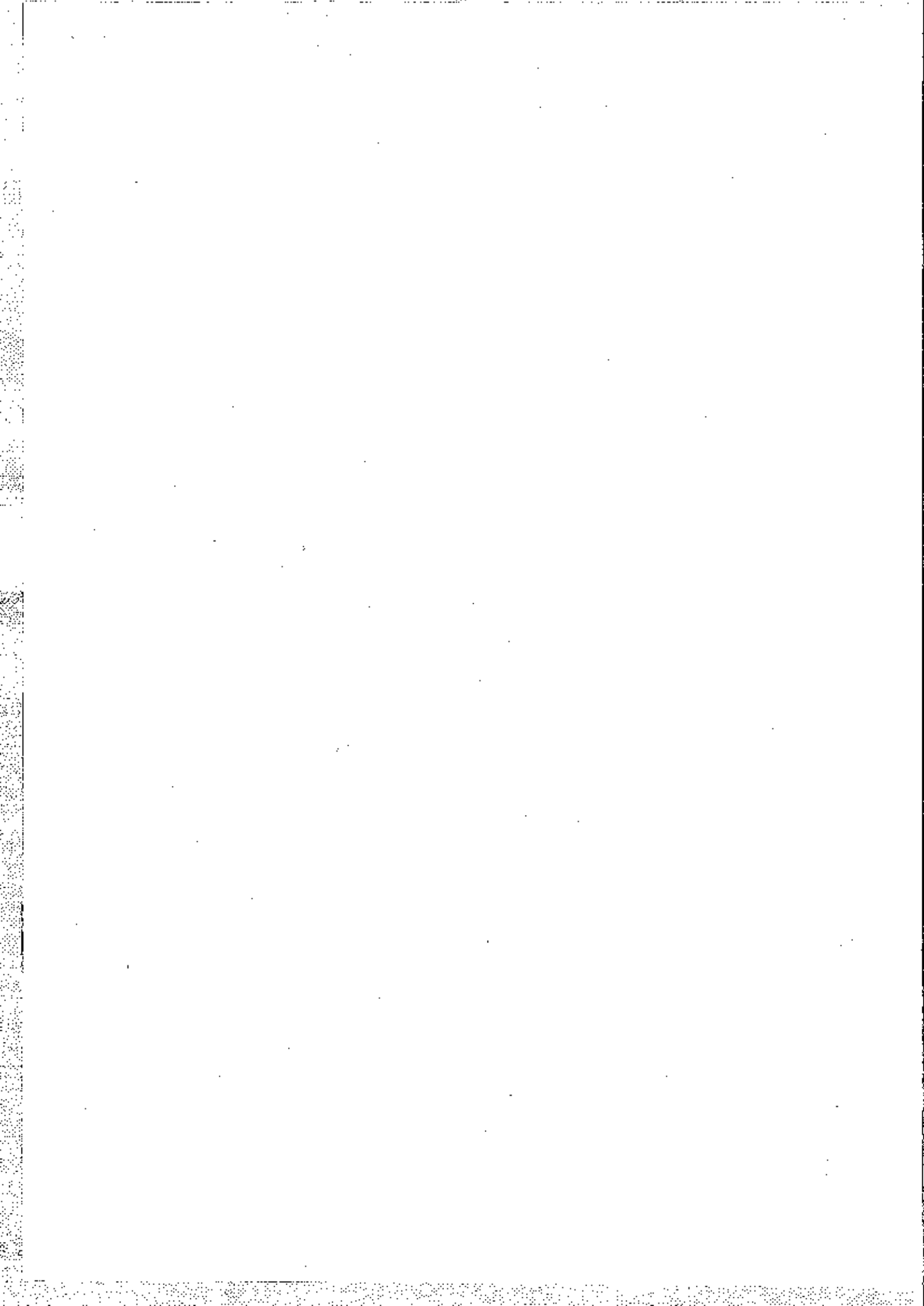
43. Notwithstanding Directive 2003/9/EC, Article 16(2), and the other specific provisions in Article 16 which permit states to refuse, suspend or withdraw support in specified cases, Article 16(4) then *regulates* such decisions. Specifically, decisions on reduction, withdrawal or refusal of reception conditions (or sanctions) must be taken 'individually, objectively and impartially', and they must be based on 'the

particular situation of the person concerned', taking into account the principle of 'proportionality'. For commentary on this, see A Baldaccini 'Asylum support and EU obligations: implementation of the EU Reception Directive in the UK' (2005) Vol 19, No 3 (ANL 152 at 158. Article 17(1) also requires account to be taken of the specific situation of 'vulnerable people' - see Puttick (2005), supra n 32, at p 121. Directive 2003/9/EC, and reception conditions, will be considered in a forthcoming article in this Journal by Dr Valsamis Mitsilegas.

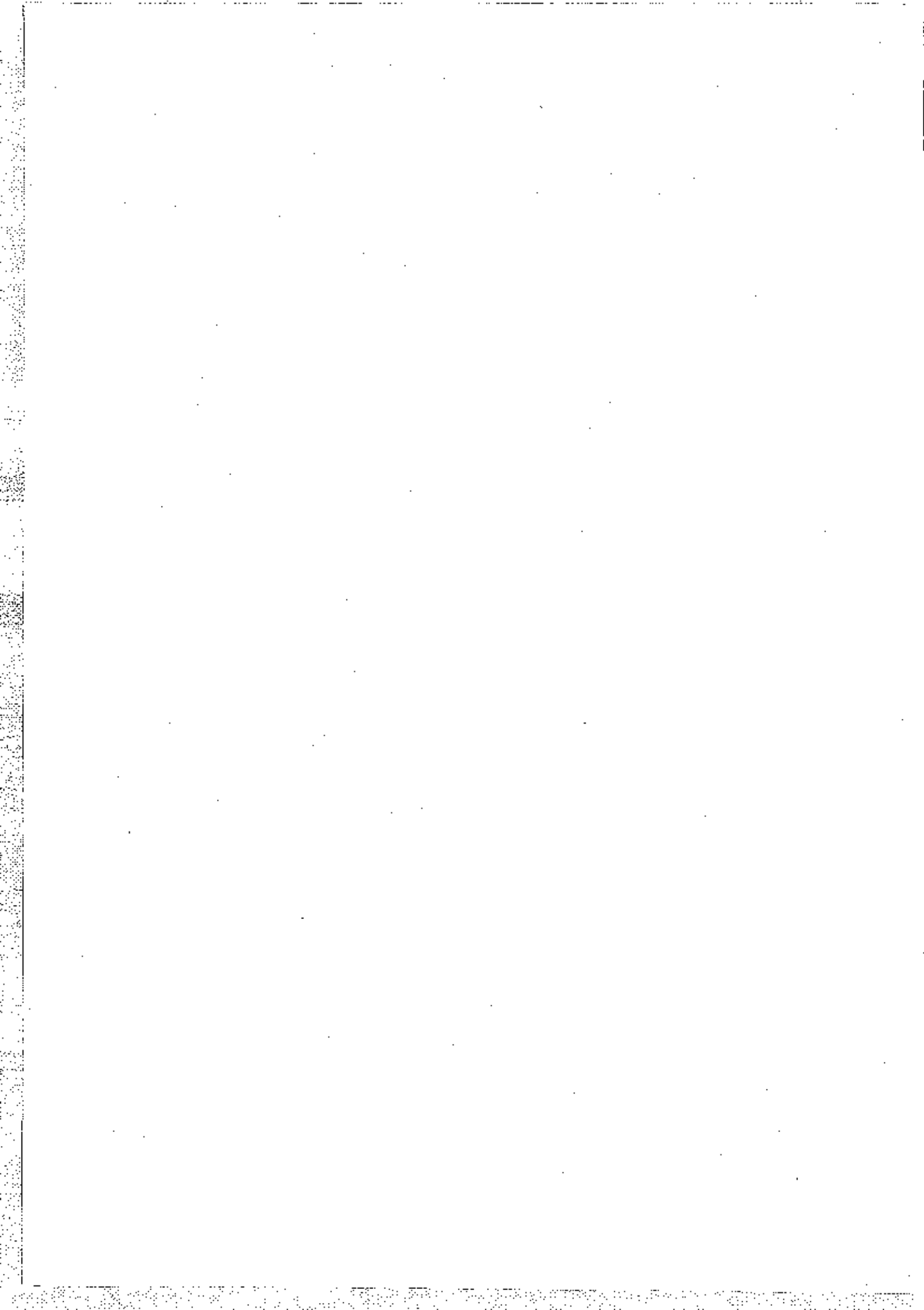
44. *Per* Lord Bingham at para 8.

45. K Puttick 'Social Security and Community Care' in Sir M Burton (ed) (Foreword by Lord Woolf LCJ) *Civil Appeals* (Welwyn Garden City: EMIS, 2005) at pp Q800-804; and L Clements *Community Care and the Law* (3rd edn, London: Legal Action Group, 2004) at pp 497-551.

46. *R (On the application of Grant) v Lambeth LBC* [2004] 3 FCR 494; [2004] BLGR 867, where it was held that whilst the local authority had a *power*, not a *duty*, to provide the claimant with support until removal directions were set (and she failed to comply with them), it did have a 'duty to house' as a result of the children's assessed needs under section 20 of the *Children Act 1989*. That duty could not be excluded by paragraph 1(1) of Schedule 3 to *NIAA 2002* as the claimant had no other means of support, and the 'power' had to be exercised in a way that avoided a forced separation of the family and infringement of her (and her child's) Convention rights under Article 8. Cf *R (On the application of Morris) v Westminster City Council* (No. 3); *R (on the application of Badu) v Lambeth LBC* [2005] EWCA Civ 1184.



WORK 4



Welcoming the New Arrivals? Reception, Integration and Employment of A8, Bulgarian, and Romanian Migrants

Keith Puttick

At a glance

Despite the EU's emphasis on the need for effective reception and integration measures for migrant workers, those who come to the UK from the Accession States (the 'A8') can experience significant employment and welfare problems after their arrival. This is not helped by their inability to access the state support that is generally available to UK and other eligible EEA nationals. Most of the difficulties are the result of their status as Accession State nationals, restrictions on the 'right to reside' in the Immigration (EEA) Regulations 2006, and the recently re-enacted 'habitual residence' test (in the Persons from Abroad Regulations 2006). Some support schemes have their own 'residence' tests, and these include the somewhat bizarre 'ordinary residence' test for tax credits that can treat a person from an Accession state who is living here, but who does not have the 'right to reside', as 'not being in the UK'. Unfortunately this has helped to create what the Swedish government warned in 2004 could become a labour market divided into 'first team' and 'second team' players. In the UK the effects of the reception regime's restrictions are all too clear from research showing the difficulties such workers can experience when jobseeking, and later when they have gained employment. This article assesses that regime, and the differences of approach taken by the three major host states, the UK, Ireland and Sweden. Consideration is also given to recent developments in international norms relating to migration for work, including the ILO's Multilateral Framework on Labour Migration (2006), and its promotion of a 'rights-based approach', and the UN Convention on the Protection of the Rights of All Migrant Workers and their Families (1990, in force from 2003).

Introduction

The decision to admit Bulgaria and Romania to the European Union was controversial. As late as September 2006 the EC Commission was expressing concerns in accession monitoring reports about those countries' ability to come in to line with the EU's *acquis communautaire*. Indeed, some of the on-going problems in key areas of government and the economy of those countries prompted the Commission to emphasise that it would look to the 'safeguards' in the conditions of accession in case of failure to deliver on entry conditions.¹ Despite this, a final

1 Act Concerning the Conditions of Accession of Bulgaria and Romania, OJ 2005 L157/203.

monitoring report² concluded that both countries had made 'enough progress' in their preparations for membership to merit their admission from 1 January 2007. UK government policy on migration from the Accession States³, and support for UK employers' ability to 'insource' from those states to meet their needs, has not changed since 2004. Until recently it continued to see the many positive benefits to be gained from the enlargement project. As the Home Office Minister, Tony McNulty, said on 22 August 2006 when announcing Home Office statistics on migration for work into the UK, A8 workers 'fill skills and labour gaps' that are not being met from those born in the UK. The government's support was no doubt reinforced by studies in 2004⁴, and again in 2006.⁵ For employers, the availability of Accession States' workers has been clearly giving them a greater pool of labour from which to recruit, as well as benefits from the skills, flexibility, 'work ethic', and retention that the migrant worker may offer.⁶ In an influential report in 2006 the recruitment organisation Manpower considered that A8 migration is playing a 'valuable role', and indicated that although it is larger businesses that are more likely to take on A8 workers, there had also been a very sharp increase in recruitment by medium-size and smaller businesses.⁷

Nevertheless, the Commission's concerns were widely publicised. They also appeared to fuel much of the opposition in the UK to Bulgarian and Romanian entry, and the right of their nationals, post-accession, to migrate to the UK for work and residence. The reportedly high levels of organised crime in those countries, and the prospect of organised gangs of criminals entering the UK, reinforced calls for either a complete ban, or else closer regulation of entry by jobseekers and workers. The Home Secretary certainly gave that impression when addressing the Police Superintendents' Annual Conference on 19 September 2006. He argued that the 'fresh challenges' to law enforcement posed by this phase of enlargement meant migration from the two countries would have to be 'managed carefully'. The argument that the labour market is currently 'over-supplied' has also been increasingly potent. For example, the Chair of the Commons Home Affairs Committee (and ex-Home Office Minister), John Denham MP, called for a halt to entry, at least until there had been 'more time to absorb the much bigger inflow of people from Poland and the other Eastern European states that's taken place over the

- 2 Presented on 27 September 2006 to the European Parliament by the President of the EC Commission, José Manuel Barroso, and Olli Rehn, EC Commissioner for Enlargement.
- 3 Poland, Hungary, Slovakia, Slovenia, Lithuania, Latvia, Estonia, Czech Republic, Malta and Cyprus (the 'A10'). They are referred to as the 'A8' in the UK as Malta and Cyprus nationals enjoy the same rights as other EEA nationals from States in the EU in 2004 (the 'E15').
- 4 S Seiskandarajah et al (2004) *EU Enlargement and Labour Migration* (Institute of Public Policy Research, 2004). The business and financial sectors identified advantages, including reductions in labour shortages, and downward pressure on wages: and by helping to reduce the age of the labour force migration from the A8 would 'reduce labour costs to companies, thus boosting profits'; ITEM Club/Ernst & Young *The Impact of EU Enlargement on the UK Economy* (Economic Update, March 2004). As more recent updates indicate, the boost to labour supply is reflected in higher output and GDP: and although unemployment rises and capital intensity and labour productivity may fall, in the longer term key sectors of the economy are beneficiaries, such as manufacturing and exports; ITEM Club/Ernst & Young *UK Economic Prospects* (Spring 2006 Forecast).
- 5 N Gilpin, M Henry, S Lemos, J Portes, C Bullen *The Impact of Free Movement of Workers from Central & Eastern Europe on the UK Labour Market* (Dept of Work and Pensions: Working Paper 29, 2006).
- 6 'Employers' Use of Migrant Labour' (London: Home Office/Institute of Employment Studies, March 2006 www.homeoffice.gov.uk/ndi) 5-7, and 29-36; and B Anderson, B M Rahn, S Spencer (PSRC Centre on Migration, Policy & Society, University of Oxford), and B Rogaly (Centre for Migration Research, University of Sussex) 'Fair Enough? Central and East European Migrants in Low Wage Employment in the UK' (London: J Rowntree Foundation, May 2006) 104-106. More recently, in a keynote speech the CBI's new Director-General, Richard Lambert, put the CBI at odds with other business organisations, including the coalition of large companies Business for New Europe, by warning against a 'fresh wave of cheap labour from Eastern Europe', and calling for a 'pause' before the 'next wave of newcomers'; 'Migrants Threaten Social Fabric, says CBI Chief' in *The Guardian* 6 September 2006.
- 7 *EU Enlargement - Two Years On* Manpower, May 2006.

last couple of years'. He said that there was pressure on services such as schools in places that had attracted many migrants, and he claimed that in his own area (Southampton) wages for local construction workers had dropped 'dramatically' as a result of the new workers. He noted that Home Office predictions in 2004 that around 13,000 A8 workers would come to the UK had proved to be wild underestimates and in addition to those who had registered for work under the government's Worker Registration Scheme (the WRS) there were others who had not – and he put the 'true figure' at between 600,000 and 800,000.⁸ Obviously such anecdotal evidence of the perceived negative consequences of the effects of opening the labour market to new arrivals is relevant, and cannot be disregarded, especially when it comes from such influential sources. That said, the prevailing view among most economists has, for the most part, continued to be that migrant in-flows do not, in general, produce significantly negative impacts on labour market conditions. Even when they do, or are suspected of doing so, they are difficult to quantify, as it is in other jurisdictions like the USA, where the issue is also contested in the political domain and among economists.⁹

In 2004 the Home Office undoubtedly under-estimated the scale of net inward migration for work from Eastern Europe after estimates of entry for jobseeking and work had been put at below 13,000 a year by Dr Herbert Brücker for the economic think-tank DIW Berlin commissioned by the European Commission *The Impact of EU Enlargement on Migration Flows* (Home Office On-line Report 25/03 at p 58), predicted a net in-flow of 5,000–13,000 until 2010. Recently, however, Dr Brücker has defended the figures, pointing out that they were produced at a time when it was expected that all the existing EU states would open their borders to entry for work, and before it was known that only the UK, Ireland and Sweden would do so.¹⁰ Opposition to further inward migration from Eastern Europe has also come from influential groups like the Local Government Association, which claimed that local councils have been struggling to cope with the pressure put on local services. Sir Sandy Bruce Lockhart, the Chairman of the LGA gave his support¹¹ to towns like Slough where the Chief Executive of the town council, Cheryl Coppel, had reported that 'thousands of workers from the EU Accession States have descended on the town'.¹² Over the past eighteen months she said that 9,000 new National Insurance numbers had been issued in Slough, of which just 150 went to British nationals. Yet, in 2004, she said, the Office for National Statistics had only recorded 300 migrants settling in the area. The issue had become important because such statistics inform the allocation of central Whitehall funding for key services. Other towns in the UK, like Crewe, had reported similar problems, said the LGA Chairman, with 3,000 new arrivals from Poland alone; and he called for the government to recognise that its statistics were no longer adequate for calculating an area's needs for services. As the date for Bulgarian and Romanian entry approached influential sections of the media have been calling for either a complete ban or else 'tough regulation' of jobseeking, take-up of employment, and access to welfare – and as discussed later in this article on 24th October 2006 the Home Secretary gave them what they had been calling for.

8. BBC Radio 4 *The World at One*, and *Ex-minister calls for block on new EU migrant workers*, Guardian Unlimited 15th August 2006. In fact the most recent figure, published by the Home Office on 22 August 2006, indicates that 447,000 people applied to the Worker Registration Scheme in the two years from May 2004 to June 2006, and 427,000 were approved; and see the *Accession Monitoring Report May 2004–June 2006* (Home Office, DWP HMRC et al, 22 June 2006). There are undoubtedly people working who should have registered – but it is also likely that many new arrivals have left the UK or are no longer working.

9. See, for example, the discussion of US in M Trebilcock and M Sadak *The Political Economy of Emigration and Immigration* (2006) NYU L. Rev 81:1, including commentary on an influential study by the National Research Council in 1997.

10. Nicholas Watt *Home Office Used Wrong Figures to Predict 'Trickle'* in *The Guardian* 2 September 2006.

11. Philip Johnston *Immigrants 'Swamping' Council Services* in *The Guardian* 28 June 2006.

12. BBC Radio 4 *Today* 27 June 2006.

In many ways this was just history repeating itself. In the lead-up to the admission of AB nationals to the UK the government came under similar, intense pressure. Indeed, restrictions became a political necessity in the wake of doom-laden media prophecies about the threat to British jobs, and the spectre painted by some sections of the media of jobseekers and low-paid workers bleeding welfare, health, and social housing systems dry. In response, the government used its powers to derogate from free movement rights that are in the Accession Treaty and in the European Union (Accessions) Act 2003, s 2.¹³ The government introduced a requirement that AB workers would have to register under a new Worker Registration Scheme (WRS). This was primarily intended as a means of monitoring entry and take-up of employment, and to inform possible further restrictions based on evidence of labour market 'disturbances' should it become necessary to extend restrictions until 2011. However, compliance with registration requirements also informs the one-year period of continuous employment that is the gateway to the full range of welfare and in-work support rights that are already available to other EEA nationals. The political rationale for the bar was provided by the Prime Minister, and it was that the new arrivals should be able to demonstrate some 'reciprocity' for their support. Specifically, it would only be available to those who 'come here to assist in meeting our skills shortages', and 'work hard'.¹⁴

The Impact of Restrictions

In the event, the restrictions introduced in 2004 have proved to be highly problematic for many Accession State jobseekers and workers. Low wages and poor conditions are often characteristics of the kind of entry-level employment available to such workers, even if the conditions may be part of a trade-off that suits them, particularly when this just a first step into other employment, and if it provides other valuable opportunities such as the acquisition of language and other skills.¹⁵ Unfortunately the worker can be caught between two very hard places during this reception phase after arrival. First, their susceptibility to exploitation in terms of low wages, long hours, and otherwise adverse working conditions, particularly in some of the segmented labour markets that currently operate in the UK. Second, those difficulties are then aggravated by barriers to access to welfare and in-work welfare support produced at the public law level of regulation, of the kind still in operation, despite changes made by the Social Security (Persons from Abroad) Amendment Regulations 2006, SI 2006/1026 (the 'Persons from Abroad Regulations 2006'). Welfare needs that would normally be met by state welfare schemes that can 'top up' or supplement low wages, pay for housing costs or assist in periods between jobs are often *not met*.¹⁶ These factors combine to ensure that many migrant jobseekers and workers habitually experience worse conditions than others in the host community in a comparable position. This group, and their dependants, are generally at the bottom of the social pile, experiencing disproportionate levels of welfare and job insecurity, and poor general

13 UK and Ireland only states to accept full free movement for EU accession countries? (2004) Vol 19, 1 JANL.

14 Prime Minister's Official Spokesman, 9 February 2004. These points were then implemented by the Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219 (the 'WRS Regulations'); and the Social Security (Habitual Residence) Amendment Regulations 2004, SI 2004/1232 (now SI 2006/1026), imposing restrictions on the take-up of employment and State welfare.

15 See the discussion by E Weinssein, *Migration for the Benefit of All: Towards a New Paradigm for Economic Migration* International Labour Review Vol. 141, No.3; and see the 'Fair Enough?' study, note 6, at p 103.

16 In Tribunal of Commissioners Case CH/2484/2005 (Feb 2006) it had been held that the 'right to reside' test was incompatible with art 12 of the EC Treaty. The claimant therefore satisfied the 'habitual residence' test for Housing Benefit and Council Tax Benefit. This was overturned on appeal as she did not come within any of the criteria for demonstrating a 'right to reside' (either under EC or UK law) so she could not be habitually resident. Whilst accepting that the legislation in question was discriminatory it was 'objectively justified' and 'proportionate'.

'welfare', a phenomenon borne out by statistical analyses of 'poverty' and social exclusion.¹⁷ In a recent study of the employment conditions of Central and East European migrant workers in the UK, it was clear that despite having qualifications and skills significantly in excess of those required for their jobs, they experienced lower wages, and longer working hours, than the occupational average; and in many cases they had no paid holiday, sick leave, or even a written contract, and none belonged to a trade union.¹⁸ Other research, conducted in 2005, indicated that as many as 90 per cent of the lowest-paid jobs in London are occupied by migrant workers, including both regular and irregular workers in terms of their employment status.¹⁹ In many ways their experience just replicates that of workers in other host states, where trade liberalisation and measures like EU enlargement that facilitate migration for work have greatly increased the proportion of workers experiencing the problems of wage inequality.²⁰ The inability of such nationals to access income-related benefits that in most cases were designed to counter the effects of such inequality, including targeted income and wage income replacement benefits during periods of time between short-term, on-call contracts that typify many migrants' jobs²¹ is a major cause of many Accession State nationals' problems during the reception phase. Furthermore, this is a deficit that highlights the glaring disparities in treatment when a comparison is made with UK nationals, or EU nationals from the E15 countries in a similar jobseeking or employment position. Litigation in 2004 raised doubts about aspects of the reception regime – and already, by then, some of the issues considered in judicial review proceedings were causing concern about Accession State nationals' reception arrangements.²²

Before looking at these issues further, the current position on free movement for nationals from EEA states needs to be considered.

Free Movement: The Rights of EEA Citizens

Most of the rights that come with 'free movement' generally extend to nationals of European Economic Area (EEA) states, and this is assisted by their status as 'citizens of the European Union'.²³ In the UK context, in which there are different categories or gradations of 'nationality', the position is more problematic – particularly as it is left to the government to determine which of its nationals (or others with close links, indefinite leave, etc.) should be accorded EU citizenship, and which should not.²⁴ Article 18(1) of the EC Treaty confers free movement and residence rights on eligible nationals and linked to that are the related rights

17 J Flaherty, P Veic-Wilson, I Dornan *Poverty: The Facts* (London: Child Poverty Action Group, 2004) at 199–201. See also G Palmer, J Carr, and P Kenway *Monitoring Poverty and Social Exclusion 2005* (York: New Policy Institute/Joseph Rowntree Foundation, 2005) where poverty indicators go beyond wage income, and include social exclusion factors like dependency on State benefits, exclusion from vocational training, and health; and see ILO data in *ILM Statistics*, and reports in *Global Employment Trends* (ILO, 2006).

18 The 'Fair Enough?' study, Note 6, at pp 29–65.

19 Y Evans, et al *Making the City Work – Low Paid Employment in London* (Queen Mary College, London University, 2005). A large proportion of the 427,000+ AS registrations (as at August 2006) were in London.

20 Reports in *Global Employment Trends* (International Labour Office, 2006); and *OECD Employment Outlook 2006* (OECD, 2006).

21 K Fittick *Welfare Benefits and Tax Credits – Law and Practice* (XPL/EMIS Publishing, 9th ed, November 2006), pp314–316. By excluding Accession State nationals from key benefits, they are also thereby excluded from important 'passport' entitlements that would also normally be available to claimants and dependants.

22 For example, see *R (H and D) v Secretary of State for Work & Pensions* [2004] 3 CMLR 11. More recent cases highlight the scope of restrictions on housing and welfare in the Nationality, Immigration and Asylum Act 2002, Sch 3; see *R (Conde) v Lambeth LBC* [2005] HLR 29; and *R (Mohamed) v Harrow LBC* [2006] HLR 18.

23 Article 17(1) of the EC Treaty.

24 *R v Secretary of State for the Home Department, ex parte Manjit Kaur (Justice, Intervening)* (Case C-92/99) [2001] 2 CMLR 24, ECJ.

such as those conferred on 'workers' by arts 39–42, business people and the self-employed exercising the 'right of establishment' under arts 43–48, and other groups. The key provisions that deal with specific free movement rights for particular groups are now consolidated into Directive 2004/38/EC. This confers a general right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Nevertheless, the precise scope of rights on entry to another EU state, particularly for jobseekers, are subject to important limitations, and nationals of Accession States are one of the key groups affected by this.

Accession State Nationals

When the UK transposed the Directive 2004/38 into domestic law this year, in the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) from 30 April 2006 (the '2006 Regulations'), those regulations set out the specific free movement rights of EEA nationals in the UK. They also introduced several new features, including the 'initial right of residence'. This is immediately qualified by reg 13(3)(b), under which the 'right to reside' ceases if the person or a family member becomes 'an unreasonable burden on the social assistance system'. There is also a permanent right of residence after 5 years residence. However, they still operate in conjunction with other legislation, including the Persons from Abroad Regulations 2006, that places limitations on entitlements normally accorded to those with the 'right to reside': and these build on the restrictions made in 2004 already referred to.²⁵ Further restrictions are also in other key social welfare legislation, means-tested benefits regulations, and limitations that bar out rights to social housing under the Housing Act 1996, Part 6 (allocations), and Part 7 (homelessness). Specific exclusions are in schemes like the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 (SI 2006/1294) from 1 June 2006. Recent case-law illustrates how welfare agencies in the UK, in many cases because of the resource problems that they have, are reluctant to assist EEA nationals with housing, even when they are from E15 countries like Holland.²⁶ The position is, of course, worse for EEA nationals from A8 States. Given that one of the main problems facing many entrants is access to housing, particularly in the reception phase, the reluctance of the government to address this problem is very unfortunate.

Restrictions affecting Accession States' nationals during the accession 'transition' period take a number of forms, and these include a mandatory registration scheme for those obtaining employment. Again, this procedure is reserved for A8 nationals, unless they are exempt.

The WRS Scheme

The WRS Regulations, reg. 4, explicitly derogates from art 39 of the EC Treaty, Directive 2004/38, and freedom of movement. The regulations then go on to restrict the specific rights of Accession state jobseekers and workers. In particular, an A8 national who is seeking work in the UK cannot be treated as a jobseeker for the purpose of being a qualified person in reg 6 of

25 Note 14. Before that, the Immigration (European Economic Area) Regulations 2000, SI 2000/1813 contained the key provisions implementing freedom of movement rights. Judicial support for the 'habitual residence' test has been reiterated recently in *Collins v Secretary of State for Work and Pensions* [2006] 1 WLR 2391, Court of Appeal, although cf *R (Bidar) v Easting LBC* [2005] QB 812, ECJ.

26 *Barnet LBC v Insaal* [2006] HLR 23, Court of Appeal when an attempt by the council to withhold housing assistance under the Housing Act 1996, Pt 7, failed; but it prompted the government to announce that it would introduce new regulations that would be effective in barring out claimants in the future.

the 2006 Regulations; and an A8 worker can only be treated as a 'worker' for the purpose of that definition while he or she is working for an authorised employer. An A8 national who wants to work in the UK is subject to registration requirements unless exempt, or has ceased to be required to register. If a person starts employment without registering, for example when the employer wrongly (or deliberately)²⁷ advises that the person does not need to do this, it will usually mean that the person is *not* engaged in authorised employment during that period. This may then have serious consequences in terms of access to employment remedies that are dependent on a viable employment contract, given the way that the doctrine of 'illegality' works. In the case of Bulgarian and Romanian nationals who are genuinely self-employed, or who are in the UK to set up businesses, the Association Agreements between the EU and those countries already assist such nationals to work and reside in the UK – and in most cases it would not be necessary for them to register under the WRS in order to establish a right to reside.²⁸ Family members of a national required to register are also subject to a registration requirement. Without going through the registration process, and gaining the required period of continuous service (12 months without interruption) a person cannot satisfy the requirements introduced by the Persons from Abroad Regulations 2006. The lack of the 'right of residence' may stop the person being 'habitually resident' in the UK. This, in turn, will bar them out of key state benefits, including Income Support, Jobseeker's Allowance, Housing Benefit and other income-related benefits.

One of the concerns about the WRS scheme is that, besides helping to track the number of entrants to the UK labour market, it does not really serve any useful purpose. Nevertheless, a failure to comply with registration formalities can create significant problems for the workers concerned, as well as employers²⁹ and other stakeholders in the process. It is likely that many Accession State workers do not register as they should do. This means that their employment has not been officially 'logged', and this can then delay their ability to access state welfare support that they would otherwise become entitled to. In some cases the failure to register may be due to reluctance on the part of employers to co-operate with registration formalities, particularly when they are operating in the informal economy, and when they want the employment relationship, and the terms on which it is operating, to stay invisible to official scrutiny. This is not uncommon when there are other aspects of the employment relationship that render the transaction 'irregular' – such as collusion with an employer who is not deducting tax or National Insurance. In many cases it is often the fault of an employer, agent or gangmaster that registration formalities are not observed, and it may often occur in conjunction with other irregularities such as a failure to deduct tax and National Insurance when wages are paid. This then has the potential to impact on the validity of the employment transaction, and enforceability of wages and other terms, something that has been a long-standing problem in the area of migrant workers' employment.³⁰ Unless it is clear that the worker's participation in such fraud is not his or her fault, for example where language

27 Apparently it is not uncommon for employers to deliberately seek to delay registration to prevent the person gaining 12 months continuous employment, with negative consequences including difficulty in accessing employment rights dependent on lawful employment, the right to claim unfair dismissal, and so forth; Thomas Lamb of Solicitors New Aylth, Perth and Kinross *Britain's appeal to migrant workers* in *The Guardian* 5 September 2006

28 Reference may be made to SI 2006/1003, Part 1 and the Immigration Rules, paras 211 et seq.

29 The WRS Regulations, reg 9 makes it an offence for an employer to employ an A8 worker requiring registration while not being an 'authorised employer'. Employers' perceptions of the WRS vary: some are hostile, and others claim not to be aware of it; *Fair Enough?* study, note 5, pp101–103.

30 Typically, in areas like restaurant and hotel work, and segmented sections of the labour market: *The Informal Economy: A Report by Lord Cribbin* (HM Treasury, March 2006) 2–5

difficulties mean that they have not understood what has been happening,³¹ it will often be the worker who suffers the effects of such 'illegality'. In particular, it may bar them out of employment proceedings against the employer if these are founded on the contract, or prevent a tribunal or court awarding a remedy in contract or tort-based actions.³²

Concerns about the way the WRS scheme works, including its complexity and uncertainty about the precise requirements of registration (and the exceptions to the duty to register), have led to calls for it to be ended.³³

Reception and Integration of Accession State Migrants

Given the vulnerability, susceptibility to exploitation³⁴, and high levels of need that many Accession State nationals may have on arrival, particularly during their period of jobseeking (and even after they have gained employment), it is not unreasonable to expect that host states like the UK should be doing more to improve their reception, integration, and support arrangements. The principles that should underpin these have been articulated in EU sources for some while: and with the growth in cross-border migration, and calls by organisations like the ILO to do more to respect the basic rights of migrant workers, the EU has recently revamped its guidance on the subject. This has included updated communications from the Commission. Although these have been directed, principally, at migrant workers from 3rd countries, the principles also extend to migrant workers from within the EEA area.³⁵ Among other things, they focus on the need to combat discrimination and social exclusion, building on principles developed since the European Council in Tampere. Since then, the expectation has been that host states should be implementing this through national action plans as part of the European Employment Strategy. Many of the principles involved are, in fact, already being implemented at a Community level, for example in measures aimed at extending to 3rd country nationals the same forms of social protection enjoyed by host states' nationals. The measures are intended, essentially, to off-set the disadvantages that such workers frequently experience in their employment, including low income and poor conditions in their employment terms as well as the problems resulting from discrimination. In this regard, the measures are linked to International Labour Organisation initiatives on 'decent work', and in the ILO's *Multilateral Framework on Labour Migration* (2006) that

31 *Wheeler v Quality Deep Ltd (t/a Thai Royale Restaurant)* [2005] ICR 265, Court of Appeal. Hooper LJ said: 'This is a very unusual case concerning as it does a foreign national working in this country in her own language with limited knowledge of the English language and of the tax and national insurance provisions of this country. Had she not had that limited knowledge, she may well not have succeeded.'

32 It is often the employer who invokes 'illegality' as a means of avoiding liability, even when it is their own illegal behaviour, rather than the employee's, that is in issue, as in *Hewcastle Catering Ltd v Ahmed and Elkannah* (1992) ICR 626, CA (when waiters were required to participate in the employer's VAT fraud).

33 B Ryan (ed) *Labour Migration and Employment Rights* (London: Institute of Employment Rights, 2005), p 28.

34 Across most economic sectors, migrant workers from Eastern Europe surveyed in the Rowntree research in 2006 (see Note 6) appeared to have lower earnings, and generally fared worse than the prevailing conditions for their occupations even where they had clear legal rights, eg less than half (worse in some sectors) had any paid holidays despite this being a legal requirement under the Working Time Regulations 1998, SI 1998/1833. For earlier research, see *Nowhere to Turn: CAB Evidence on the Exploitation of Migrant Workers* (National Association of Citizens Advice Bureaux, 2004); and see *Supporting Migrant Workers in Rural Areas* (Citizens Advice, 2006). This is consistent with the experience of migrants' entry-level conditions in other host states; see *International Migration Outlook* (Recent Trends, Part 1) (OECD, 2006).

35 See the 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Immigration, Integration and Employment' (COM (2003) 336 Final); and, more recently 'A Common Agenda for Integration: Framework for the Integration of Third-Country Nationals in the EU' (COM 2005 389 Final).

reinforce requirements directed at ensuring migrant workers are not treated less favourably than host state nationals.³⁶

Despite some of the recent initiatives that are clearly capable of assisting Accession State migrants, for example measures to combat discrimination in the workplace,³⁷ there are still many aspects of the UK's reception regime which is far from welcoming. In analysing the issue it is worth making some comparisons with the approaches taken in the other two main host states for Accession States' workers, Sweden and the Republic of Ireland.

A10 Workers in Sweden

Like the UK, Sweden has looked to Accession States' nationals to meet the needs of its labour market. In its main restatement of labour market policy and 'tasks', the Swedish government has said that the 'big problem for Sweden' is that it has "a demographically based shortage of labor".³⁸ Accordingly, as part of that policy the key governmental agencies involved – the Labor Market Administration (Arbetsmarknadsverket, AMV), the National Labor Market Board (Arbetsmarknadsstyrelsen, AMS), and the public Employment Service (Arbetsförmedling) – all became subject to the 'overriding task' of channelling labour to employers, and taking steps to combat recruitment problems. In its preparations ahead of 1st May 2004, Sweden took some important steps designed to pre-empt the risk of exploitation of new arrivals, and the real risk offered to agencies and employers to discriminate in the recruitment and employment process. In doing this it also sought to reduce the scope for irregular working. Although wide-ranging employment protection legislation was already in place,³⁹ in 2004 Sweden increased efforts to give full effect to relevant EC anti-discrimination measures and it appears to have done so with the specific needs of Accession State workers in mind. In doing so, and in securing protection for workers engaged in irregular employment, Swedish courts are not impeded by requirements that the labour contract is legally viable and consistent with migration laws. This may be contrasted with the UK position. In the UK, irregularities in the process of regulating entry to the host state territory and entry to employment (what may be termed 'primary level regulation') can then produce adverse consequences for a worker who then enters employment in a relationship that is essentially a private law one, but which continues to be regulated (at what may be termed 'secondary level' regulation). The regulatory regime that applies to migrant workers' employment transactions – including a cross-over effect, whereby public law regulation impacts negatively on the labour transaction operating at a private law level between the migrant and employer (or agent) – is a distinctive feature of the UK labour market, and it is replicated in other common law jurisdictions.⁴⁰ The problem focuses, in particular, on contract-based aspects of the employment, especially proceedings against the employer for

36 ILO Conventions 97 (art 6), 111 (arts 1, 2), and 143 (arts 1–12). Convention 97 requires States 'to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals'.

37 Mack Bell 'Implementing the EU Racial Equality Directive: implications for immigration law' (2004) Vol 18 No 1 *IANL*, p.39.

38 *Swedish Labor Market Policy* FS6-Y (Stockholm: Swedish Institute, May 2005) 6.

39 Including the Security of Employment Act 1974 (LAS 1974, revised in 1982); the Measures to Counteract Ethnic Discrimination in Working Life Act 1999 (SFS 1999:130); the Employment Protection Act 1982 (SFS 1982:80); and the Prohibition of Discrimination Act 2003 (2003:307).

40 See, for example, the Canadian case of *Re Still and Minister of National Revenue* (1997) 154 DLR (4) 229; (1998) 1 FC 549. The burden of proof is usually on the party alleging illegality/unlawful performance, who is in many cases the employer: *Cole v Celeron(UK) Ltd* [2004] IRLR 210, Court of Appeal; *Halsbury's Laws of England* Vol 16(1A)18; and R. Buckley *Illegality and Public Policy* (London: Sweet & Maxwell, 2002).

unpaid wages. However, it has also been held to apply in proceedings where the complainant has sought to invoke statute-based rights, including rights deriving from EU law, as highlighted in cases like *Vakante*.⁴¹ In that case the worker concerned, a Croatian teacher, worked in breach of immigration restrictions while his asylum claim was being considered. It was held he could not pursue his case, even in respect of non-contract rights relating to alleged race discrimination reinforced by EC Council Directive 2000/43.

To coincide with the arrival of A10 workers from May 2004, Sweden made important adaptations to its domestic legislation to ensure that groups like migrant workers are protected against discrimination based on nationality, race, and ethnicity grounds, something which Sweden saw as an essential step. Like the UK, however, the government came under pressure to regulate access to the jobs market, and in particular to limit access to state welfare systems. So in March 2004, ahead of the arrival of new workers, it proposed transitional rules for the 'good of all concerned', and these were included in a package of changes presented in a Communication to Sweden's Parliament, the Riksdag, by the Minister for Migration Policy, Barbro Holmberg and Employment Minister Hans Karlsson.⁴²

As in the UK and Ireland, measures were introduced to coincide with the admission of Accession State migrant workers, the government asserting that 'a period of adjustment' was needed. Among other things it proposed:

- *special work permit rules* for a transitional period for workers from the new EU Member States, giving due consideration to the vulnerability of individual workers and concern for Swedish workers' welfare and 'good order' in the labour market.
- *anti-discrimination 'guarantees'* to ensure that new workers would enjoy the same rights and responsibilities as Swedish citizens, observing that 'We do not want a guest worker system, in which workers are only permitted limited access to Swedish welfare. Nor do we want people to be exploited on the labour market in a way that would risk wage dumping and weakening of the terms of employment for all'.

They also considered that 'the great differences in pay levels and social security between Sweden and the new Member States' would lead to substantial strains on the employment and social systems resulting in a labour market divided into 'first team' and 'second team' players. Part of the concern was that low pay, and less favourable conditions of the second team would inevitably result in a transfer of costs to the state welfare system. It was noted, for example, that Swedish state benefits for the family would, in themselves, exceed a normal wage income in most of the new Member States. 'A family with two children that has a third child while the father is working in Sweden may receive social benefits far in excess of the income they could earn in their country of origin.' Given that it would be too easy for employers to 'tempt people to take jobs at very low pay', they proposed 'a more transparent set of rules'.

Among other things these principles informed measures to:

- *Avoid the creation of a 'guest worker system'*, and to enable workers to report instances of exploitation. The proposals added that all Accession State nationals could 'come to

41 *Vakante v Governing Body of Adey & Stanhope School (No 2)* [2005] ICR 231, Court of Appeal. Following implementation of the Directive in the UK, it is likely that if such proceedings were started now, and were well-founded, there would be a different result. For a discussion of illegal working and commentary on this important case, see B Ryan 'The Evolving Legal Regime on Unauthorised Work by Migrants in Britain' (2006) *Comparative Labor Law and Policy Journal* 27-3.

42 *Employment Transitional Rules for All Concerned* (Holmberg-Karlsson Communication: 15 March 2004).

Sweden to work'. However, for the sake of those workers the job must be 'a proper one; with pay meeting the terms of a collective agreement'.

- *Checking of tax payments and social security contributions to prevent tax and social security abuse, particularly the abuse of 'self-employment' status using the F-tax card (Sweden's self-employed classification) by people who should really be classified as 'employees'.*
- *Ratification of ILO Convention 94 to prevent 'social dumping'.*

Whilst the government's initial proposals were not all adopted⁴³, the Holmberg-Karlsson communication to the Riksdag committed Sweden to a radical review of labour and welfare systems to 'adapt them to a globalised world', so they can work in 'a world in which people are becoming more mobile'. Despite its rhetorical and more aspirational features, the scheme contains a number of distinctive features that compare favourably with the UK's reception arrangements, particularly in seeking to ensure that entry-level employment would be in line with prevailing labour market conditions. In the UK it has become clear since 2004 that employers can and do engage new Accession State workers on less favourable terms and conditions than those prevailing. Indeed, some commentaries have gone further and suggested that the ability to displace existing staff is one of the advantages of having access to such workers.⁴⁴ There has been no rush in the UK to review or change aspects of the UK employment law that preserve a generous management prerogative to reorganise the workplace, and, if necessary, to carry out 'economic' dismissals as a means of containing labour costs.⁴⁵

More recently, in 2006 Sweden has reviewed its approaches to the reception of new migrants, and the remit of the Swedish Integration Board extends to new migrant workers. It remains to be seen whether the positive principles that have underpinned Sweden's reception regime since 2004 will continue following the change of government this year. The Budget Bill 2007 indicates a growth in labour supply, and slow wage inflation, no doubt assisted by increased employment of A10 workers.

Ireland and A10 Workers

From 1 May 2004, the Republic of Ireland declared an 'open access' policy permitting unrestricted access to employment by Accession state workers. Speaking at a Council of EU Employment and Social Policy Ministers in Brussels he co-chaired with Ireland's Welfare Minister, Mary Coughlan, the Irish Labour Affairs Minister, Frank Fahey, said that 'There continues to be a strong demand from Irish employers for overseas labour and we believe that our decision to allow free access to our labour market will be to everyone's advantage'. To coincide with Ireland's transformation from a country of emigration to one of net inward migration, Dail Éireann approved a comprehensive national 'action plan', the *National Action Plan Against Racism (2005-8)*⁴⁶ designed to ensure that 'racism has no place in

43 Parts of the package were rejected, in some cases after an alliance of business and union groups, and opposition by Left and Right groupings in the Riksdag.

44 'Bottlenecks [to access to skilled labour] can typically be eased more rapidly and effectively now by importing skilled workers from the Accession countries. Indeed, anecdotal evidence suggests that UK employers are finding ways to replace elements of their workforce by this labour.'; *Item Club UK Economic Prospects* (Spring 2006 Forecast) (London: Ernst & Young), at p 14.

45 'Economic' dismissals are generously catered for by the UK's redundancy system: *Murray v Foyle Meats Ltd* [2000] AC 51. There is no 'right to remain in a job', and opportunities to contest employers' reasons for displacement dismissals are negligible: R. Painter & K. Puttick *Employment Rights* (London: Pluto, 3rd ed 2006) pp 321-337.

46 *National Action Plan Against Racism: An Plean Náisiúnta In Aghaidh An Chéimíochais* (2005-8).

problematic, in the way that they exclude large sections of the migrant workforce if they are outside the concept of 'regular' work, or engaged in irregular working. Unfortunately this does not take into account the complex reasons that now operate to make employment irregular and which take workers outside the scope of mainstream national protection.

Migration for work, and insourcing, facilitated by trade liberalisation measures like EU enlargement and 'freedom of movement' have conferred significant benefits on UK employers, the economy, and other stakeholders. However, from the migrant worker's perspective the process often brings with it some significant employment and welfare problems. Many workers finding themselves in atypical forms of wage labour, not least, casual and agency work, and work of limited duration that are often outside the scope of ILO measures. Furthermore, the complexity of many migration-for-work schemes, and the increasing inter-action between migration and employment status, produce status "gateways" that can be very problematic. These have the potential in some jurisdictions like the UK and Ireland to bar out access to even the most basic labour rights and remedies. This is relevant to most migrants, but is particularly difficult for those in irregular employment, and particularly when complex arrangements like the WRS scheme operate to exclude workers from mainstream employment rights.

The complexity and range of forms of irregular working means that there are clearly groups of workers within that population who merit basic employment protection. It is no longer appropriate for international norms to go on adopting a blanket approach that removes basic employment rights from *all* such workers, irrespective of the type of "irregular" category, or the reasons why their employment is 'irregular'.

The Multilateral Framework

The ILO's adoption of the *Multilateral Framework on Labour Migration* in 2006⁵³ has clearly been an important development, bringing together the core ILO principles that host states should be translating into substantive rights. In particular, it promotes the ILO's 'Decent Work' agenda, and emphasises the 'integrated approach' that the ILO and most states, and the EU, recognise are being generated by increased migration for work. In formal terms it gives effect to the conclusions and resolution of the ILO Conference in 2004 on 'a fair deal for the migrant worker in the global economy'⁵⁴. Among other things, the *Framework* has positive features such as the promotion of co-operation between governments and interest groups in the management of migration for employment. While upholding the right of sovereign states to develop their own policies to manage labour migration, it emphasises the need for greater recognition and protection of migrant workers' human rights, including rights at the private law level when employment transactions are made and operate. In a key section in Principle V it states that the 'human rights of all migrant workers, regardless of their status, should be promoted and protected'. This relates, primarily, to the principles and rights in the 1998 ILO *Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, reflected in the eight 'Fundamental ILO Conventions' – although it clearly reinforces key regional measures like the European Convention of Human Rights. To that extent it reinforces legal rights that are capable of enforcement in major host states like Sweden, Ireland, the UK. It also includes 'guidelines' that reinforce the 'practical effects' of the Principles. As a minimum, it expects states 'to take into

53 Adopted by the Tripartite Meeting of Experts on the ILO Multilateral Framework on Labour Migration (Geneva, 31 October – 2 November 2005).

54 Issues discussed at the 92nd Session of the ILO Conference 2004, culminating in agreement to initiate a 'plan of action' for migrant workers. See *Towards a Fair Deal for Migrant Workers in the Global Economy* (ILO, 2004).

account' ILO Conventions, as well as the UN *Convention on the Protection of the Rights of All Migrant Workers and their Families* 1990. If that Convention has been ratified, as is increasingly being done, then the ILO requires the state to ensure that its provisions are 'fully implemented' (Guideline 9(b)), in the same way that other ILO Conventions at that point become binding and mandatory.

Despite these helpful features, the *Multilateral Framework* is not, in itself, binding on states. Specifically, it comprises 'Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration'. Furthermore, there are still some clear inconsistencies between the requirements and standards in the eight 'fundamental' ILO Conventions and the standards set by other bodies like the UN, including those set out in the 1990 UN Convention. An important example is that whereas ILO Conventions continue to exclude from the scope of their protection workers who are not lawfully within the host state's territory (C97, art 6), or who are not in 'regular' employment, the UN Convention 1990 (in force since 2003) goes much further. In particular, it extends a package of minimum, basic rights to all workers, irrespective of their migration status. Some of those rights are particularly relevant to workers in the reception phase and when they take up new employment.

The UN Convention 1990

A detailed analysis of the Convention is not proposed here.⁵⁵ However, a number of points may be made as these are relevant to reception arrangements for Accession State nationals, including those in irregular employment for these reasons already considered.

In a key passage the Preamble to the Convention states:

'Workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers',

and adds that

'certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition.'

For that reason, as well as the others that are articulated in the Preamble, the Convention's entry into force has been a particularly important development. It offers an important opportunity to adopt a new approach based on what would seem to be a very sound principle. Namely, that whatever a host state chooses to do when imposing conditions on access to its territory, and at a public law level, when it comes to basic employment rights workers should be able to enjoy a basic package of rights that is no less favourable than that which applies to nationals of the state of employment, and other workers accorded such rights. That includes the right to go to court, and access employment remedies as part of a wider development of effective reception and integration measures.

This is particularly apposite in relation to wages and other key conditions such as hours of work, rest periods, health and safety.

55 For a fuller discussion see P Yaran, *For Millions of Migrants - A New Convention in The World of Work* (ILO Magazine) No 48, Sept 2003, p 22; and on the Convention and other standards, see S Gibbons 'International Agreements on Labour Migration' in B Ryan (ed) *Labour Migration and Employment Rights* (2005, Institute of Employment Rights), ch 6.

Part III of the Convention requires host states to ensure that all migrant workers can benefit from a basic package of minimum rights, irrespective of their immigration status. For present purposes this is particularly helpful for those in atypical employment, including the kind of casual, short-term, and agency types of entry-level employment of the kind often in engaged in by Accession states' nationals. It would also assist workers adversely affected by procedural irregularities that could impact on the validity or enforceability of employment terms; and where access to labour law remedies may have been prejudiced. Obviously this is very relevant in situations where employment is 'irregular', including cases where WRS requirements have not been complied with. It is not uncommon, for example, for a worker who thinks he or she has completed the requisite 12 months service with an authorised employer (thereby obviating the need for further registration) to start new employment when this is not the position. Typically, there have been 'interruptions' during that period that total more than 30 days; and that means the worker remains subject to registration, and will be working illegally in terms of WRS requirements.⁵⁶ A key provision is art 25. Article 25(2) stipulates that it shall not be lawful to derogate in private contracts of employment from the principle of 'equality of treatment'. Article 25(3) is then important in requiring that states' measures must ensure that migrant workers are not deprived of rights that derive from the equality principle by reason of 'any irregularity in their stay or employment'. Clearly states must also ensure that their labour law systems at the secondary level do not enable employers to utilise "illegality" and similar defences. Specifically, 'employers shall not be relieved of any legal or contractual obligations' by reason of irregularities. Unfortunately, this is precisely what happens in the UK and, to a lesser extent in the Republic of Ireland. Clearly, the Convention does not, and did not intend, to confer equality in the sense of attempting to confer the same labour and social rights on all workers. In particular, it acknowledges that there should, be limits to the rights of those in irregular employment. The further rights in Part IV, including other rights relating to freedom of movement, education, training, and other social rights can continue to be reserved for workers in regular, documented employment.

Since 2003 there have been increasing numbers of ratifications. However, it is significant that EU states and the major non-EU host states have been slow to ratify the Convention. Indeed, no major host states have done so, to date. Of the states that have ratified, some have insisted on derogations that enable matters such as remuneration, dismissal rights, employment periods, hours, to go on being governed by the parties' contract, and by the private law arrangements made between the employer and worker.⁵⁷ Needless to say, such derogations have the capacity to undermine the Convention's objectives.

Conclusions

The current reception regime has been producing significant problems for A8 and other EEA nationals. This has particularly been the case for jobseekers and those in low-paid employment with limited resources to meet what can be high levels of housing and other welfare need. As a result of the restrictions announced by the Home Secretary on 24 October 2006,⁵⁸ Bulgarian and Romanian jobseekers will not have an automatic right of to take up vacancies in the UK

56 WRS Regulations 2004, reg 2(3), (4); and (8). It is clear that if a worker is not properly registered he or she cannot be 'legally working' as a result of the way regs 7-9 have been worded.

57 P. Taran *For Millions of Migrants - A New Convention in The World of Work* (ILO Magazine) No 48, Sept 2003, p 22. As at 8 May 2006 there were 27 signatory States and 34 parties.

58 Written Ministerial Statement to the House of Commons on Romania and Bulgaria by the Rt. Hon. John Reid, Secretary of State for the Home Department, 24 October 2006.

from January 2007.⁵⁹ Whilst having the right to enter the UK, they will in most cases be restricted in their ability to access income-related benefits or other support schemes. In effect, they will therefore become the third and most disadvantaged of the three EEA groups. The fear must be that the combined effect of being barred out from mainstream employment and state welfare will mean they are far more likely to undertake employment in the informal labour market, and thereby be at considerable risk of being barred out of mainstream employment rights and protection: and the imposition of fixed penalty notices on employers illegally employing them is likely to impact more heavily on the workers concerned given that this will underline the 'illegality' of the employment transaction.

Even allowing for public and media concerns about aspects of Bulgarian and Romanian accession, it is not entirely clear why the government has decided to introduce such restrictions at this critical stage in the enlargement project. The political advantages of being seen to be 'tough on immigration', and 'in control' (particularly following earlier debacles this year in the Home Office) are clear enough. A further factor is the potency of the argument that the labour market is becoming 'over-supplied' since 2004, particularly in relation to new arrivals with low skills – and that pending the removal of all controls on EEA nationals' access to the UK labour market in seven years' time there should be a bar on low-skilled entry, and more selective 'cherry-picking' of entrants with skills.⁶⁰ This is also, to some extent, informed by growing concerns in government and among policy-makers that the concentration of A8, E15 and non-EU workers in London and the South-East may be aggravating the exceptional and atypical labour market problems London experiences, and the capital's current high levels of unemployment (that are out of line with other regions).⁶¹ This has been underlined in a separate move, announced at the same time as the restrictions on Bulgarian and Romanian nationals, that all access to the UK on low-skilled work schemes from outside the EU is being phased out, starting from 1 January 2007.

Despite such explanations, it is a concern that the government should be taking such measures with minimal debate and legislating by 'Written Ministerial Statement' in this way. It is also unfortunate that it proposes to maintain restrictions on access to income-related benefits and other support schemes in ways that will undoubtedly impact negatively on all new arrivals from EEA states. For those with special needs, and who require assistance with housing, the planned extensions to the limitations on Housing Act 1996 schemes are particularly regrettable.⁶²

It is very much to be hoped that the current disparities in treatment affecting EEA nationals will be removed, if not soon then certainly by the time the restrictions on Bulgarian and Romanian arrivals are reviewed in a year's⁶³ time.

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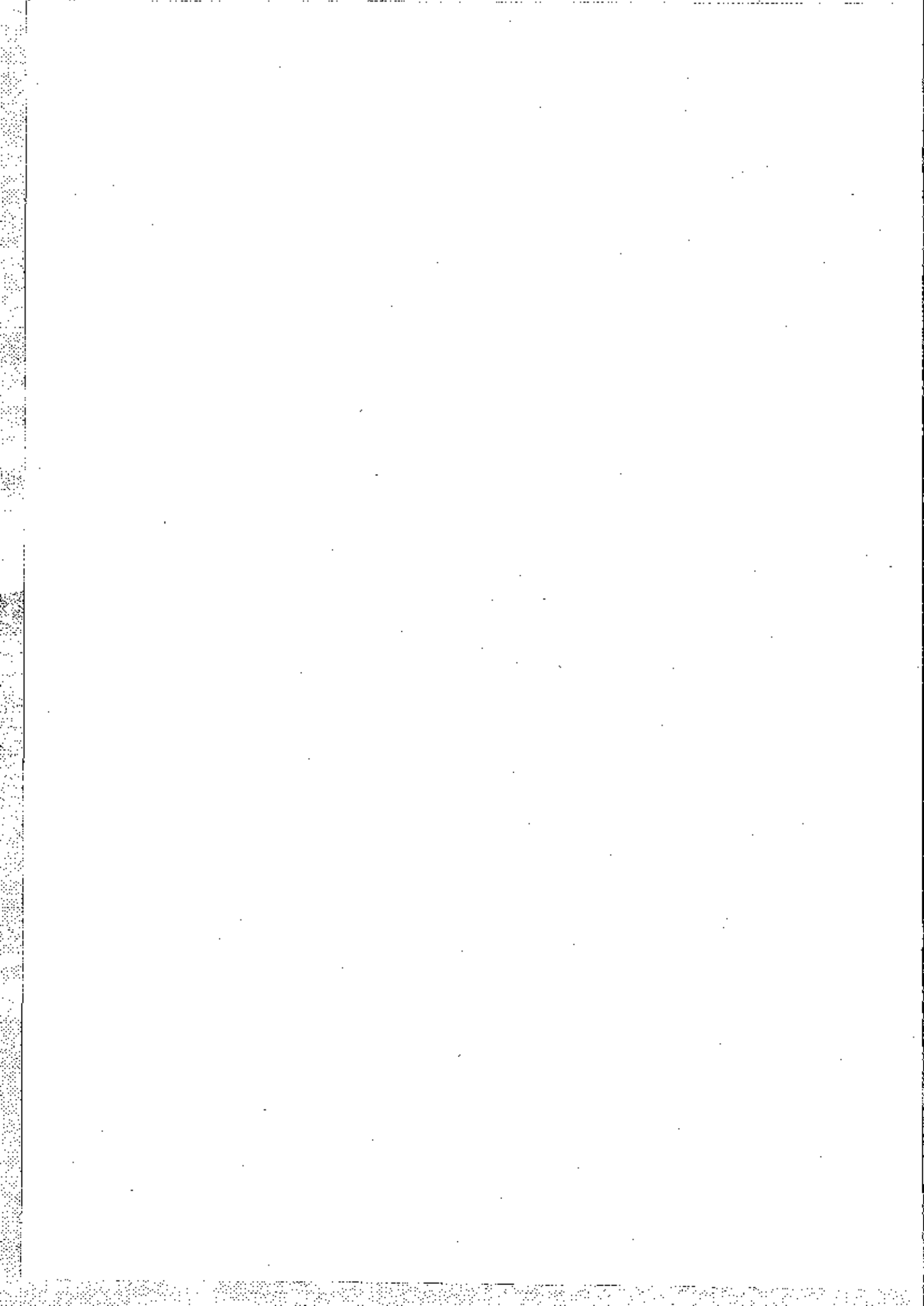
59 *Controlled Access to UK Labour Market for New Accession Countries* Home Office 25 Oct 2005. Key points are that a limited number of workers will be able to work in the food processing and agriculture industries. Otherwise, skilled workers can obtain a work permit or demonstrate eligibility under the highly skilled category of the Highly Skilled Migrant programme. Access to low skilled schemes will be subject to 'quotas' and capped at 20,000 a year, and A2 workers on schemes will be limited to 6 months work and barred out of benefits and social housing. The WRS scheme is to continue, but will not apply to Bulgarians and Romanians. There are no specific limitations on use of the 'self-employed' worker route: so many more entrants are likely to seek to enter the labour market on that basis than would be the case without such controls.

60 EEA transitional restrictions on this group have been aligned more closely with the 'points'-based approach started earlier this year. This is consistent with other states that have moved away from a general open-door approach and towards selective admission, as described in Ayelet Schachar *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes* (2006) NYULRev. Vol 81:148.

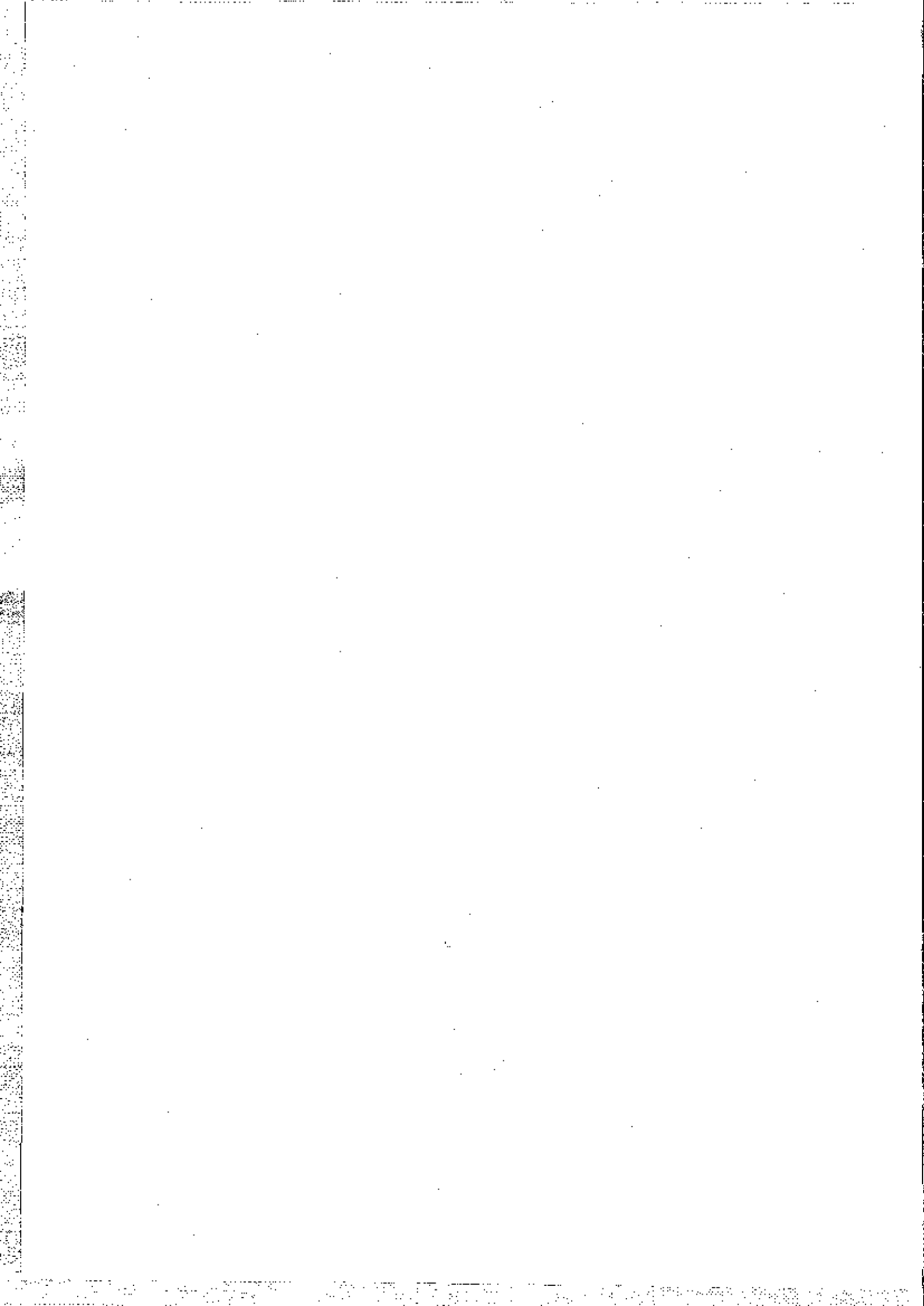
61 *Employment Opportunity for All: Analysing Labour Market Trends in London* (HM Treasury, Budget Report 22 March 2006).

62 See the discussion of the *Barnet LBC v Ince* case above, and Note 26.

63 A process to be undertaken with the assistance of a new Migration Advisory Committee.



WORK 5



Precarious welfare: family and extended family members' 'right to reside', support, and work

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In the second of two articles, Keith Puttick discusses the right to reside of family and extended family members of EEA nationals in the UK. It focuses, in particular, on those who are not themselves EEA nationals, and the scope for a 'retained' or 'derived' right. This is a complex area, as can be seen in recent cases like Teixeira. As he explains, the right to reside is now the main gateway to support, as well as access to the labour market. Some groups, including single parents after separation who are non-EEA nationals, and outside the scope for a retained right, can be caught between several very hard places. Typically, they may not be in employment, and are not receiving maintenance or other financial support. They may also find it difficult to claim benefits or housing. Exceptionally, they may be get assistance from social services under Community Care legislation.

A family member of an EEA national in the UK can assert a right to reside in the UK in two phases under the Immigration (EEA) Regulations 2006. The first is in an 'initial period' of residence of 3 months, and this depends on not becoming 'an unreasonable burden' on the social assistance system and the second operates during an 'extended period' after that.(1)

An 'extended family member' enjoys similar rights, at least while the conditions for this status continue to be satisfied.(2) However, neither family member nor extended family member status continue indefinitely. It may be lost, for example, if the EEA national on whom the status is based loses his or her right to reside by not maintaining 'qualified person' status after employment ends,(3) or if a right to reside is not secured under the other possible categories.(4)

The key regulation on this says: 'A family member of a qualified person residing in the United Kingdom under paragraph (1) or of an EEA national with a permanent right of residence under regulation 15 is entitled to reside in the United Kingdom for as long as he remains the family member of the qualified person or EEA national' (emphasis added).(5)

If the right to reside is lost, a family member who is not an EEA national may then need to assert a new basis for it. The trigger for this, and for an adverse determination, is usually a claim for benefits or housing, as seen in the cases of Ibrahim or Teixeira (discussed below). The problem is that even if the claimant has started a new life in the UK, and has integrated in the way EC Directive 2004/38 envisages,(6) there is no automatic right for a non-UK or EEA national in that situation to remain in the UK and access State support. The issue can be particularly difficult given the way the self-sufficiency rule is being operated by some agencies and local authorities.

The scope of the retention provisions is considered later in this article. Before that, it is proposed to consider the concept of family membership.

The 'right to reside' gateway

A person in the UK who is not a UK or EEA national, and who is subject to immigration control, is generally barred out of most UK benefits and social welfare support unless s/he is within one of the exemptions.(7)

Particular regulations set out family members' entitlements, and the detail needs to be consulted. In general, they follow the model for income Support. This stipulates that a person is not a 'person from abroad', and is therefore not subject to the way a person from abroad is treated for claims purposes (including an applicable amount of 'nil')(8) if s/he is a family member of a jobseeker or worker, self-employed person; or is a person who has retained right to reside status.(9)

In most cases the right to reside provided in the Immigration (EEA) Regulations 2006 is now the gateway for residence, work, social security, housing, employment, and other welfare rights. However, the EU Treaty provisions and other EC secondary legislation and ECJ case-law can also still be the source of residence rights. As well as providing a variety of ways in which a spouse or other family member can retain residence, there is also a route to a permanent right of residence after five years' continuous residence with the EEA national.(10)

Specifically, regulation 15(1) provides that the following are among those who acquire the right to reside in the UK permanently:

- an EEA national who has resided in the UK in accordance with the regulations for a continuous period of 5 years
- a family member of an EEA national who is not an EEA national but who has resided in the UK with the EEA national in accordance with the regulations for a continuous period of 5 years.
- a worker or self-employed person who has ceased activity (this is defined in regulation 5)
- the family member of a worker or self-employed person who has ceased activity
- a person who was the family member of a worker or self-employed person where:
 - (i) the worker or self-employed person has died;
 - (ii) the family member resided with him immediately before his or her death; and
 - (iii) the worker or self-employed person had resided continuously in the UK for at least the 2 years immediately before his or her death or the death was the result of an accident at work or an occupational disease
- a person who
 - (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
 - (ii) was, at the end of that period, a family member who has retained the right of residence

It is not entirely clear what 'resided in the UK with the EEA national' in, or 'the family member resided with him...' actually means, or whether it introduces some kind of minimum 'living together' requirement (as the case-law on 'durable relationship' has recently indicated. The observations of Commissioner Jacobs in CIS/612/2008' (14 August 2008), discussed below, are particularly important in this regard. What is clear, though, is that the claimant's residence must be *continuous*. As in other areas of the scheme's operation, 'residence' means residence in the exercise of a right under EC Law rather than under UK law.(11)

A closer analysis of these points, and the key legislation and recent case-law, is provided in the rest of this article.

'Family member'

Family membership is narrowly defined by EC Directive 2004/38(12) and under the UK regulation that transposes it. Regulation 7 provides that the following are a person's family members:

- a spouse or civil partner;
- direct descendants, including those of the spouse or civil partner who are:
 - (i) under 21; or
 - (ii) dependants of the person, or of his or her spouse or civil partner;
- dependent direct relatives in the person's ascending line, or that of the spouse or civil partner;
- a person who is to be treated as a family member under the provisions dealing with extended family members (see below), and who satisfies conditions on the issue of EEA family permits, registration certificates, or residence cards.

Family membership confers on a family member a right to support and to work.(13) However, this right is generally dependent upon, and runs in tandem with, the EEA national's residence and 'right to reside'. One practical consequence of this, it seems, is that it can only be exercised in the same EEA country where both are residing. It cannot, for example, enable the non-EEA national to work in an EEA country other than the one in which the EEA national is exercising a right to reside. This is another indication that the courts see family members' rights as dependent on, and linked closely to, the EEA national's rights.(14) The least problematic of these provisions is probably regulation 7(1)(b). This confers a right to reside on a 'direct descendant'. It has been held that nothing more is needed than to prove 'descendancy' and age; for example when a daughter claims Child Benefit on behalf of her children.(15)

Extended family membership

Regulation 8, which has its origins in article 3 of EC Directive 2004/38, sets out what is required to become and remain an 'extended family member'. In summary, it means a person who satisfies one of four possible conditions in regulation 8(2)-(5).

'Extended family member'

8. —(1) In these Regulations 'extended family member' means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and —

(a) the person is residing in an EEA State in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;
(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or

(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.

(3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his civil partner.

(4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.

(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.

Regulation 8(5) provides a right of residence for partners who are not married to or in a civil partnership with an EEA national but who can show that they have a 'durable relationship'. The concept of a durable relationship was considered recently by Commissioner Jacobs in CJS/612/2008 (14 August 2008). He observed that a 'couple are likely to be partners if they are living together with each other in the same household as husband and wife'. Although he accepted, on the evidence in that case, that 'the couple in this case were partners by the time of the Secretary of State refused the claim for income support' he went on to reject the claim. There were six reasons given, but they included the short period of the relationship (barely a year), which had in any case been interrupted by periods of separation. Further factors included 'commitment' and the claimant's uncertainty about the relationship.

Although the case-law is still evolving, it is not clear at what point a person who is in a 'durable relationship' is liable to be treated as no longer in that relationship – for example after the parties have left a shared household, or moved on to a new relationship.

Using the 'extended family' head

The extended family member route has been used successfully in a number of contexts - for example by those who have been unsuccessful in asserting asylum claims, but who continue living in the UK, and then go on to establish a right to reside on the basis of regulation 8(2).

To do so requires the claimant to demonstrate dependency or household membership. However, this failed in *KG (Sri Lanka) v Secretary of State for the Home Department*.⁽¹⁶⁾ After arriving in the UK in 2000 the claimants' asylum claims had failed. They continued living in the UK, but several years later applied for residence as family relations of EU citizens who had arrived after them and who, by then, had acquired EEA nationalities. However, it had been determined that they had arrived in the UK straight from Sri Lanka. They had not therefore been residing in an EEA State in which the Union citizens were also residing. Furthermore, they could not rely on earlier residence in Sri Lanka with the family members, even if they had become EU citizens later. Arguments about the purpose of the Directive being to maintain family unity failed. Whilst family unity, and family reunification, played a part, the court took as the main basis for the scheme the need to assist EEA nationals to exercise free movement rights. As Buxton LJ said, 'the emphasis is on the recognition of family life as a support to, and encouragement of, the exercise of rights by the Union citizen, and not as an end in itself. In any case, the court concluded

that the case did not come 'anywhere near' to meeting the other requirements in art 3(2) of the Directive.

Retaining a 'right to reside'

An essential feature of Directive 2004/38, as set out in the Preamble, is that family members should be 'legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership'. This was to ensure that in such circumstances 'family members already residing within the territory of the host Member State retain their right of residence...' (17)

Art 13 makes it clear that such family members are to retain their right of residence 'exclusively on a personal basis'. This is transposed into UK law by regulation 10, which lays down the conditions for acquiring the status of a 'family member who has retained the right of residence'.

There are four routes to retaining a right to reside set out in regulation 10(2), paras (2), (3), (4), and (5) (see Box B)

'Family member who has retained the right of residence'

10. (1) In these Regulations, 'family member who has retained the right of residence' means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the conditions in this paragraph if –

- (a) he was a family member of a qualified person when the qualified person died;
- (b) he resided in the United Kingdom in accordance with these Regulations for at least the year immediately before the death of the qualified person; and
- (c) he satisfies the condition in paragraph (6).

(3) A person satisfies the conditions in this paragraph if –

- (a) he is the direct descendant of—
 - (i) a qualified person who has died;
 - (ii) a person who ceased to be a qualified person on ceasing to reside in the United Kingdom; or
 - (iii) the person who was the spouse or civil partner of the qualified person mentioned in sub-paragraph (i) when he died or is the spouse or civil partner of the person mentioned in sub-paragraph (ii); and
- (b) he was attending an educational course in the United Kingdom immediately before the qualified person died or ceased to be a qualified person and continues to attend such a course.

(4) A person satisfies the conditions in this paragraph if the person is the parent with actual custody of a child who satisfies the condition in para (3).

(5) A person satisfies the conditions in this paragraph if –

(a) he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;
(b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) he satisfies the condition in paragraph (6); and

(d) either -

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

(ii) the former spouse or civil partner of the qualified person has custody of a child of the qualified person;

(iii) the former spouse or civil partner of the qualified person has the right of access to a child of the qualified person under the age of 18 and a court has ordered that such access must take place in the United Kingdom; or

(iv) the continued right of residence in the United Kingdom of the person is warranted by particularly difficult circumstances, such as he or another family member having been a victim of domestic violence while the marriage or civil partnership was subsisting.

(6) The condition in this paragraph is that the person -

(a) is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or

(b) is the family member of a person who falls within paragraph (a).

Retention issues & case law

The conditions in regulation 10 are problematic in some ways. In the case of a married couple, or civil partners, retention is catered for in respect of a person who has 'ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person'. But this only operates as long as the requirements, as to period of the marriage/partnership (three years), and residence in the UK (one year), can be satisfied.

It is not clear where that leaves people in *other* kinds of relationships. For example, a party to a long-term unmarried/unregistered relationship, or in a marriage or civil partnership which has been for less than those periods. Nor is it clear where that leaves a relationship where there is just separation, for example if the EEA national has simply left the country or the household (or where the relationship has ended, but no formal dissolution or termination is in prospect.

Regulation 10(5) envisages situations where ~~there have been~~ 'particularly difficult circumstances'. It is helpful that this then explicitly covers domestic violence, including violence directed at other family members (i.e. children) but it seems to be wide enough to encompass other possibilities. Also, it seems to be the basis for acquiring a right to reside ahead of any proceedings to terminate the marriage or civil partnership:

There is considerable uncertainty around the scope for retaining a right to reside after the spouse who is the EEA national has lost his or her right to reside after leaving

employment, and leaving the country – and at what point this occurs. In that scenario, assuming the non-EEA spouse is responsible for the couple's children, and those children have started in UK education, can she maintain (or acquire) a right to reside from the fact that her children may be entitled to continue with their education (and they need a parent to look after them, and help them realise that right)? In principle, the answer should be 'yes'. The legal basis for doing so seems clear enough, but the issue is complicated by the need for satisfying the 'self-sufficiency' requirement. Recent Commissioners' Cases have not completely clarified some of the difficult issues around this question (e.g. CIS/1121/2007, 21 November 2007, Commissioner Rowland).

Aspects of this issue have been referred from the Court of Appeal to the European Court of Justice in the *Ibrahim* case (18). In that case Ms Ibrahim (I), a Somali national, and her children had the right to reside in the UK on the basis of her marriage to a Danish citizen working in the UK. Three of the children were Danish citizens and had come to the UK with I. A fourth child was born in the UK. Two of the children had started in UK schools, and were still attending those schools when I sought the council's help. I's husband had stopped work, and left the UK. He later returned to the UK, and was claiming benefits: but, by then, he had ceased to be a 'qualified person'. None of the family was, by that stage, self-sufficient, and I was not working. She was claiming means-tested benefits. She then applied to the local authority for homelessness assistance for herself and her children. The rules in relation to the 'right to reside' are similar to those applicable to benefits. This was refused as the council considered she had lost the right to reside and had not gained it. Even if she was eligible under regulation 10 she was not 'self-sufficient'. The county court allowed I's appeal, concluding that she had a right to reside assisted by the fact that the two older children had a right to reside in order to complete the education they had started. This, in turn, meant that I gained a 'derivative' right to reside as their primary carer which operated independently of any need to show 'self-sufficiency'.

On appeal to the Court of Appeal there was doubt about whether *Baumbast* (19), the main case that supported I's case, could in fact assist her given that in that case the claimants were self-sufficient. The court decided that the issues were not clear. So the case has been referred to the ECJ. A key question posed to the ECJ was whether retention or a derived right (based on I's role as primary carer of children who had entered UK education) depended on satisfying the requirements of the Immigration (EEA) Regulations; or whether she could derive that right more readily directly from art 12 of Reg (EEC) No 1612/68? If so, was she required to have access to sufficient resources and comprehensive sickness insurance to avoid becoming a burden on the social assistance system? Previous cases suggest this may be essential. (20)

The resources issue featured again in *Teixeira* (21) where a Portuguese parent who was (or had been) a worker sought assistance from Lambeth Council. Her daughter, Patricia, was born in the UK and entered education here, but at a time when her mother was not a 'worker'. The parents then divorced. The father, also Portuguese, continued to live in England. Patricia resided with him under a court order which gave her as much contact with her mother as she wished. By the time of the appeal Patricia lived with her mother. Unlike *Ibrahim*, the county court rejected her appeal against the council's refusal to provide housing, holding that art 12 did not assist a claimant who was not self-supporting, and who was dependent on public resources. As in *Ibrahim*, the case has now been referred to the ECJ.

Retention: using a child's 'right to reside'

Recent Commissioners' cases have shown that there is scope for a claimant to assert a new right to reside based on a number of grounds, including her child's right to reside, assisted by regulation 10(3), (4). However, the outcome will depend on the claimant's particular circumstances, and how these then map on to the retention scheme.

This was illustrated by CIS/4304/2007 (13 May 2008) where the claimant was of Somali origin and Dutch nationality. Her elder two children moved to the UK in 2004, and the claimant followed next year with her youngest child. She worked as an office cleaner for two hours a day, five days a week, in 2005 — but only for several months. She claimed Jobseeker's Allowance until January 2007. She claimed IS after she became ill. This was refused, but she won an appeal. On appeal by the Secretary of State, Commissioner Jacobs identified a number of possible ways in which a right to reside might be maintained — but all of these required another tribunal, on a rehearing, to consider them.

It had been argued, successfully, that the claimant had a right to reside as a family member of her eldest child. However, that daughter, after starting a university course in 2005, had undertaken some full-time work. She had helped her mother financially. If the tribunal had been right to treat the claimant as a family member of her daughter, she could not be a 'person from abroad'.⁽²²⁾ The problem, though, was that despite dealing with the issue of whether the daughter's work was 'genuine and effective' and not 'marginal and ancillary' and could use that as the basis for a right to reside, it did not go on to consider the link that existed between the mother and that daughter. In particular, it had not considered whether the claimant was dependent on her daughter. The tribunal on the rehearing was therefore directed to deal with the 'dependence' point, assisted by ECJ authorities which were considered in CIS/2100/2007 (13th May 2008);⁽²³⁾ as well as the question of whether the work of claimant's student daughter was sufficient to give her 'worker' status (assisted by CIS/1793/2007).

The tribunal had also decided, relying on *Baumbast*, that the claimant could assert a right to reside as a former worker with a child at school. Although in *Baumbast* the court had decided that the dependent child of a worker had an independent right to education (giving her primary carer the right to reside to ensure that the child could effectively exercise that right), this was distinguishable in that the claimant was not working at the time when her youngest child entered general education (and the tribunal had been wrong to treat the issue as dependent on the time when the child installed herself in the UK). There were also, he said, 'other issues', for example whether Directive 2004/38 was 'exhaustive of the rights of residence', or whether they could derive from other EC Law sources; whether the scope for a right to reside based on *Baumbast* depended on the parents remaining self-sufficient (one of the points still for determination in *Ibrahim*), and whether the claimant retained her worker status because of her temporarily inability to work as a result of an illness or accident.

Spouses & partners' 'dependency'

One of the criticisms of the family membership and retention parts of the scheme is that they seem to create a relationship of dependency between the non-EEA national and her (or his) spouse or civil partner. This may, in some cases, put pressure on such a family member to try to maintain a difficult, even abusive, relationship until the scope for retaining a right to reside is clearly engaged. The termination of

marriage/civil partnership seems to underline this, as it stipulates that a retained right to reside normally requires the marriage or partnership, prior to the start of proceedings, to have lasted for at least three years; and for the parties to have resided in the UK for at least one year (reg.10(5)(d)(i)). However, it does not explicitly state that the parties must have resided *together* throughout that period (unlike the wording used in reg 15(1)(b), and the requirements for acquiring permanent residence, which seem to require the family member to have resided in the UK, and *with* the EEA national).

For some groups of non-EEA nationals who have lost the right to reside when the relationship with the EEA national ends, for example after a unilateral divorce (at which point the other spouse may well regard any duty to maintain as ended), the loss of the right to reside will often generate other significant advice needs. This is particularly problematic if that person is then a 'person from abroad' - and if support from mainstream State benefits, housing, etc is barred out by the restrictions like the Immigration and Asylum Act 1999 s.115 (and 'person from abroad' and residence restrictions in regulations).

Exceptionally, a claimant who is unable to claim benefits, and who has no other means of support, may be able to access accommodation from the Community Care system if her need for care and attention has arisen solely because of destitution, or from the anticipated physical effects of becoming destitute. This applies, for example, to spouses who have fled from a violent spouse, although, as one of the leading cases confirms, the precise type and level of support will depend on the gateway assessment of her needs at that point.(24) If the person has children, the fact that the claimant does not have a right to reside should not prevent support, including cash payments when these are needed, being provided.(25)

Conclusions

As these articles have shown, the right to reside system is a difficult one for advisers. There are still key areas where clients' rights are unclear, not least the circumstances in which family member status can be lost and the circumstances in which it can be retained - what might be called the 'lost and found' part of the scheme.

Although the status of A8 workers who have not completed 12 months continuous and registered work has been clarified by the House of Lords in *Zalewska* (they held that 12 months continuous, registered service is required, and approved Commissioner Rowland's view that the scheme is not disproportionate or discriminatory), (26) the position in other areas is still *far* from certain.

Among other things, there is also uncertainty as to how far article 18 of the EC Treaty can confer residence and support rights - for example in situations where a 'right to reside' is not available under the UK's 2006 regulations. There have been some indications that it can be very helpful: for example in CIS/408/2006 (11 June 2008), when Commissioner Rowland concluded that a wife could retain a right to reside, despite stopping work, when this was necessary to provide care for her husband. This was a lacuna that could (and should) be filled, aided by the Treaty provisions. Apart from anything else, this was consistent, he said, with a need for 'due regard for family life and dignity'.

As will be seen from *Ibrahim*, though, the scope for relying on the Treaty itself, and provisions of secondary legislation that have been displaced by the Directive 2004/38 (and by the UK regulations) remains to be seen when the ECJ provides guidance in

that case. It looks like we will have to wait until the New Year for the results of ECJ references in *Ibrahim* and *Teixeira*. In the meantime, we are still seeing a stream of Commissioners' (now Upper Tribunal judges') cases on subjects like durable relationships, and the application of 'living together' requirements in determining that particular status.

In practice, clients' advice issues are often inter-woven with other family-related advice points, and this is particularly so when advising in the separation and divorce context.

Immigration status and the 'right to reside' will feature as one of the three topics considered at the 'Family & Welfare' workshop for advisers on Thursday 30th April 2008 (Staffordshire University's Ashley Centre). Details at: <http://tinyurl.com/5gk6vp>

Footnotes

1. Immigration (European Economic Area) Regulations 2006, SI 2006/1003, regs 13, 14. The scheme also applies to family members of UK nationals as if they are EEA nationals, e.g. while the UK national is residing as a worker or self-employed person in another EEA State, or was so residing before returning to the UK; and the family member is his spouse or civil partner and 'living together' in that State or were doing so before their return to the UK, reg 9.

2. Regs 7(3), (4), 8.

3. E.g. by not registering as a jobseeker after a year's employment; reg 6(2). Qualified person status was discussed in the first article.

4. Including temporary inability to work, or pursue self-employment, due to illness or accident; involuntary employment followed by vocational training; or voluntary unemployment followed by vocational training linked to previous employment; reg. 6(2), (3). Worker or self-employed status may also be maintained in after retirement if the conditions in reg. 5 are met.

5. Reg. 14(2).

6. In theory, and in line with the way family unity and integration principles were intended to work, the greater the integration of EU citizens and their family members in the host State, the greater the degree of protection they can expect, e.g. in relation to expulsion; Preamble to the Directive, para 24.

7. Immigration and Asylum Act 1999 s.115. Regulations may provide an exemption, but in CDLA/708/2007 (10 July 2008) these did not assist a child claimant for DLA, who had Indian nationality and lived in the UK with his mother and her husband, who also both had Indian nationality.

8. Income Support (General) Regulations 1987, SI1987/1967, Schedule 7, para 17.

9. IS (General) Regulations 1987, reg. 21AA(3), (4)(d).

10. Reg. 15. In CIS/2258/2008 (17 September 2008) it was held that residence must continue throughout the 5-year period, less short holidays. The claimant could not show this, as a result of periods abroad. The scope for demonstrating a permanent residence right using the five year qualification period under EC Directive 2004/38, and assisted by art 18 of the EC Treaty and *Baumbast v Secretary of State for the Home Department* (Case C413/99) [2002] E.C.R. I-7091, is due to be considered by Upper Tribunal Judges (formerly a Tribunal of Commissioners) in CIS/1471/2007. It was not listed for hearing at the time of writing.

11. *McCarthy v Secretary of State for the Home Department* [2008] EWCA Civ 641; [2008] 3 CMLR 7 <http://tinyurl.com/5gt2d6> and see CIS/3255/2005 (19 December 2007); and R(IS) 6/08 (where a claim based on the claimant's father's residence failed as he had been living in the UK in accordance with UK Law, not EC Law, following a successful asylum claim and naturalisation).

12. Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States: Official Journal of the European Union, OJ 2004, L158/882004, art 2(2)(a)-(d).
13. The right to work is in art 23 of Directive 2004/38: 'Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there.'
14. *Matterm v Ministre du Travail et de l'Emploi* (C-10/05) [2006] ECR I-3145; [2006] Imm AR 471, ECJ.
15. CF/1883/2007 (3 December 2007) (Commissioner Mesher).
16. [2008] EWCA 13; [2008] Imm AR 343; accessible at <http://tinyurl.com/5kyuon>
17. Directive 2004/38/EC, Preamble, para 15; and art 13.
18. *Harrow LBC v Ibrahim* [2008] EWCA Civ 386 (21 April 2008); accessible at <http://tinyurl.com/5746kt>
19. *Baumbast and R v Secretary of State for the Home Department* (Case C-413/99) [2002] ECR I-7091, ECJ.
20. *E.g. W (China) and X (China) v Secretary of State for the Home Department* [2007] 1 WLR 1514, CA; accessible at <http://tinyurl.com/6eozub>
21. *Teixeira v Lambeth LBC* [2008] EWCA Civ 1088 (10 Oct 2008); accessible at <http://tinyurl.com/5r2hkx>
22. IS (General) Regulations 1987, reg 21AA(4)(d), in conjunction with art 2(2)(d) of the Directive.
23. Assisted by the main ECJ decisions on this, including *Centre Public d'Aide Sociale de Courcelles v Lebon* (Case 316/85) [1987] ECR 281; *Chen v Secretary of State for the Home Department* (Case C-200/02) [2005] QB 325; and *Jia v Migrationsverket* (Case C-1/05) [2007] QB 545, which were considered in CIS/2100/2007 (13 May 2008).
24. National Assistance Act 1948, s 21(1A) in combination with the Local Government Act 2000, s.2; see *Oxfordshire County Council v R (Khan) and Officer of the Deputy Prime Minister* [2004] HLR 41, CA; accessible at <http://tinyurl.com/55jkh4>. As a source of support this has become more difficult since the recent House of Lords case *R (M) v Slough Borough Council* [2008] UKHL 52. There can, of course, be some significant benefits take-up problems for claimants who have fled violent households, even without the added difficulties of the 'right to reside' gateway – as illustrated by cases on 'notional capital' like CIS/78/2001 (*138/01).
25. In most cases this will be under the Children Act 1989, ss 17, 20. There are limits, though, to how far this route to support can help children's parents.
26. *Zalewska v Northern Ireland Department for Social Development* [2008] UKHL 67 (discussed in the first article). The Lords decision is accessible at: <http://tinyurl.com/5czjrm>. Baroness Hale gave a powerful dissenting judgment, agreeing with arguments put forward by CPAG and the Public Law Project, concluding that the impact on A8 workers like Ewa Zalewska in such cases was excessively severe and disproportionate.

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Family Welfare & Work

Advisers' Workshop

Thursday 30th April 2009

10.00 am – 4.00 pm

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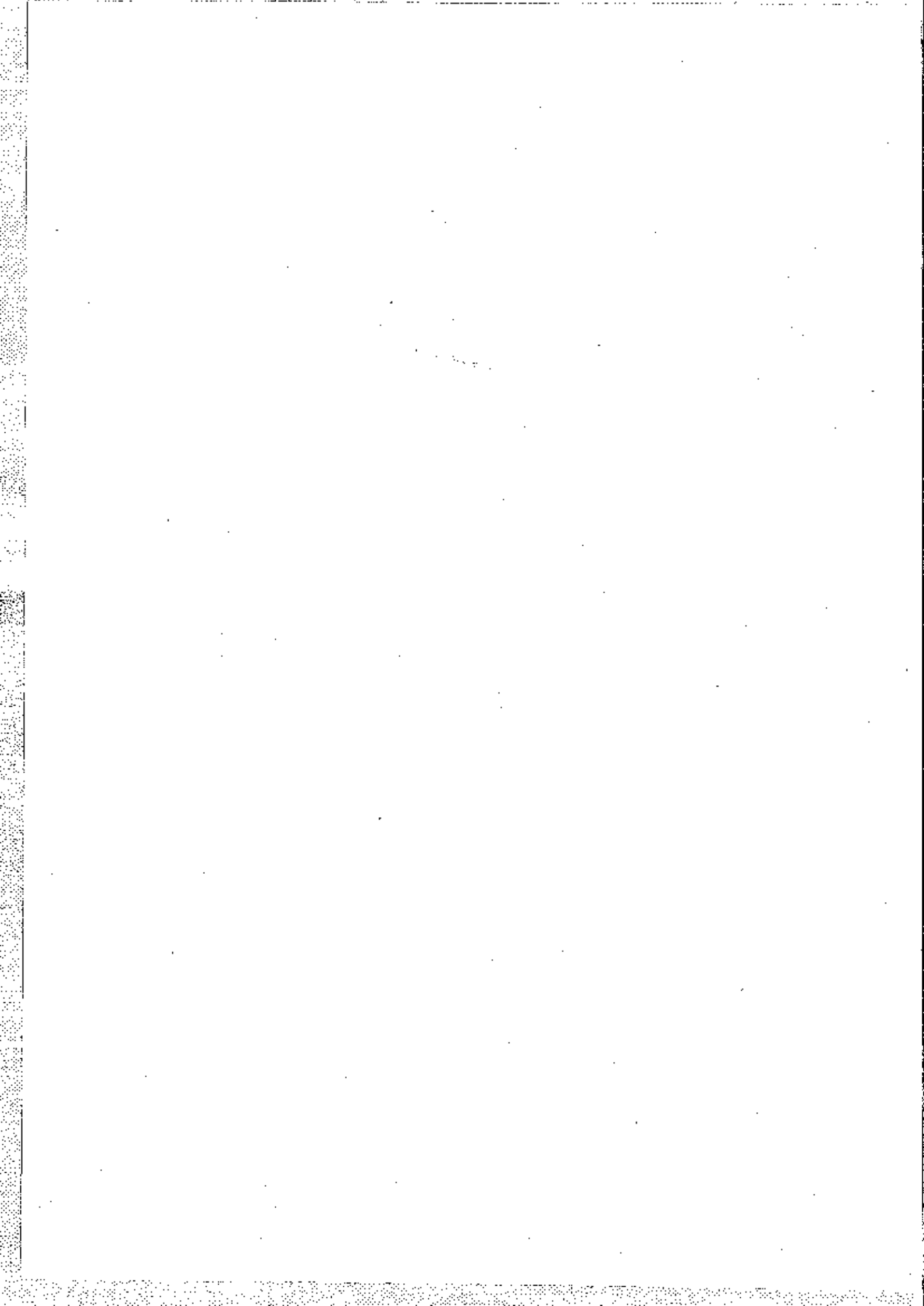
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WORK 6



Precarious welfare: family and extended family members' 'right to reside', support, and work

Adviser 131 January/February 2009

In the second of two articles, Keith Puttick discusses the right to reside of family and extended family members of EEA nationals in the UK. It focuses, in particular, on those who are not themselves EEA nationals, and the scope for a 'retained' or 'derived' right. This is a complex area, as can be seen in recent cases like Teixeira. As he explains, the right to reside is now the main gateway to support, as well as access to the labour market. Some groups, including single parents after separation who are non-EEA nationals, and outside the scope for a retained right, can be caught between several very hard places. Typically, they may not be in employment, and are not receiving maintenance or other financial support. They may also find it difficult to claim benefits or housing. Exceptionally, they may be get assistance from social services under Community Care legislation.

A family member of an EEA national in the UK can assert a right to reside in the UK in two phases under the Immigration (EEA) Regulations 2006. The first is in an 'initial period' of residence of 3 months, and this depends on not becoming 'an unreasonable burden' on the social assistance system and the second operates during an 'extended period' after that.(1)

An 'extended family member' enjoys similar rights, at least while the conditions for this status continue to be satisfied.(2) However, neither family member nor extended family member status continue indefinitely. It may be lost, for example, if the EEA national on whom the status is based loses his or her right to reside by not maintaining 'qualified person' status after employment ends,(3) or if a right to reside is not secured under the other possible categories.(4)

The key regulation on this says: 'A family member of a qualified person residing in the United Kingdom under paragraph (1) or of an EEA national with a permanent right of residence under regulation 15 is entitled to reside in the United Kingdom for as long as he remains the family member of the qualified person or EEA national' (emphasis added).(5)

If the right to reside is lost, a family member who is not an EEA national may then need to assert a new basis for it. The trigger for this, and for an adverse determination, is usually a claim for benefits or housing, as seen in the cases of Ibrahim or Teixeira (discussed below). The problem is that even if the claimant has started a new life in the UK, and has integrated in the way EC Directive 2004/38 envisages,(6) there is no automatic right for a non-UK or EEA national in that situation to remain in the UK and access State support. The issue can be particularly difficult given the way the self-sufficiency rule is being operated by some agencies and local authorities.

The scope of the retention provisions is considered later in this article. Before that, it is proposed to consider the concept of family membership.

The 'right to reside' gateway

A person in the UK who is not a UK or EEA national, and who is subject to immigration control, is generally barred out of most UK benefits and social welfare support unless s/he is within one of the exemptions.(7)

Particular regulations set out family members' entitlements, and the detail needs to be consulted. In general, they follow the model for Income Support. This stipulates that a person is not a 'person from abroad', and is therefore not subject to the way a person from abroad is treated for claims purposes (including an applicable amount of 'nil')(8) if s/he is a family member of a jobseeker or worker, self-employed person; or is a person who has retained right to reside status.(9)

In most cases the right to reside provided in the Immigration (EEA) Regulations 2006 is now the gateway for residence, work, social security, housing, employment, and other welfare rights. However, the EU Treaty provisions and other EC secondary legislation and ECJ case-law can also still be the source of residence rights. As well as providing a variety of ways in which a spouse or other family member can *retain* residence, there is also a route to a permanent right of residence after five years' continuous residence with the EEA national.(10)

Specifically, regulation 15(1) provides that the following are among those who acquire the right to reside in the UK permanently:

- an EEA national who has resided in the UK in accordance with the regulations for a continuous period of 5 years
- a family member of an EEA national who is not an EEA national but who has resided in the UK with the EEA national in accordance with the regulations for a continuous period of 5 years
- a worker or self-employed person who has ceased activity (this is defined in regulation 5)
- the family member of a worker or self-employed person who has ceased activity
- a person who was the family member of a worker or self-employed person where:
 - (i) the worker or self-employed person has died;
 - (ii) the family member resided with him immediately before his or her death;
 - and
 - (iii) the worker or self-employed person had resided continuously in the UK for at least the 2 years immediately before his or her death or the death was the result of an accident at work or an occupational disease
- a person who
 - (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
 - (ii) was, at the end of that period, a family member who has retained the right of residence

It is not entirely clear what 'resided in the UK with the EEA national' in, or 'the family member resided with him...' actually means, or whether it introduces some kind of minimum 'living together' requirement (as the case-law on 'durable relationship' has recently indicated. The observations of Commissioner Jacobs in C15/612/2008 (14 August 2008), discussed below, are particularly important in this regard. What is clear, though, is that the claimant's residence must be *continuous*. As in other areas of the scheme's operation, 'residence' means residence in the exercise of a right under EC Law rather than under UK law.(11)

A closer analysis of these points, and the key legislation and recent case-law, is provided in the rest of this article.

'Family member'

Family membership is narrowly defined by EC Directive 2004/38(12) and under the UK regulation that transposes it. Regulation 7 provides that the following are a person's family members:

- a spouse or civil partner;
- direct descendants, including those of the spouse or civil partner who are:
 - (i) under 21; or
 - (ii) dependants of the person, or of his or her spouse or civil partner;
- dependent direct relatives in the person's ascending line, or that of the spouse or civil partner;
- a person who is to be treated as a family member under the provisions dealing with extended family members (see below), and who satisfies conditions on the issue of EEA family permits, registration certificates, or residence cards.

Family membership confers on a family member a right to support and to work.(13) However, this right is generally dependent upon, and runs in tandem with, the EEA national's residence and 'right to reside'. One practical consequence of this, it seems, is that it can only be exercised in the same EEA country where both are residing. It cannot, for example, enable the non-EEA national to work in an EEA country other than the one in which the EEA national is exercising a right to reside. This is another indication that the courts see family members' rights as dependent on, and linked closely to, the EEA national's rights.(14) The least problematic of these provisions is probably regulation 7(1)(b). This confers a right to reside on a 'direct descendant'. It has been held that nothing more is needed than to prove 'descendancy' and age, for example when a daughter claims Child Benefit on behalf of her children.(15)

Extended family membership

Regulation 8, which has its origins in article 3 of EC Directive 2004/38, sets out what is required to become and remain an 'extended family member'. In summary, it means a person who satisfies one of four possible conditions in regulation 8(2)-(5).

'Extended family member'

8. —(1) In these Regulations 'extended family member' means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and –

(a) the person is residing in an EEA State in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;
(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or

(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.

(3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his civil partner.

(4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.

(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.

Regulation 8(5) provides a right of residence for partners who are not married to or in a civil partnership with an EEA national but who can show that they have a 'durable relationship'. The concept of a durable relationship was considered recently by Commissioner Jacobs in CIS/612/2008 (14 August 2008). He observed that a 'couple are likely to be partners if they are living together with each other in the same household as husband and wife'. Although he accepted, on the evidence in that case, that 'the couple in this case were partners by the time of the Secretary of State refused the claim for income support' he went on to reject the claim. There were six reasons given, but they included the short period of the relationship (barely a year), which had in any case been interrupted by periods of separation. Further factors included 'commitment' and the claimant's uncertainty about the relationship.

Although the case-law is still evolving, it is not clear at what point a person who is in a 'durable relationship' is liable to be treated as no longer in that relationship – for example after the parties have left a shared household, or moved on to a new relationship.

Using the 'extended family' head

The extended family member route has been used successfully in a number of contexts - for example by those who have been unsuccessful in asserting asylum claims, but who continue living in the UK, and then go on to establish a right to reside on the basis of regulation 8(2).

To do so requires the claimant to demonstrate dependency or household membership. However, this failed in *KG (Sri Lanka) v Secretary of State for the Home Department*.⁽¹⁶⁾ After arriving in the UK in 2000 the claimants' asylum claims had failed. They continued living in the UK, but several years later applied for residence as family relations of EU citizens who had arrived after them and who, by then, had acquired EEA nationalities. However, it had been determined that they had arrived in the UK straight from Sri Lanka. They had not therefore been residing in an EEA State in which the Union citizens were also residing. Furthermore, they could not rely on earlier residence in Sri Lanka with the family members, even if they had become EU citizens later. Arguments about the purpose of the Directive being to maintain family unity failed. Whilst family unity, and family reunification, played a part, the court took as the main basis for the scheme the need to assist EEA nationals to exercise free movement rights. As Buxton LJ said, 'the emphasis is on the recognition of family life as a support to, and encouragement of, the exercise of rights by the Union citizen, and not as an end in itself. In any case, the court concluded

that the case did not come 'anywhere near' to meeting the other requirements in art 3(2) of the Directive.

Retaining a 'right to reside'

An essential feature of Directive 2004/38, as set out in the Preamble, is that family members should be 'legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership'. This was to ensure that in such circumstances 'family members already residing within the territory of the host Member State retain their right of residence...' (17)

Art 13 makes it clear that such family members are to retain their right of residence 'exclusively on a personal basis'. This is transposed into UK law by regulation 10, which lays down the conditions for acquiring the status of a 'family member who has retained the right of residence'.

There are four routes to retaining a right to reside set out in regulation 10(2), paras (2), (3), (4), and (5) (see Box B)

'Family member who has retained the right of residence'

10. (1) In these Regulations, 'family member who has retained the right of residence' means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the conditions in this paragraph if –

- (a) he was a family member of a qualified person when the qualified person died;
- (b) he resided in the United Kingdom in accordance with these Regulations for at least the year immediately before the death of the qualified person; and
- (c) he satisfies the condition in paragraph (8).

(3) A person satisfies the conditions in this paragraph if –

- (a) he is the direct descendant of—
 - (i) a qualified person who has died;
 - (ii) a person who ceased to be a qualified person on ceasing to reside in the United Kingdom; or
 - (iii) the person who was the spouse or civil partner of the qualified person mentioned in sub-paragraph (i) when he died or is the spouse or civil partner of the person mentioned in sub-paragraph (ii); and
- (b) he was attending an educational course in the United Kingdom immediately before the qualified person died or ceased to be a qualified person and continues to attend such a course.

(4) A person satisfies the conditions in this paragraph if the person is the parent with actual custody of a child who satisfies the condition in para (3).

(5) A person satisfies the conditions in this paragraph if –

- (a) he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;
- (b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) he satisfies the condition in paragraph (6); and

(d) either -

- (i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;
- (ii) the former spouse or civil partner of the qualified person has custody of a child of the qualified person;
- (iii) the former spouse or civil partner of the qualified person has the right of access to a child of the qualified person under the age of 18 and a court has ordered that such access must take place in the United Kingdom; or
- (iv) the continued right of residence in the United Kingdom of the person is warranted by particularly difficult circumstances, such as he or another family member having been a victim of domestic violence while the marriage or civil partnership was subsisting.

(6) The condition in this paragraph is that the person --

- (a) is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or
- (b) is the family member of a person who falls within paragraph (a).

Retention issues & case law

The conditions in regulation 10 are problematic in some ways. In the case of a married couple, or civil partners, retention is catered for in respect of a person who has 'ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person'. But this only operates as long as the requirements as to period of the marriage/partnership (three years), and residence in the UK (one year), can be satisfied.

It is not clear where that leaves people in *other* kinds of relationships. For example, a party to a long-term unmarried/unregistered relationship, or in a marriage or civil partnership which has been for less than those periods. Nor is it clear where that leaves a relationship where there is just separation, for example if the EEA national has simply left the country or the household (or where the relationship has ended, but no formal dissolution or termination is in prospect).

Regulation 10(5) envisages situations where there have been 'particularly difficult circumstances'. It is helpful that this then explicitly covers domestic violence, including violence directed at other family members (i.e. children) but it seems to be wide enough to encompass other possibilities. Also, it seems to be the basis for acquiring a right to reside *ahead* of any proceedings to terminate the marriage or civil partnership.

There is considerable uncertainty around the scope for retaining a right to reside after the spouse who is the EEA national has lost his or her right to reside after leaving

employment, and leaving the country – and at what point this occurs. In that scenario, assuming the non-EEA spouse is responsible for the couple's children, and those children have started in UK education, can she maintain (or acquire) a right to reside from the fact that her children may be entitled to continue with their education (and they need a parent to look after them, and help them realise that right)? In principle, the answer should be 'yes'. The legal basis for doing so seems clear enough, but the issue is complicated by the need for satisfying the 'self-sufficiency' requirement. Recent Commissioners' Cases have not completely clarified some of the difficult issues around this question (e.g. CIS/1121/2007, 21 November 2007, Commissioner Rowland).

Aspects of this issue have been referred from the Court of Appeal to the European Court of Justice in the *Ibrahim* case.(18) In that case Ms Ibrahim ('I'), a Somali national, and her children had the right to reside in the UK on the basis of her marriage to a Danish citizen working in the UK. Three of the children were Danish citizens and had come to the UK with I. A fourth child was born in the UK. Two of the children had started in UK schools, and were still attending those schools when I sought the council's help. I's husband had stopped work, and left the UK. He later returned to the UK, and was claiming benefits; but, by then, he had ceased to be a 'qualified person'. None of the family was, by that stage, self-sufficient, and I was not working. She was claiming means-tested benefits. She then applied to the local authority for homelessness assistance for herself and her children. The rules in relation to the 'right to reside' are similar to those applicable to benefits. This was refused as the council considered she had lost the right to reside and had not gained it. Even if she was eligible under regulation 10 she was not 'self-sufficient'. The county court allowed I's appeal, concluding that she had a right to reside assisted by the fact that the two older children had a right to reside in order to complete the education they had started. This, in turn, meant that I gained a 'derivative' right to reside as their primary carer which operated independently of any need to show 'self-sufficiency'.

On appeal to the Court of Appeal there was doubt about whether *Baumbast*(19), the main case that supported I's case, could in fact assist her given that in that case the claimants were self-sufficient. The court decided that the issues were not clear. So the case has been referred to the ECJ. A key question posed to the ECJ was whether retention or a derived right (based on I's role as primary carer of children who had entered UK education) depended on satisfying the requirements of the Immigration (EEA) Regulations; or whether she could derive that right more readily directly from art 12 of Reg (EEC) No 1612/68? If so, was she required to have access to sufficient resources and comprehensive sickness insurance to avoid becoming a burden on the social assistance system? Previous cases suggest this may be essential.(20)

The resources issue featured again in *Teixeira* (21) where a Portugese parent who was (or had been) a worker sought assistance from Lambeth Council. Her daughter, Patricia, was born in the UK and entered education here, but at a time when her mother was not a 'worker'. The parents then divorced. The father, also Portugese, continued to live in England. Patricia resided with him under a court order which gave her as much contact with her mother as she wished. By the time of the appeal Patricia lived with her mother. Unlike *Ibrahim*, the county court rejected her appeal against the council's refusal to provide housing, holding that art 12 did not assist a claimant who was not self-supporting, and who was dependent on public resources. As in *Ibrahim*, the case has now been referred to the ECJ.

Retention: using a child's 'right to reside'

Recent Commissioners' cases have shown that there is scope for a claimant to assert a new right to reside based on a number of grounds, including her child's right to reside, assisted by regulation 10(3), (4). However, the outcome will depend on the claimant's particular circumstances, and how these then map on to the retention scheme.

This was illustrated by CIS/4304/2007 (13 May 2008) where the claimant was of Somali origin and Dutch nationality. Her elder two children moved to the UK in 2004, and the claimant followed next year with her youngest child. She worked as an office cleaner for two hours a day, five days a week, in 2005 – but only for several months. She claimed Jobseeker's Allowance until January 2007. She claimed IS after she became ill. This was refused, but she won an appeal. On appeal by the Secretary of State, Commissioner Jacobs identified a number of possible ways in which a right to reside might be maintained – but all of these required another tribunal, on a rehearing, to consider them.

It had been argued, successfully, that the claimant had a right to reside as a family member of her eldest child. However, that daughter, after starting a university course in 2005, had undertaken some full-time work. She had helped her mother financially. If the tribunal had been right to treat the claimant as a family member of her daughter, she could not be a 'person from abroad'.⁽²²⁾ The problem, though, was that despite dealing with the issue of whether the daughter's work was 'genuine and effective' and not 'marginal and ancillary' and could use that as the basis for a right to reside, it did not go on to consider the link that existed between the mother and that daughter. In particular, it had not considered whether the claimant was *dependent* on her daughter. The tribunal on the rehearing was therefore directed to deal with the 'dependence' point, assisted by ECJ authorities which were considered in CIS/2100/2007 (13th May 2008);⁽²³⁾ as well as the question of whether the work of claimant's student daughter was sufficient to give her 'worker' status (assisted by CIS/1793/2007).

The tribunal had also decided, relying on *Baumbast*, that the claimant could assert a right to reside as a former worker with a child at school. Although in *Baumbast* the court had decided that the dependent child of a worker had an independent right to education (giving her primary carer the right to reside to ensure that the child could effectively exercise that right), this was distinguishable in that the claimant was not working at the time when her youngest child entered general education (and the tribunal had been wrong to treat the issue as dependent on the time when the child installed herself in the UK). There were also, he said, 'other issues', for example whether Directive 2004/38 was 'exhaustive of the rights of residence', or whether they could derive from other EC Law sources; whether the scope for a right to reside based on *Baumbast* depended on the parents remaining self-sufficient (one of the points still for determination in *Ibrahim*); and whether the claimant retained her worker status because of her temporarily inability to work as a result of an illness or accident.

Spouses & partners' 'dependency'

One of the criticisms of the family membership and retention parts of the scheme is that they seem to create a relationship of dependency between the non-EEA national and her (or his) spouse or civil partner. This may, in some cases, put pressure on such a family member to try to maintain a difficult, even abusive, relationship until the scope for retaining a right to reside is clearly engaged. The termination of

marriage/civil partnership seems to underline this, as it stipulates that a retained right to reside normally requires the marriage or partnership, prior to the start of proceedings, to have lasted for at least three years; and for the parties to have resided in the UK for at least one year (reg.10(5)(d)(i)). However, it does not explicitly state that the parties must have resided *together* throughout that period (unlike the wording used in reg 15(1)(b), and the requirements for acquiring permanent residence, which seem to require the family member to have resided in the UK, and *with* the EEA national).

For some groups of non-EEA nationals who have lost the right to reside when the relationship with the EEA national ends, for example after a unilateral divorce (at which point the other spouse may well regard any duty to maintain as ended), the loss of the right to reside will often generate other significant advice needs. This is particularly problematic if that person is then a 'person from abroad' - and if support from mainstream State benefits, housing, etc is barred out by the restrictions like the Immigration and Asylum Act 1999 s.115 (and 'person from abroad' and residence restrictions in regulations).

Exceptionally, a claimant who is unable to claim benefits, and who has no other means of support, may be able to access accommodation from the Community Care system if her need for care and attention has arisen solely because of destitution, or from the anticipated physical effects of becoming destitute. This applies, for example, to spouses who have fled from a violent spouse, although, as one of the leading cases confirms, the precise type and level of support will depend on the gateway assessment of her needs at that point.(24) If the person has children, the fact that the claimant does not have a right to reside should not prevent support, including cash payments when these are needed, being provided.(25)

Conclusions

As these articles have shown, the right to reside system is a difficult one for advisers. There are still key areas where clients' rights are unclear, not least the circumstances in which family member status can be lost and the circumstances in which it can be retained - what might be called the 'lost and found' part of the scheme.

Although the status of A8 workers who have not completed 12 months continuous and registered work has been clarified by the House of Lords in *Zalawska* (they held that 12 months continuous, registered service is required, and approved Commissioner Rowland's view that the scheme is not disproportionate or discriminatory), (26) the position in other areas is still far from certain.

Among other things, there is also uncertainty as to how far article 18 of the EC Treaty can confer residence and support rights - for example in situations where a 'right to reside' is not available under the UK's 2006 regulations. There have been some indications that it can be very helpful: for example in CIS/408/2008 (11 June 2008), when Commissioner Rowland concluded that a wife could retain a right to reside, despite stopping work, when this was necessary to provide care for her husband. This was a lacuna that could (and should) be filled, aided by the Treaty provisions. Apart from anything else, this was consistent, he said, with a need for 'due regard for family life and dignity'.

As will be seen from *Ibrahim*, though, the scope for relying on the Treaty itself, and provisions of secondary legislation that have been displaced by the Directive 2004/38 (and by the UK regulations) remains to be seen when the ECJ provides guidance in

that case. It looks like we will have to wait until the New Year for the results of ECJ references in *Ibrahim* and *Teixeira*. In the meantime, we are still seeing a stream of Commissioners' (now Upper Tribunal judges') cases on subjects like durable relationships, and the application of 'living together' requirements in determining that particular status.

In practice, clients' advice issues are often inter-woven with other family-related advice points, and this is particularly so when advising in the separation and divorce context.

Immigration status and the 'right to reside' will feature as one of the three topics considered at the 'Family & Welfare' workshop for advisers on Thursday 30th April 2008 (Staffordshire University's Ashley Centre). Details at: <http://tinyurl.com/5qk6vp>

Footnotes

1. Immigration (European Economic Area) Regulations 2006, SI 2006/1003, regs 13, 14. The scheme also applies to family members of UK nationals as if they are EEA nationals, e.g. while the UK national is residing as a worker or self-employed person in another EEA State, or was so residing before returning to the UK; and the family member is his spouse or civil partner and 'living together' in that State or were doing so before their return to the UK; reg 9.
2. Regs 7(3), (4), 8.
3. E.g. by not registering as a jobseeker after a year's employment; reg 8(2). Qualified person status was discussed in the first article.
4. Including temporary inability to work, or pursue self-employment, due to illness or accident; involuntary employment followed by vocational training; or voluntary unemployment followed by vocational training linked to previous employment; reg. 6(2), (3). Worker or self-employed status may also be maintained in after retirement if the conditions in reg. 5 are met.
5. Reg. 14(2).
6. In theory, and in line with the way family unity and integration principles were intended to work, the greater the integration of EU citizens and their family members in the host State, the greater the degree of protection they can expect, e.g. in relation to expulsion; Preamble to the Directive, para 24.
7. Immigration and Asylum Act 1999 s.115. Regulations may provide an exemption, but in CDLA/708/2007 (10 July 2008) these did not assist a child claimant for DLA who had Indian nationality and lived in the UK with his mother and her husband, who also both had Indian nationality.
8. Income Support (General) Regulations 1987, SI1987/1967, Schedule 7, para 17.
9. IS (General) Regulations 1987, reg. 21AA(3), (4)(d).
10. Reg. 15. In CIS/2258/2008 (17 September 2008) it was held that residence must continue throughout the 5-year period, less short holidays. The claimant could not show this, as a result of periods abroad. The scope for demonstrating a permanent residence right using the five year qualification period under EC Directive 2004/38, and assisted by art 18 of the EC Treaty and *Baumbast v Secretary of State for the Home Department* (Case C413/99) [2002] E.C.R I-7091, is due to be considered by Upper Tribunal Judges (formerly a Tribunal of Commissioners) in CIS/1471/2007. It was not listed for hearing at the time of writing.
11. *McCarrthy v Secretary of State for the Home Department* [2008] EWCA Civ 641; [2008] 3 CMLR 7 <http://tinyurl.com/5qt2d6> and see CIS/3255/2005 (19 December 2007); and R(IS) 6/08 (where a claim based on the claimant's father's residence failed as he had been living in the UK in accordance with UK Law, not EC Law, following a successful asylum claim and naturalisation).

12. Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States: Official Journal of the European Union, OJ 2004, L158/882004, art 2(2)(a)-(d).
13. The right to work is in art 23 of Directive 2004/38: 'Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there.'
14. *Maffern v Ministre du Travail et de l'Emploi* (C-10/05) [2006] ECR I-3145; [2006] Imm AR 471, ECJ.
15. CF/1863/2007 (3 December 2007) (Commissioner Mesher).
16. [2008] EWCA 13; [2008] Imm AR 343: accessible at <http://tinyurl.com/5kyuon>
17. Directive 2004/38/EC, Preamble, para 15; and art 13.
18. *Harrow LBC v Ibrahim* [2008] EWCA Civ 386 (21 April 2008): accessible at <http://tinyurl.com/5746kt>
19. *Baumbast and R v Secretary of State for the Home Department* (Case C-413/99) [2002] ECR I-7091, ECJ.
20. E.g. *W (China) and X (China) v Secretary of State for the Home Department* [2007] 1 WLR 1514, CA: accessible at <http://tinyurl.com/6eozub>
21. *Teixeira v Lambeth LBC* [2008] EWCA Civ 1088 (10 Oct 2008): accessible at <http://tinyurl.com/5r2hkk>
22. IS (General) Regulations 1987, reg 21AA(4)(d), in conjunction with art 2(2)(d) of the Directive.
23. Assisted by the main ECJ decisions on this, including *Centre Public d'Aide Sociale de Courcelles v Lebon* (Case 316/85) [1987 ECR 281; *Chen v Secretary of State for the Home Department* (Case C-200/02) [2005] QB 325; and *Jia v Migrationsverket* (Case C-1/05) [2007] QB 545, which were considered in CIS/2100/2007 (13 May 2008).
24. National Assistance Act 1948, s 21(1A) in combination with the Local Government Act 2000, s.2; see *Oxfordshire County Council v R (Khan) and Office of the Deputy Prime Minister* [2004] HLR 41, CA: accessible at <http://tinyurl.com/65jkk4>
As a source of support this has become more difficult since the recent House of Lords case *R (M) v Slough Borough Council* [2008] UKHL 52. There can, of course, be some significant benefits take-up problems for claimants who have fled violent households, even without the added difficulties of the 'right to reside' gateway – as illustrated by cases on 'notional capital' like CIS/78/2001 (*138/01).
25. In most cases this will be under the Children Act 1989, ss 17, 20. There are limits, though, to how far this route to support can help children's parents.
26. *Zalewska v Northern Ireland Department for Social Development* [2008] UKHL 67 (discussed in the first article). The Lords decision is accessible at: <http://tinyurl.com/5czjmm> Baroness Hale gave a powerful dissenting judgment, agreeing with arguments put forward by CPAG and the Public Law Project, concluding that the impact on A8 workers like Ewa Zalewska in such cases was excessively severe and disproportionate.

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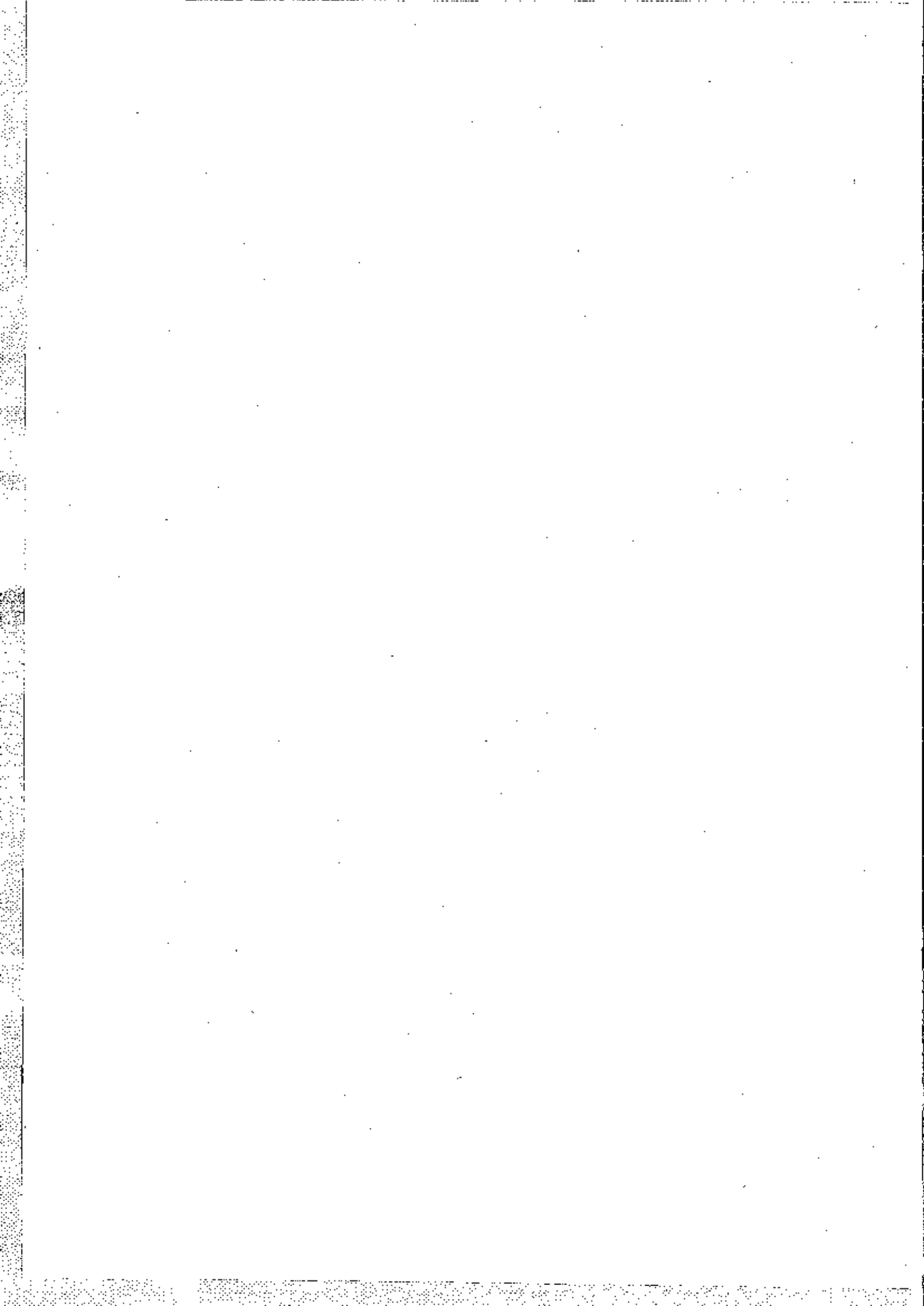
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WORK 7



Recognition of Overseas Unilateral Divorce After *K v K*: the Implications for Divorced Spouses' and Child Dependants' Financial Support, State Welfare and Public Policy

Keith Puttick

It seems easier than ever before for a spouse in a UK-based marriage to leave the country, divorce his wife, and later gain recognition for that divorce from a UK court – usually in time to trump the wife's later petition for divorce and ancillary relief.

Needless to say, the apparent unfairness and inequalities involved, especially in cases where the wife has had no notice of the divorce proceedings, no opportunity to participate, and no financial provision (either for herself, children or other household dependants), and what to all intents and purposes now seems to be an alternative system of divorce in the UK, prompts a lot of angry commentators to demand the introduction of legislation to reform what looks like a thoroughly unjust blight on our Family Law system. However, there are some important competing considerations which support a rather more measured and generous assessment. In particular, by recognising such divorces our courts are maintaining "comity" with the jurisdiction where such divorces take place. In doing so, the argument runs, they are also catering for the needs and expectations of those who may be based in the UK but who move freely between the UK and that country where such unilateral divorces are readily available – and who may well empathise more closely with the standards and values of the system that supports unilateral divorce. Furthermore, in an era which advocates respect for diversity, and other cultures' way of doing things, the unilateral divorce system merits respect, even if it may not exactly accord with the UK's mainstream standards and values in relation to divorce – for example in relation to matters like procedural fairness, distributive justice, and the need for both parties to contribute to the needs of the post-divorce reconstituted

family in line with the guidance provided by the House of Lords in the *Miller* case, and Baroness Hale's "rationales" (considered below). Apart from anything else, says this discourse, the alternatives offered by unilateral divorce are deeply rooted in the belief systems and culture of a sizeable minority of UK citizens. As a result, the argument runs, the faith communities that adhere to this form of divorce are entitled to complain about any unwelcome intervention by the State in what is, essentially, a private or "faith community" matter. That is a matter that is now, in some respects, underpinned by Convention rights (including ECHR art 9, as it protects communities' right to protect systems of divorce that accord with their religion, and manifestations of religious custom and practice).

This article looks at these points, and related "welfare" aspects, including the operation of benefits, tax credits, and community care systems that assist divorced wives and family members after such divorces. Again, this is another feature of the system that seems to be attracting a lot of concern – especially from critics who say that all this does is facilitate unilateral divorce, and paper over the cracks in what is essentially a defective and unjustifiable recognition system. The article considers this, and in doing so also considers some of the significant difficulties that are experienced by some divorced spouses and child dependants (and other dependent family and extended family members of the wife's household) who may have little choice but to look to the welfare system as their only means of post-divorce support. The system offers a particularly important lifeline to those who may find it difficult to get financial provision under Part III of the Matrimonial and Family Proceedings Act 1984 (the MFPA) following recognition of their husbands' unilateral divorce. The scale of that problem is not known, but it is likely that even the Child Support Agency, when it was functioning at its very worst (with a non-compliance rate of 95%) probably outperformed the MFPA. In practice, many UK-based spouses who find themselves divorced, but without any support from their former spouses, have little choice but to turn to the benefits system for help. The problem, though, is that many of them may well find it difficult to access State welfare support – particularly if they do not have the requisite immigration status, including the "right to reside", that is now the main gateway to most forms of State benefits, local authority community care and housing services (and which, if they had it, would also enable them to work in the UK legally and be independent of the State welfare system). There are, for example, significant conditions to be met before a right to reside that may have been gained as a spouse or family member of a UK or EEA national can be retained following unilateral divorce (a matter discussed later when addressing the scope for a post-divorce "retained"

or “derived” right to reside, and discussing cases like *Ibrahim*). Claimants in this group who are not UK or EEA nationals may also encounter difficulties in the form of barriers like the Immigration and Asylum Act 1999, s 115, which bars out claimants who are “subject to immigration control” – something highlighted by cases like *Khan*.

To understand the difficulties of such groups, though, the story begins not with a discussion of the welfare system but with the way our judges are now dealing with “recognition” requests under the legislation concerned, which is the Family Law Act 1986, Part II.

Recognition of Overseas Unilateral Divorce

Case-law in the last ten years indicates that our courts are increasingly ready and willing to recognise overseas unilateral divorces. This has been helped by the development of a number of important principles and judicial perceptions of the factors that should inform recognition decisions. The principles they deploy are, for the most part, an overlay on the statutory scheme in the FLA, and the original scheme that it replaced, which was the Recognition of Divorces and Legal Separations Act 1971. As already indicated, the need to maintain “comity” with jurisdictions that permit unilateral divorce features strongly. Comity is well established in the case-law, and is referred to in leading commentaries like Dicey Morris and Collins on the Conflict of Laws (Sweet & Maxwell, 2008, 14th ed). More recently, as a judicial discourse, it has been taken much further, extending the parameters of both the comity and “respect” agendas significantly – for example to bring into account the need for respect for the standards that underpin and reinforce the other jurisdiction’s laws, customs and practices. Implicit in this is the courts’ recognition of the importance of respecting the standards with which an increasingly large proportion of UK citizens may empathise. This is difficult and contentious territory, nevertheless it is a new and emerging track that was highlighted in the reasoning in decisions like *El Fadl v El Fadl* [2000] 1 FLR 175 and, more recently, *K v K* [2007] EWHC 2945; [2008] Fam Law 404 (sub nom *H v H (Talaq Divorce)*). Although it may not always be clear whose standards, exactly, are being supported (it is unlikely to be those of wives and family members affected by unilateral divorce, or the women and families who feel they may be at risk from such unilateral action in the future). Nevertheless, it is now undoubtedly an important new strand in our judges’ thinking, and one that is clearly very potent in its effects. So much so that even in cases where a wife may have had no notice of the divorce, and no involvement in the proceedings

involved, it seems to be capable of overriding such considerations, and reinforces the court's willingness to accord recognition to that divorce. In some cases the results appear to be spectacularly unjust, barring out the wife's UK petition for divorce as well as attempts to get financial provision dealt with as part of those divorce proceedings.

As a result of cases like *El Fadl*, a case in which recognition was accorded (despite the wife in that case only just learning that she had been divorced 16 years earlier), UK-based wives will now find it increasingly difficult to resist recognition by our courts of their husbands' unilateral divorce. As a corollary, we can expect to see a lot more casts where those wives' UK petitions for divorce and ancillary relief are blocked in the way that happened in *El Fadl* and *K v K*. This raises some complex issues for policy-makers, especially given that what the overseas unilateral divorce now offers is an alternative, secondary system of divorce, and one that operates in tandem with the usual court-based system. It is also potentially far more advantageous to a party to a UK-based marriage who is eligible to use it, and who wants to do so. It is perhaps no great surprise that a number of important and influential organisations since cases like *El Fadl* now publicise the overseas route to divorce as an option for some UK-based spouses who are in UK-based marriages and, indeed, extol its virtues and advantages.

Despite such concerns from the system's critics, it is important to give proper consideration to the judicial principles and other competing discourses that support this route to divorce. First and foremost, the comity point. Mr Justice Hughes put it this way in *El Fadl*:

"I am satisfied that however much a unilateral divorce without notice may offend English sensibilities, comity between nations and belief systems requires at least this much, that one country should accept the conscientiously held but very different standards of another, where they are applied to those who are domiciled in it (p. 190) ..."

English sensibilities are not the full story, though. In the bigger picture, these observations run much deeper, and raise other issues around perceived differences in "standards", to use the judge's word. Closely allied to this is the principle of non-intervention by the State in what some sections of the community (and commentators) regard as predominantly "private" or faith community matters. The argument runs that the apparent incompatibility with the UK's "standards" should not be a sufficient basis for refusing recognition – even in cases where a wife has been completely excluded from the divorce proceedings.

Unlike the UK, however, most other jurisdictions appear to be rather more circumspect about some aspects of "non-intervention" discourse.

Non-Intervention v Equality, Fairness and Public Interest Discourses

The non-intervention argument is a potent one, and particularly so in an era in which the rights of faith communities, and of individuals to practice their faith, quite rightly enjoy protection – and may, indeed, in some respects be reinforced by ECHR art 9. Nevertheless, despite its increasing importance in the UK context, it is a discourse that receives far less deference in the rest of the EU, and most other jurisdictions. This is particularly evident when it has to be balanced against the rights of others who are affected by matters like divorce. For present purposes that means, of course, those of the other spouse, the needs of the children, and the community's. After all, it is the taxpayer and the wider community that funds the State welfare system and, in effect, meets the costs and on-costs of the actions of the divorcing spouse; and mitigates the worst financial effects of this kind of divorce. In Canada, the Supreme Court in *Braker v Marcovitz* (2007) SCC 54 (14 December 2007), albeit with several powerful dissenting judgments, insisted that the important principle of non-intervention in religious groups' affairs was not so important that it prevented the courts stepping in to protect a wife's basic rights. In that case the issue focused on a wife's ability to obtain a divorce under an agreement freely entered into by the husband, and which was needed to enable her to complete the divorce process, be free of him, and remarry. As Mr Justice Abella put it for the majority, "the right to have differences protected does not mean that those differences are always hegemonic", and "not all differences are compatible with Canada's fundamental values". He accepted that determining when the assertion of a right based on difference must yield to a more pressing public interest was a complex task. Nevertheless, it was a "delicate necessity". In the end, he concluded that any harm done to religious freedom by requiring him to pay damages for unilaterally breaching his commitment, was "significantly outweighed by the harm caused by his unilateral decision not to honour it". He did not accept that the court's intervention was an "unwarranted secular trespass into religious fields".

It is fair to say that most European countries have started to be a lot more sensitive to the need to respect freedom of religion, and practices of faith communities' (including divorce practices) than in previous periods of our history. "Freedom of religion", and the right of a person to "manifest his religion or belief, in worship, teaching, practice, and observance" in ECHR art 9 is now a central feature of Convention rights. However, as the Canadian Supreme Court stressed in relation to a comparable

freedom in Canada's Charter of Rights and Freedoms, this is subject to limitations. In Europe, one of those limitations is spelt out in article 9(2), namely those that are "necessary for the protection of the rights and freedoms of others". In the context of unilateral divorce and its impact on UK-based spouses who are being divorced, that means, of course, the rights of such individuals, and others like child dependants and other dependants forming part of the post-divorce reconstituted family. In the European context, and no doubt many other jurisdictions, it is probably fair to say that those jurisdictions strive to ensure that the rights of *both* parties, husband and wife (or partners in a registered civil partnership or equivalent relationship), are properly protected. Procedural rights in the process are no doubt reinforced by ECHR art 6, and the right to a fair trial, but also ECHR Protocol 7, article 5. The latter provides that "spouses are to enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage, and in the event of its dissolution".

However, the UK government has had a long-term reluctance to bringing Protocol 7, art 5 into operation for a number of complex, and not always clear, reasons. The net effect, combined with the deployment of some of the newer forms of comity discourse that we have been seeing from our courts, is that the UK's recognition jurisdiction now seems to be significantly out of step with the rest of Europe. In those jurisdictions "fair trial" and "equality" principles are both seen as important elements in their recognition process; and these, combined with financial considerations, offer divorced spouses and children an altogether different scheme than they can expect in the UK.

Recognition and Financial Provision: The UK Position

Broadly, a court in the UK, when hearing an application for recognition of an overseas divorce, confines itself to determining whether the divorce satisfies the requirements in the overseas jurisdiction for a valid divorce in that country. Even if there may be perceived shortcomings in the process, these are, in general, not a relevant consideration for the court here. Whatever may have been the position in the past under Common Law, which took a much more robust approach to awarding recognition, procedural shortcomings will not in most cases be a sufficient basis for refusing recognition. On the face of it this approach is entirely consistent with what was laid down in 1970 when the core feature of the recognition scheme were set out in the Hague Convention on the Recognition of

Divorces and Legal Separations (1970) (Cm 6248). As a general principle, the aim was to provide for a system of recognition that avoided the necessity for the recognising court to be judgmental about the other jurisdiction's standards or "values".

Critics make the point, though, that this takes a very narrow view of what the Hague Convention was about, and point out that things have moved on since then, not least in terms of developing human rights jurisprudence; the "equality" agenda; and in terms of key ECHR articles like article 6, and the right to a "fair trial". Among other things, matters such as notice and participatory rights have become central to what, by international standards, can reasonably be expected from a divorce process; and particularly one in which child-related aspects of the redistributive function of divorce need to be addressed. Critics also point out that the Hague Convention does, in fact, explicitly signal to courts the importance of both "public policy" – and in appropriate cases this can extend to procedural failings that include the other spouse's exclusion from the proceedings in the other country. What is more, the Family Law Act 1986 (the FLA) Part II, when it implemented Hague Convention requirements, gave the courts explicit powers to address such matters and withhold recognition. Specifically, the FLA s 51(3)(a) provides that the validity of an overseas divorce may be refused if it was obtained "(i) without such steps having been taken for giving notice of the proceedings to a party to the marriage as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or (ii) without a party to the marriage having been given (for any reason for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to those matters, he should reasonably have been given..."

The difficulty, though, lies in the use of the word *may* in "may be refused" which underlines the essentially discretionary nature of the recognition jurisdiction. Clearly, our courts in recent cases have chosen not to use such powers to withhold recognition – and particularly when comity, respect for others' standards, and non-intervention arguments come to the fore. In doing so, they have moved away from earlier approaches that in the past (under the FLA and earlier legislation) *would* almost certainly, and in every case, have led to immediate rejection of recognition applications – either on s 51(3)(a) grounds or on the wider "public policy" grounds catered for in the scheme.

And what of the financial aspects, including public interest concerns about the implications of recognising unilateral divorces where there has been no financial provision made for the divorced spouse and child dependants?

Financial Provision: a "Public Policy" Question?

Whatever the controversies around the procedural and inequality aspects of this area of the recognition system may be, it is in fact the *financial* aspects of recognition system that are, if anything, the cause of much of the concern about the way the recognition regime has been operating.

One aspect of this relates to the structure of the legislation that deals with recognition and financial provision. For *historical reasons*, in the UK the financial aspects of recognition are dealt with in separate legislation. More precisely, if a divorced spouse wishes to apply for financial provision, property adjustment, etc, having been divorced in overseas proceedings or non-court processes, she must make an application under the Matrimonial and Family Proceedings Act 1984, Part III. Unlike most other jurisdictions, where the financial aspects of the overseas divorce are considered holistically, and as part of the merits of the application, a request here for financial provision is dealt with *after* recognition, and under the separate jurisdiction provided by the MFPA. Interestingly, at the "recognition" stage the court is not even required to address financial aspects at all – a curious feature of our system, particularly given that it is usually the cessation of financial support (usually after a period of living apart when provision is being made, as in *El Fadl*) that is the trigger for a UK-based wife's petition for divorce. Furthermore, most family law specialists, being aware of the difficulties associated with the MFPA (and the practical problem of getting orders enforced), will seek to get their client's UK petition under way before the other spouse obtains an overseas divorce.

What is even more surprising, and relevant to public interest and "public policy" aspects, the recognition scheme in the FLA Part II does not appear to permit the court to make recognition conditional on such provision – even when it becomes obvious that this will mean the wife and child dependants will have no choice but to start accessing the State welfare system as her source of support. The introduction of such a requirement, for example where that party to the proceedings is plainly not "self sufficient", would, of course, obviate the necessity for a later application under the MFPA jurisdiction.

Undertakings & "Commitments". In practice, a petitioner for recognition here may well make indicate that he is prepared to make financial provision. Indeed, this was a feature of *K v K*, although it is not clear from the judgment whether, and to what extent, it would have affected the recognition issue if he had *not* made such a commitment. Indeed, having secured recognition petitioners who have declined to give such positive undertakings of the kind made in *K v K* may well go on to defend

MFFA proceedings. The court may also refuse to give leave to a wife to make an application in the MFFA proceedings. Even if leave is granted, it may later be determined in the MFFA proceedings that it is not appropriate for an order to be made (for example where the husband who pronounced the unilateral divorce has married again, and has new commitments: or there is no longer any property, at that stage, which can be the subject of orders).

The reality, unfortunately, is that the MFFA scheme is replete with problems for applicants to overcome: something that is very unfortunate, not just for the wife and child dependants, but for a wider range of stakeholders than just the wife and child dependants who are affected. The root cause of this is, of course, the fact that a key characteristic of the unilateral divorce system is that in the overseas jurisdictions where it is available there is unlikely to be any provision made for the spouse or child dependants once the divorce becomes effective. This is, no doubt, problematic for the wives and dependants in those countries. Here, the worst effects of this are mitigated by a social security, social services, and housing system that may provide residual support in such cases — although, as discussed later, this is by no means a universal safety-net.

Before addressing this, it is proposed to look at some of the characteristics of unilateral divorce in comparison with the court-based system.

Distributive Justice and the Miller “Rationales”

Most parties to a UK-based marriage who want a UK divorce must petition the court, and go through a court-based process in which *both* parties have the opportunity to participate. If they want financial provision, property adjustments, etc, ancillary relief may be sought. At the request of the petitioner, or the respondent (in his or her answer), orders for maintenance pending the outcome of the proceedings, and for financial provision, property adjustments, or pension sharing may be made.¹

Child support following separation is also if the parent with care, non-resident parent, and qualifying child are habitually resident in the UK. These are all characteristics which have been described as the “judge-determined divorce and property settlement”, the fourth model in what Lloyd Cohen in *Marriage: The Long-Term Contract* describes as the fourth “polar legal structure”.²

The model described also recognises the need for a “fair trial” of the issues and a fair redistribution of resources which does justice between the divorcing couple, and factors in the parties’ needs, particularly those generated by the relationship, and the needs of dependent children. It

also addresses the principles and “rationales” for redistributing resources set out in *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618.³ Issues may be raised by both parties, and contested matters can be dealt with by an independent court. Given that in many cases there may be inequalities in terms of access to family resources as between the husband and wife, the UK system, like most modern divorce systems, can address this issue, and do so by the time divorce proceedings are completed. In particular, the process will consider the necessity of redistributing assets, and making provision for income transfers – particularly while dependent children are young.⁴ The system also recognises that there are other stakeholders involved, not least the State welfare system which in the UK provides a secondary level of support at two key stages. First, by providing support during the transition during a post-separation and divorce phase when income replacement may be needed, often in practice for a parent with care and her children. Second, it provides residual support in the aftermath of divorce proceedings, typically after any redistribution of resources has been completed in the ancillary relief stages of divorce. The assumption that underlies such residual support is that parties will have access to at least a proportion of the assets generated during the relationship; and that parents will have re-ordered their affairs in a way that facilitates the upbringing of dependent children. The model assumes that resources will have been transferred between the parties as part of the re-ordering process. Capital and income resources that are available to a party who claims State welfare support (who, more often than not, will be the wife if she is to be the parent with care) will be taken into account in assessing the State’s contribution to supporting the family following separation and divorce. This is evident, for example, in the way that the value of assets like the former matrimonial home and income transfers are dealt with when a parent with care receives benefits like Income Support or tax credits.⁵ The assumption is that redistribution of resources by the parties, either voluntarily or by court order, will obviate the need for parties to seek assistance from the community and the State welfare system.

Support for the Reconstituted, Post-Divorce Family

Looked at this way, the primary source of “welfare” for the reconstituted, post-divorce family must be (as it was always intended to be as the current system evolved) the parties’ own resources available for redistribution on dissolution. The secondary (or residual) source is then the State welfare system. Needless to say, the State welfare system, and those who

pay for it, have a clear interest in seeing that the divorce system *does* function effectively and, if possible, avoids the necessity for divorcing parties to have to resort to it. This is, of course, an enduring theme of successive governments, and has informed key family legislation like the Child Support Act 1991 and, more recently, the Child Maintenance and Payments Act 2008. The point was also made with crystal clarity by Hale LJ in *J v C (Child: Financial Provision)* [1999] 1 FLR 152,⁶ when she said that it is not unreasonable to look to a father who has the resources to support his children, and “thereby relieve the State welfare system of that burden so far as possible”. In that case the party in question had won the National Lottery. Despite this, he was not supporting his former partner and their child, and the Child Support system was plainly not delivering any of the support the mother, as parent with care, needed. She concluded that he *should* be providing support, and this helped to inform the need for an order under the Children Act 1989. She pointed out that there is a point of “public policy” that, where resources allow, the family obligation should be respected in a way that reduces, or even eliminates, the need for support from public funds. In that case the family obligation she referred to was owed by the father in an unmarried relationship but it plainly operates with regard to others, too, including spouses. In both cases it is underpinned by the various statutory duties to “maintain” in legislation like the Social Security Administration Act 1992 and Child Support Act 1991.⁷

More recently, the duty of a former cohabitant to contribute to the costs of the reconstituted family has been restated in Scotland with the enactment of the Family Law (Scotland) Act s 28. This enables a court to require him (or her) to pay the parent with care capital sums or other amounts “in respect of any economic burden of caring”. As recently seen in *CM v STS* [2008] CSOH 125 (Court of Session, Lord Matthews) this is a procedure that involves a transfer of resources between former cohabitants. As well as putting the parent with care in funds, it is a mechanism that reduces or removes the burden to the community and other stakeholders of supporting that parent and child.

Unilateral Overseas Divorce: a Developing Alternative?

An overseas divorce offers an alternative to divorce for a UK-based marriage, and one that can provide the opportunity to side-step the model just described, including the redistributive process and the “family

obligation". This is particularly the case if it is undertaken in a jurisdiction which permits unilateral divorce and expects little or nothing from the divorcing party in terms of financial provision for the other spouse and child dependants. At its core this route simply involves the divorcing party leaving the country, returning to the jurisdiction where he married, and securing a divorce there. Subsequently, he can return to the UK and in a UK court seek "recognition" for the overseas divorce. As a route, it is particularly attractive to parties who maintain their links with the country which offers such a divorce option, and it is facilitated by the UK's generous jurisdictional rules that enable recognition to be obtained by a person who has residence, domicile or nationality in that country (see the next section, *The UK's Jurisdiction*). For a UK-based spouse considering divorce, there is no shortage of advice on this on a number of websites – some of which indicates that the overseas route is both "Islamic as well as legally binding".³

There may be perfectly sound, genuine reasons for taking this option – particularly when the marriage and relationship is over, and the choice of divorce forum is genuinely dictated by the fact that the divorcing party has already left the UK and started a new life in that country: furthermore, the divorcing spouse may well declare himself ready to provide financial support to his family (as in *K v K*). In pursuing a divorce in that jurisdiction he may simply be following the processes laid down by the divorce laws of that country. On the other hand a divorcing party's motives and reasons may not be so clear (or justifiable). Indeed, the attraction for a less scrupulous party is that, depending on the choice of forum, it may dispense with many of the unwelcome features of the court-based UK system including its adversarial nature, and expectations as to spousal and children's support. As discussed later, even if unilateral divorce is a custom and practice recognised and followed within the husband's UK faith community, for example when it is facilitated by his local Sharia council in the UK, the difficulty that a husband faces is that if the divorce is pronounced in the UK it will not prevent his wife declining to participate in that divorce procedure and insisting on initiating a divorce through the ordinary UK courts. In doing so, she will, of course, secure the right to have financial and other matters dealt with by the court. In many instances, the advice she is likely to get from her faith community will be supportive of that approach. She may be counselled to pursue a divorce that utilises the civil courts and her faith community as discussed later in this article, referring to examples from the Dewsbury Sharia Council website (see the section *Divorced Wives and Children: Advice from Faith Communities*). In practice, advice centres operated by faith communities may be keen to ensure as much convergence between

the advice they give and mainstream rights and responsibilities under UK law. This is readily apparent in the discussion in the *Equal Treatment Bench Book – Guidance for the Judiciary* (2004, Judicial Studies Board, at 3-51; updated 2008).

This may still not suit the husband's priorities – for example if his primary objective is to avoid oversight by a court of financial and property aspects of the divorce, or to re-order his financial affairs before divorce proceedings begin. It is in this context that a husband, particularly one who moves freely between the UK and a country that offers the facility of a unilateral divorce, may well prefer to go to that country and, while there, complete the formalities needed for an effective, unilateral divorce.

The requirements for doing so, and which create the necessary conditions for subsequently achieving "recognition", are set out in Part II of the Family Law Act 1986 (the FLA). If they are met, the divorce is as good, for most purposes, as a divorce obtained in the UK. It is that new and developing jurisdiction that is now considered.

The UK Court's Jurisdiction

Availability of this route depends, of course, on jurisdictional requirements being met. In theory, such "forum shopping" is not only discouraged – it might, in appropriate circumstances, enable the UK court to reject a claim for recognition. However, the point is not clear. In practical terms it is very difficult for a court to decline jurisdiction given that a husband can rely on one of three possible ways of establishing his right to apply for recognition, all of which might be readily satisfied by a party to a UK-based marriage minded to take this route.

Specifically, he must show that at the date when the proceedings were commenced he was *habitually resident* in the country in which the divorce, annulment or legal separation was obtained; or, second, that he was *domiciled* in that country; or, third, that he was a *national* of that country. If either party to the marriage satisfies any of these requirements, the court has jurisdiction. So, for example, if the divorcing husband's wife is domiciled in the UK at the time that recognition proceedings are commenced he will also be eligible on *that* basis, as illustrated in *K v K*.

Needless to say, such overseas divorces are controversial. First, as already noted, the fact that some jurisdictions permit divorces to be obtained *unilaterally* is a major concern for some commentators. That is, the fact that an applicant can get his divorce without telling his spouse,

and without giving her the opportunity to participate in the proceedings, flies in the face of core principles that underpin modern divorce (whatever may have been the position in the past, including periods when there was legal support for unilateral divorce in Britain's colonial period).¹⁰ In terms of the UK's modern recognition regime, the "proceedings" can be wide-ranging, and not necessarily judicial in nature, given that the term rolls up judicial proceedings with *other* types of procedures that do not involve any court-based process. Indeed, they may involve minimal State involvement of *any* kind.¹¹ Second, the jurisdiction may require little or no financial provision for the party being divorced, or child dependants.

Accordingly, the procedure may obviate the need for any redistribution of resources, or the kind of support arrangements normally associated with ancillary relief in the course of a UK divorce.

Assuming the UK court recognises that the husband's earlier divorce is "effective", and the UK court *does*, subsequently, grant "recognition", the pre-existing divorce will, in effect, have trumped the wife's UK petition. This relegates any claims the wife and children may have, from that point, to a claim for financial support under Part III of the Matrimonial and Family Proceedings Act 1984 – a route that is far from easy for some applicants; and one that, if unavailable, means the former spouse, children, and other dependants will have no choice but to rely on the State welfare system.

K v K and "Equality" Concerns

K v K provides a valuable case study in how a ~~modern unilateral divorce~~ can be achieved, and how the UK court then approaches such recognition requests. In that case, the court decided the requirements needed for "recognition" had been satisfied after the husband in a UK-based marriage had returned to Pakistan, pronounced a talaq divorce, and then recorded it. The fact that he had not notified his wife beforehand was disregarded. He obtained the declaration sought. This meant that his wife's subsequent attempt to initiate UK divorce proceedings was unsuccessful. The ease with which such a divorce can be obtained, and then recognised, makes this a very attractive alternative to the rather more demanding, court-based system that would normally operate. This is helped by the fact that the procedure in the FLA Part II has a limited focus, and simply examines whether the overseas divorce is "effective" in terms of the overseas jurisdiction's requirements. It is not even concerned with *validity*, an entirely different concept according to the leading case on "mail order" divorces.¹² Furthermore, once that exercise is complete,

the scope for the UK court to withhold recognition, for example on grounds of "public policy", or lack of a "fair trial", now seems to be extremely limited.

"Inequality": ECHR Protocol 7, Art 5

Recognition in such cases is also assisted by the fact that, unlike other European jurisdictions the UK does not yet apply any pervasive "equality" requirements. In France, applications of the kind seen in *K v K* would almost certainly be rejected, either on equality grounds or by invoking the need for "reasons"¹³ – or by deploying the *fraude à la loi* principle. This is where the court concludes, by referencing to the timing of the divorce and other factors, that the husband initiated proceedings for the sole purpose of avoiding the consequences, including financial factors, of French proceedings. Above all, though, wives can and do invoke "inequality" arguments, relying on ECHR Protocol 7, art 5 and "equality" requirements, to secure rejection of such applications.¹⁴ This does not appear to feature in UK family law, primarily because of delays in ratifying Protocol 7 of the ECHR.¹⁵ As significant, however, the UK recognition approach seems to entirely disregard the fact that recognition is being accorded to a process that may have been the antithesis of a "fair trial". In doing so, it side-steps the need for both sides to a contested divorce to have access to adversarial proceedings, and proceedings that satisfy the minimum requirements that would be expected from a system operating within the EU or a European country that subscribes to the ECHR. Indeed, a UK court would almost certainly reject a recognition application in comparable proceedings if it was sought for a divorce obtained within the EU, and coming to it under EC Reg 1347/2000 (on recognition and enforcement of judgments in matrimonial matters or EC Reg 2201/2203: matrimonial matters and parental responsibility).¹⁶

It is not clear, therefore, why a different standard should be applied when recognising divorces after applications have been made in respect of divorces obtained *outside* the EU area. One might have assumed that the need to ensure that "fair trial" and "fairness" requirements would apply equally wherever the divorce takes place, but would certainly be engaged if one of the parties to the marriage, and especially the one that is more vulnerable, is based in the EU and the recognising court is in an EU State (see *Recognition: Divorces in Other EC Member States*).

With these points in mind, closer consideration can be given to the FLA scheme itself.

Recognition and the FLA Part II

The Common Law in earlier times was reluctant to countenance recognition of divorces obtained otherwise than in court proceedings.¹⁷ The current law, which gives effect to the Hague Convention on the Recognition of Divorces and Legal Separations (1970) (Cm 6248), is a *lot* more generous to applicants for recognition. In particular, as discussed later in this article, it permits applications for recognition to be made in respect of divorces gained in a wide range of "proceedings", some of which involve little or no judicial process whatsoever, and minimal State involvement – either before or after the event. The essential requirement is simply that the divorce must be "effective under the law of the country in which it was obtained",¹⁸ as provided by the FLA s 46(1). Assuming the court accepts that the divorce was, indeed, "effective", the only bar to recognition at that point is if the court exercises its discretion to refuse the application. However, the discretion to refuse recognition can only be exercised in very limited circumstances – namely on several limited procedural grounds, or if recognition would be "manifestly contrary to public policy" under s 51(3). Present indications, from the case-law, are that our courts are reluctant to exercise that discretion, except in a very limited range of circumstances. Not only is there no express power in the 1986 legislation that enables the UK court to insist, as a condition of obtaining recognition, on the husband making financial provision for his wife and children (as would be necessary in mainstream divorce proceedings), the court does not have any other powers to regulate other matters that might impact on the divorced wife's or children's "welfare".

Unilateral Divorce: Pronouncements in the UK?

Interestingly, if similar divorce processes are attempted by a husband in the UK (as opposed to completing them in an overseas jurisdiction) they would not satisfy recognition requirements under the FLA. They may be effective from the point of view of the faith community (a consideration that is significant, especially given the support there may be within that community, and in the parties' kinship network for this form of divorce) – but they will not be effective, for the most part, without the parties' agreement. Unilateral divorce using this route is now a possibility in the UK, although it is a softer variant, and one that looks to the parties themselves to sign up to the process, and for consent to be obtained. For example, in the advice and guidance provided by the Muslim Law

(Shariah Council) UK a woman seeking a divorce from her husband is invited, as one option, to contact her husband to "ask for an Islamic Divorce". In what is essentially a *consensual* process either spouse may be invited to agree a divorce, and sign documentation that is witnessed by "two competent Muslim witnesses". Such approaches have, more recently, been reinforced this year by the introduction of newer procedures, including the introduction of Shariah "courts" acting as arbitration tribunals, operating in terms of the Arbitration Act 1996 – and making rulings that can be legally binding. Initiation of the process, however, is still dependent on the parties' agreement; and in this respect there are similarities with other faith communities' approaches to mediation, arbitration, and divorce (Jewish Beth Din courts have been operating in a similar way, and under similar powers, for many years, as they have done in jurisdictions like the USA and Canada). Nevertheless, the development has not been at all well received in some quarters. Dominic Grieve, the Shadow Home Secretary, reportedly said:

"If it is true that these tribunals are passing binding decisions in the areas of family and criminal law, I would like to know which courts are enforcing them because I would consider such action unlawful."

(Abul Taher, "Revealed: UK's First Official Sharia Courts", *The Sunday Times*, 14 September 2008.)

The pronouncement of a unilateral divorce by a husband (in the UK; or wherever he is) may also be effective under the law of the country where the marriage was celebrated, for example if the divorce is then completed by formalities recorded in that overseas jurisdiction. This may, in fact, be all that the party wants if he anticipates a permanent return to that country. But it will not qualify for recognition under the FLA Part II, and be "recognised" here.

This was highlighted, for example, in 2002 in *Sulaiman v Juffali* [2002] 1 FLR 479, a case in which the husband pronounced the talaq in England the day after his wife filed her petition for divorce here; and then recorded it in Saudi Arabia (in an attempt to head off a UK divorce initiated here by the wife). Recognition was refused. The main obstacle was, and remains, the FLA s 44(1).¹⁹ Similarly, in the earlier, pre-FLA House of Lords case in *R v Secretary of State for the Home Department ex parte Fatima (Ghulam)* [1986] AC 527, the husband pronounced a talaq divorce in the UK in respect of his wife who was living in Pakistan. This was then recorded in Pakistan. However, in accordance with the notification requirements, this then necessitated completion of a 90-day period from that point before it became effective. In the meantime he had decided to marry again. He had selected his new bride, and wanted to

bring her into the UK. The divorce was recorded properly, and satisfied Pakistan's laws in every respect. In the ordinary course of events it only needed a 90 days period from that point before it became fully effective. However, the husband failed in his attempt to bring her into the UK as the immigration authorities refused her leave to enter. One of the immigration officer's objections focused on the operation of the talaq divorce, and the time it would take before the marriage to the fiancée became effective. The validity of the divorce itself arose as a collateral issue in the ensuing judicial review proceedings to contest the immigration officer's decision. In the event, the husband's case eventually failed in the Lords, on the ground that the requirements relating to "proceedings" in the legislation required that all the actions required to complete a divorce must undertaken in *one* country, not two.

A similar requirement operates now under the FLA, and this was the reason for an application for recognition failing in *Berkovits v Grinberg* [1995] 2 All ER 681. In that case the writing of the Jewish "get" by the husband had been done in England, but it was then served on the wife in Israel. It was held that the divorce was not effective in the UK, and did not qualify for recognition under the FLA. Although the wording of the scheme was different from that in the 1971 Act, the court held that the law has not changed in this regard.

Divorce, Further Marriage and "Support" Issues

Plainly, a combination of restrictions in the FLA s 44(1) and cases like *Sulaiman v Juffali* are a significant obstacle to divorce and remarriage faced by many UK-based husbands who want the freedom to divorce their spouses in accordance with the customs and practices of their faith community, and in the ways permitted in the jurisdictions with which they may have ongoing, close ties. Typically, this would be places like Pakistan, North Africa and East Africa (Somalia, Eritrea, etc), and some parts of South-East Asia with Muslim communities, such as Malaysia and Indonesia. It is in this context, and for some husbands, that other options become important, including the possibility that he simply marries again. For a UK-based husband, this may well be very attractive. Indeed, it already appears to be a well-established practice, particularly among the older generation of migrants into the UK. According to one researcher, it is "not uncommon practice for an immigrant man to have one wife in Britain, and another in Pakistan".²⁰

The fact that the UK welfare system now assists polygamous unions, and households where there is more than one wife living in the UK

(through benefits like Income Support, Tax Credits, and social housing), is helpful in this regard. It helps to make a UK-based polygamous union financially, and in other ways, a more viable proposition than it would be, in fact, in those countries where such support for divorce is generally not available (and where regulatory mechanisms have, consequently, sought to introduce deterrents to entry into polygamous unions, particularly if the husband is unable to demonstrate that he can support further family members). That said, despite the perceived advantages in the UK, there are a number of difficulties for both the husband and the members of the polygamous union (newer entrants to the union as well as existing members). In particular, there are potential difficulties with the immigration system when a person who is already married seeks to bring a new spouse into the UK (for example as her/his sponsor) given the restrictions on obtaining clearance, leave to enter, leave to remain, or a variation on leave in the Immigration Rules (mainly in Part 8 – Family Members). The precise scope (or rationale) for these restrictions is not always clear. What is clear, though, is entry can be particularly problematic if the authorities are not satisfied that there has been a valid divorce of an existing, UK-based spouse. There are restrictions, too, in the State welfare system. These are less of a problem than they used to be, largely as a result of an increase in the number of entrants to the UK of groups from countries like Somalia where polygamous unions are more common. Nevertheless, there are some restrictions. Most of the remaining restrictions are mainly aimed at inhibiting entry into polygamous unions while a spouse who is already claiming benefits is still resident with another spouse in the UK. The issue has come to the fore on occasions when benefits have been refused to a claimant who has entered into a new marriage while the system is still supporting other wives and family members. Normally, as the guidance to welfare agencies' decision makers confirms, unless a new wife is being married after an effective divorce has been obtained, the expectation is that such marriages *must* have been celebrated abroad, and not in the UK. This is confirmed, albeit not very clearly, by updated Housing Benefit and Council Tax Benefit guidance (Housing Benefit Guidance Manual (DWP, 16 June 2008, para 1.11).

In some cases, there may be doubt about the validity of a polygamous marriage, and therefore the precise status of a new wife in a polygamous household. This may, in turn, be problematic for a claimant seeking polygamy payments as part of benefits like IS, HB and Working Tax Credit, given that those additional payments are dependent on satisfying a marital status requirement as a gateway to a claim – and then maintaining that status subsequently. This is, in fact, increasingly problematic for husbands making claims given the closer regulation of entry into

polygamous unions now starting to take place in many countries; and given the greater scope for treating such marriages as invalid. If a decision-maker is uncertain, for example, whether a partner for whom a claim is being made is, in fact, the claimant's spouse then it may be necessary for the claimant to provide further evidence of her status.²⁰

When a UK-based husband goes abroad and enters into a new marriage, while still married to a wife or wives in the UK, the emotional impact of this may be significant, and the insecurity this can cause, are clear enough (a theme explored in the film *East is East* (1999, directed by Damien O'Donnell, based on the book by Ayub Khan Din). However, it may also have other unwelcome effects, financially and for her take-up of benefits if benefits and tax credits are being claimed from that household. This is something that is not unusual for some UK-based wives during protracted periods of separation from their husbands: In the first place the husband's absence may be for a period that is long enough to amount to a change of circumstances that can have a number of consequences, and possibly require the existing award to end, and a new claim to be made. But at that point there may simply not be enough information for decision-makers to make the right decision. For a wife and children who are already part of a polygamous union, she may already be helped by components like polygamy payments – something that is often invaluable in meeting the extra costs associated with polygamous marriage. However, continuity of payments depends on the husband and other partners continuing to live in the same "household". Furthermore, awards will generally end if the composition of the group changes, which it will when a new spouse joins the polygamous union (in the same way that a divorce, and cessation of "living together" will trigger a change of circumstances and end to an award in most cases). From a decision-maker's point of view this can also in practice be problematic – particularly when they lack accurate and up-to-date information about a household's circumstances. Not all the wives to the polygamous union may be aware of what is happening in terms of changes to the composition of the "household", something that may be difficult if their first language is not English and they are unable to respond effectively to agencies' enquiries, and have limited access to advice. Eligibility criteria may not be satisfied while the parties' marital status remains uncertain, although vulnerable claimants, especially when they have child dependants living with them, are helped by IS "urgent cases" payments and other award mechanisms.²²

In the area of immigration law there may also be difficulties at the marriage-immigration interface given that, as Prakash Shah has pointed out, the immigration authorities are not particularly supportive of "non-

English marital practices" like polygamy. Although that evaluation probably needs revisiting as a result of changing policy and attitudes in the last five years to polygamous unions, and what may at one time have been regarded as "atypical". Nevertheless, the operation of some of the substantive rules that regulate uptake can still impact negatively on claimants in this area of the system; and, as a result, some vulnerable groups can suffer.²³ The welfare system is now a lot more receptive to claimants in polygamous households than it used to be, and it is also more accommodating of polygamous household's needs. Nevertheless, the system does come under strain, and claimants can sometimes experience a lot of difficulty when a husband either divorces one of the wives in the union, or simply introduces another member to that union. In either case it will trigger an immediate, reportable "change of circumstances". This may then prompt a protracted enquiry into issues like status and eligibility. In some cases, as will be considered later, the impact on a former spouse (assuming the divorce is legally effective), or a spouse who has ceased to reside with her husband who is either a UK or EEA national may be severe if she is not a UK or EEA national, and cannot from that point retain a "right to reside" or secure a derived right to reside; or if, having left the household, she is subject to immigration control, and cannot come within one of the exemptions that assist a former wife who has been residing in the UK as her husband's family member or spouse.

Polygamy, Divorce and Related Issues

As the judges in *K v K* and *El Fadl* pointed out, many UK nationals and residents maintain close links with countries like Pakistan, Bangladesh, India and other comparable jurisdictions which permit polygamous marriage, as well as unilateral divorce.²⁴ For that reason, a husband in the UK, whether or not he has UK nationality, domicile, or habitual residence, may already have more than one wife. In some cases he may want to divorce his wife and marry again, possibly within a short period of pronouncing a divorce. Alternatively, he may simply marry again, entering into a polygamous union. This may be done outside the UK, and is perfectly acceptable, and potentially valid if carried out properly and in accordance with the law and custom and practice. However, the marriage's validity may depend on compliance with the laws of the jurisdiction where he marries – and this needs to be considered. For example, in Pakistan the Muslim Family Laws Ordinance of 1961 (the MFLO) has procedures designed to regulate such entry into polygamous marriage;

and there are comparable procedures in other States like Bangladesh. The MFLO, which as Werner Menski explains "caused huge controversies" because of its attempts to curtail the rights of Muslim men to polygamy,²⁵ is still good law and imposes certain minimum procedural requirements. Specifically, it requires those wishing to enter into a polygamous union to submit an application to the local union council, together with a fee, before then requiring the council to adjudicate on the application in discussion with the parties, or representatives of the parties. The application is supposed to indicate whether the applicant has obtained the consent of an existing wife.

However, even if it does not do so, the chairman of the council, and the arbitration council, can still consider the matter, and determine if it would be appropriate for the marriage to proceed. If consent is not obtained, there are financial implications – notably the husband is supposed to pay dower to the existing wife or wives (and he is also subject to penalties if the council decides to pursue this). A key point is that a failure to comply with the procedures laid down, or to obtain prior consent, does not necessarily invalidate the husband's subsequent marriage to his new wife. In this regard the legal position is similar to the position after non-registration of a talaq divorce (as discussed later). The procedures in the MFLO would appear to be, for the most part, merely directory, not mandatory.²⁶ In practice, the fact that the existing wife is resident abroad, and out of contact with the husband and council, are potential reasons for the council to disregard the need for compliance. Accordingly, what was intended as a measure to regulate unrestricted entry to remarriage after a talaq divorce, or a further marriage, does not in practice appear to do so.

The wider welfare points referred to are revisited later. Before then, consideration is given to the requirements of the FLA on "recognition".

The FLA and "Recognition": Key Requirements

The lead provision in the FLA Part II is s 45(1). This provides that subject to s 46(2) and ss 51, 52, the validity of a divorce, annulment or legal separation obtained in a country outside the British Isles shall be recognised in the United Kingdom if, and only if, it is entitled to recognition by virtue of ss 46–49. Essentially, when it enacted Part II Parliament set out to provide a scheme to facilitate recognition of overseas divorce, but which also tried to bring some minimum procedural requirements into the process – particularly for parties, mostly wives and their children. It has been argued that the scheme also displaced earlier principles devel-

oped by the case-law under the preceding 1971 legislation, and thereby effectively limited the scope for invoking "public policy" grounds in order to refuse an application - but this is by no means clear.

The scheme differentiates between two types of process. First, where the overseas divorce was obtained in "proceedings", which as already noted include "judicial or other proceedings" (s 54). Second, it caters for divorces obtained *otherwise than by means of proceedings*.

The essential pre-conditions to a divorce obtained in "proceedings" are in s 46(1), and in this case the gateway, as noted already, is that the divorce is "effective under the law of the country in which it was obtained"; *and at the relevant date* (i.e. the date when the proceedings were commenced) either party to the marriage -

- (i) was habitually resident in the country in which the divorce, annulment or legal separation was obtained; *or*
- (ii) was domiciled in that country; *or*
- (iii) was a national of that country.

It will be clear from this that there will be many would-be applicants for divorce using the *K v K* route who could readily satisfy at least one of the above three criteria. Indeed, it is not unusual for a person to maintain alternate "residence" between the UK and a country like Pakistan, Bangladesh, or India, or, indeed, any of the North African States or other countries where unilateral divorce is available. Indeed, many UK residents routinely move between the UK and a country like Pakistan, and it may not be clear at any given time which country he is "habitually resident".

Mr Justice Hughes made the important point in *K v K* that "there are a great many people living in the UK from Pakistan and many move freely between both countries".

For a divorce obtained *otherwise than by means of proceedings* the requirements are rather more demanding. Specifically, the divorce will be recognised if:

- (a) it is "effective under the law of the country in which it was obtained";
- (b) at the relevant date (i.e. the date on which it was obtained)
 - (i) *each party* to the marriage was domiciled in that country; *or*
 - (ii) either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce is recognised as valid; and
- (c) neither party to the marriage was habitually resident in the United

Kingdom throughout the period of one year immediately preceding that date.

The Discretion to Refuse: Public Policy

Assuming s 46 is satisfied, there are still several grounds for refusal in s 51 – but these are discretionary. Recognition *may* be refused if the divorce was granted or obtained at a time when it was irreconcilable with a decision determining the subsistence or validity of the marriage. Further, it *may* be refused if the divorce was granted or obtained at a time when there was no subsisting marriage between the parties. In the case of a divorce gained in proceedings recognition *may* be refused under s 51(3)(a) if it was obtained:

- (i) without such steps having been taken for giving notice of the proceedings to a party to the marriage as, having regard to the nature of the proceedings and all the circumstances, “should reasonably have been taken”; or
- (ii) without a party to the marriage having been given (for any reason other than lack of notice) “such opportunity to take part in the proceedings as, having regard to those matters, he should reasonably have been given”.

In this regard, it is clear that in cases decided before *K v K*, either under the scheme that the FLA replaced or, indeed, after 1986, the likely consequence of a breach of paras (i) or (ii) above was that the divorce would not be recognised. Recognition was refused, for example, in *D v D (Recognition of Foreign Divorce)* [1994] 1 FLR 38 when a UK-based wife was not told of divorce proceedings in Ghana. Her UK petition for divorce was therefore able to go ahead (similarly in *Durhur-Johnson v Durhur-Johnson* [2005] 2 FLR 1042, discussed in the section *Earlier Case-Law: Inconsistencies?*, below).

One of the difficulties that UK courts experience is with the quality of the evidence that applicants adduce in support of recognition; and it is not unusual for a wife in recognition proceedings to allege that documents are not genuine or have been fraudulently obtained. In this case the court may properly direct that the case be dealt with in the courts of the jurisdiction in question, particularly if it is better placed to deal with allegations of forgery. This was the course of action taken in *Abbassi v Abbassi* [2006] 2 FLR 414, and approved by the Court of Appeal. In that case the wife had petitioned for divorce in the UK. At that point the husband contended that he had divorced her several years previously, but

had not told her – and had nevertheless continued to cohabit with her. The seriousness of this, given that it meant (if correct) she had been cohabiting with someone to whom she was not married, merited careful consideration rather than the court simply rubber-stamping the overseas divorce.

Divorce Otherwise than by "Proceedings". In this case, recognition may be refused under s 51(3)(b) if:

- (i) there is no official document certifying that the divorce is effective under the law of the country in which it was obtained; or
- (ii) where either party was domiciled in another country at the relevant date, there is no official document certifying that the divorce is recognised as valid under the law of that other country.

Public Policy "Refusals"

Parliament in 1986 went further and, in accordance with the Hague Convention, maintained the public policy basis for refusal in s 51(3). This provides that the court may refuse recognition where recognition "would be manifestly contrary to public policy". This extends to both divorce processes. Since the enactment of the FLA, and its predecessor, the Recognition of Divorces and Legal Separations Act 1971, the general view that appears to have been taken by the courts is that if a divorce is effective then the ground available in s 51 to refuse recognition on public policy grounds should only be used "sparingly".²⁷

The precise scope for invoking public policy objections in proceedings for recognition is unclear, but it almost certainly extends to concerns about incompatibility with the right by one of the parties to a "fair trial".

This is evident from the parallel recognition jurisdiction that operates for divorces obtained in proceedings in another EU country – a point revisited later in this article (see *Recognition: Divorces in Other EC Member States*, below). The problem is, however, that the issue has not been considered in cases under the FLA Part II.

Declarations of Validity

A declaration is the remedy that will be the end result in most successful recognition proceedings. In this respect, the s 55 jurisdiction extends to declarations in a variety of contexts. When the UK makes a declaratory decree in accordance with the FLA Part III it is a potent remedy, as intended by Parliament when the scheme was enacted, and in accordance

with principles set out by the Law Commission in its report *Declarations in Family Matters*.²⁸ In some cases the jurisdiction is aimed at establishing whether a marriage subsisted where, perhaps, there may be doubt. In others it focuses on the efficacy of a *divorce*. Specifically, the process enables applicants to establish whether a marriage was effective at its inception, or was subsisting at a specified date.²⁹ It also enables an applicant to establish, at least in the UK, that a marriage did *not* subsist at a particular time.³⁰ In other cases, though, the focus is simply on establishing the validity of a divorce, at least in the UK. In this case an applicant can seek a declaration that the validity of a divorce, annulment or legal separation obtained outside England and Wales is entitled to recognition, or that it is *not*.³¹ Needless to say, the stakes can, in some proceedings, be high with the result impacting on matters such as inheritance, and the validity of subsequent marriages if, perhaps, a divorcing husband has entered a new marital union before the previous one was dissolved.

K v K

Facts and Issues

The case was started when Mr Imdad K sought a declaration that a talaq divorce granted to him in Pakistan in March 1987 (and effective in Pakistan from April 1988) was a valid divorce, and entitled to recognition in the UK. The application was contested by Mrs Rukhsana K who lived in Ilford, Essex in what had been the former matrimonial home. The parties were married in April 1966 in Pakistan where Mr K was living at the time of his application. Following the marriage, they began to live in the UK in 1966, and had four children, all of whom were over 18 years of age by the time of the application. In October 1986 the husband returned to Pakistan; whether he returned to the UK after that is in dispute. He claimed that in March 1987 he obtained a divorce by talaq in the chambers of an attorney in Faisalabad. This, he said, became effective 90 days after it was received by the chairman of the union council (the official required to record the husband's action in accordance with the MFLO). That was in December 1987. Mr K then said that he had returned to the UK and visited the wife in March 1998; and gave her a copy of the divorce. None of this was accepted by the wife.

In January 2004 the wife petitioned for divorce in the Ilford County Court on the grounds of five years' separation; and two months later

gave notice of her intention to proceed with an application for ancillary relief.

In August 2004 the husband filed an affidavit with the court saying that he had divorced his wife in Pakistan in March 1987, and delivered the divorce personally to her when he came to England in 1987. She denied this. A decree nisi was then granted in Ilford in October 2004. The husband appeared at a hearing in December 2004, and in March 2005 issued his petition asking for recognition. It was served on the Attorney General who, having filed an Answer, decided to take no further part in the proceedings.

FLA: Applying the Requirements

In the course of his judgment, Mr Justice Sumner reiterated the requirements of the FLA s 55 (as discussed earlier in this article) enabling a person to apply for a declaration, pointing out that the validity of a divorce obtained overseas was entitled to recognition. The court had jurisdiction, he noted, if one of the parties was domiciled in England and Wales on the date of the application. In this case there had been no dispute that the wife was domiciled in the UK.

He added that under s 46 the validity of an overseas divorce should be recognised if it is effective under the law of the country in which it was obtained: but at the relevant date either party to the marriage had to be habitually resident or domiciled in the country in which the divorce was obtained. It was accepted that the husband was ordinarily resident in Pakistan at the relevant time. By s 51(3) the validity of an overseas divorce may be refused if the divorce was obtained "without such steps having been taken for giving notice of the proceedings to a party to the marriage as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken".

It could be refused, he noted, if the divorce was obtained "without a party to the marriage having been given (for any reason other than lack of notice) such opportunity to take part in proceedings as, having regard to those matters, he should reasonably have been given".

The Evidence

The court considered the evidence. It had not been possible to produce any copy of the notice of the talaq which it had been said was sent to the union chairman, which was a mandatory procedural requirement. However, the "next best evidence" was a Certificate of Validity of Divorce which was available. On that basis the judge could conclude that

notice had been given to the union chairman for the purposes of registration and in compliance with the law in Pakistan. It had also been recorded that an iddat period of 90 days from 31 December 1987 to 31 March 1988 (another post-pronouncement requirement) had been completed. This was important as a talaq divorce is not effective until 90 days after the notice has actually been received by the chairman. The necessity of informing the wife of the talaq divorce before it became effective, following a judgment of the Pakistan High Court, was pointed out.

However, the court was shown other evidence supporting the validity of the divorce, including a deed of divorce presented in evidence. Despite changes made by the Muslim Family Law Ordinance (MFLO) 1961³³ that required a husband to send notice of the talaq to his wife (also pointed out by the expert witness), and apparently this had not happened, "on balance" Mr Justice Sumner considered that the talaq pronounced by K, coupled with evidence of a valid notice to the chairman, was "effective".

He concluded that the talaq pronounced in this case would have been recognised by a Pakistani court. In doing so he was supported by the expert witness's conclusions, and his impressions of the husband's evidence. His conclusions were assisted by the consideration that the husband would have tried to secure a divorce before remarrying. He observed: "I think it is unlikely that he would have entered a second marriage without divorcing his first wife. This is so in particular when he was going to continue living in the community where he was known. I do not consider that he would have run the risk associated with such a course." However, he was in greater difficulty in deciding when the wife became aware of the divorce. On balance, he also concluded that: "the husband did tell the wife of the divorce before his remarriage in 1992. It may have been in 1987."

The Earlier Case of El Fadl

Mr Justice Sumner noted that in *El Fadl v El Fadl* [2000] 1 FLR 175, a case that involved the validity of a talaq pronounced in Lebanon (and in which, again, the wife had not been given notice, and had not participated), the court had held that consent or objection of the wife to the divorce was irrelevant. Nor had it been necessary for her to have notice of the pronouncement in order to give effect to the talaq. In terms of compliance with the procedures applicable in Lebanon, the talaq divorce had been recorded in the Sharia court in accordance with Lebanese law. That registration was sufficient for the talaq properly to come within the

definition of "proceedings", and therefore for the process to be regulated by s 46. Furthermore, it had been said by the judge in that case that it would not have been a proper exercise of discretion to refuse a divorce which was valid by the personal law of both parties at the relevant time, and which had been known to them for many years.

Wider Considerations: Comity and Free Movement

In the course of his judgment, Mr Justice Sumner made some further important observations.

First, he concluded that the case was regulated by the requirements of s 46(1) of the FLA on the basis that there was involvement in the divorce process by Pakistan's union council system, and regulatory laws. In *Chaudhary v Chaudhary* [1985] Fam 19 it had been held that the mere pronouncement of divorce before witnesses was insufficient to amount to "proceedings". Proceedings required:

"some form of State machinery to be involved in the divorce process: not necessarily machinery established by the state, since existing religious machinery recognised by the state is sufficient ... The act or acts of one or both of the parties to the marriage, without more, cannot amount to proceedings; there must be the intervention of some other body, a person with a specific function to fulfil such as the Union Council in the case of the talaq considered in."

In *Quazi v Quazi* [1984] AC 744 (and in particular Lord Scarman at p. 824) it had been established that the following were capable of qualifying as proceedings:

"... any act or acts, officially recognised as leading to divorce in the country where the divorce was obtained, and which itself is recognised by the law of the country as an effective divorce."

Second, he was clear that he should exercise his discretion in favour of granting the application. Although the decision of Mr Justice Hughes in *El Fadl* was not binding it was of persuasive authority. However, he decided to accept the analysis of the court in that case, and follow it. Having regard to the fact that the wife had not been given notice of the divorce, nor any "opportunity to take part", he adopted the following key passage from the judgment:

"I am satisfied that however much a unilateral divorce without notice may offend English sensibilities, comity between nations and belief systems requires at least this much, that one country should accept the conscientiously held but very different standards of another, where they are applied to those

who are domiciled in it (p. 190) ... I am satisfied that where, as here, the talaq is the prevailing form of divorce in the country of both parties, where it had been validly executed there, so that the marriage is at the end in the country, where it was contracted, and to which both parties belonged and where there is no evidence of forum shopping, not only does public policy not call for non-recognition, in the end it summonses recognition."

In *K v K* the judge pointed out that the wife had been away from Pakistan for 25 years when the divorce took place. She was likely to be domiciled in the UK. "However she was born, brought up, and married in Pakistan to someone of the same background. They both have family there. The husband returned when their marriage came to an end. It is not an uncommon situation." He went on to say, in an important passage in the judgment that:

"There are a great many people living in the UK from Pakistan and many move freely between both countries. Where there are as here close links to each country, it is important that marriages and divorces recognised by the country where they take place should be recognised in the other country unless there are good reasons for not doing so.

I see no good reasons here. That the wife has been away from Pakistan for a long period and is no longer domiciled there are factors. Also she was not given notice of the divorce nor the opportunity to participate. That is a feature of a talaq divorce. But neither party wishes the marriage to continue.

The husband has expressly accepted that the wife has a valid financial claim under Part III of the Matrimonial and Family Proceedings Act 1984."

Accordingly, Mr Justice Sumner accepted the husband's case, and pronounced the declaration sought.

Earlier Case-Law: Inconsistencies?

The successful outcomes for the applicant husbands in *El Fadi v El Fadi* and *K v K* undoubtedly marks a major shift when compared with earlier cases where recognition has been refused when spouses have not been informed of proceedings – and have been excluded from participation in the divorce process. They contrast with earlier cases such as *Zaal v Zaal* [1983] FLR 284 – a case in which a husband had left his wife in the UK, and then divorced her by talaq divorce in a brief ceremony in front of two witnesses in Dubai. This was effective under Dubai law. However, it became clear that the wife had only learned about the divorce after the event, by which time it was irrevocable, and she could do nothing about

it. The absence of formal notice had also deprived the wife of an opportunity for reconciliation, and meant that she could not make contact with, and gain support from, her husband's family. Such "secrecy" was against public policy, held the court, and recognition by the UK court was refused. The wife's UK petition for divorce was thereupon accepted, and a decree nisi pronounced. As considered when looking at the discretion to refuse recognition, under the FLA 1986 s 53(1) there was a similar outcome for the applicant in *Durbur-Johnson v Durbur-Johnson* [2005] 2 FLR 1042. In that case the husband and wife had married in Nigeria in 1998 and had then settled in London in 1999. In 2004 the wife petitioned for divorce in London. Before a decree nisi could be pronounced, the husband, who by then was living in Nigeria, said that he had already been divorced in Nigeria. It was clear from the evidence that there had, indeed, been Nigerian proceedings, and a divorce had been granted: and this had happened after the wife had failed to answer the divorce petition. He asked for the proceedings in London to be stayed, and asked the court to recognise the overseas divorce under s 46(1). It was pointed out in the proceedings that the wife had never been informed of the Nigerian proceedings, and had therefore not been given an opportunity to participate in them. The Attorney-General took part in the proceedings, and contended that the court should refuse to recognise the decree using its powers under s 51(3). The court agreed. There was no evidence that the divorce in Nigeria was legally effective, but even if it was, and it could be assumed that the requirements of s 46(1) had been met, the court was not satisfied that it was appropriate to recognise the divorce given the husband's failure to give notice of the Nigerian proceedings to his wife. The husband had failed to inform his lawyers that his wife might be in London (rather than at an address in Nigeria). Similarly, recognition was refused in *D v D (Recognition of Foreign Divorce)* [1994] 1 FLR 38 when a UK-based wife was not told of divorce proceedings.

Recognition was also refused in *Joyce v Joyce and O'Hare* [1979] Fam 93; [1979] 2 All ER 156 on the basis that no reasonable opportunity to "take part" in overseas proceedings had been given to the wife who had been divorced. The case was decided on the Recognition of Divorces and Legal Separations Act 1971, the legislation that the FLA Part II replaced.

In that case the wife had obtained a magistrates' order for custody of the children and maintenance on the grounds of the husband's adultery and desertion. In the event, he paid nothing before leaving the UK for Canada where he filed a divorce petition. The petition was served on his wife, and it made clear that she only had 60 days to which to file an appearance. The wife, however, had difficulties in getting over to

Canada, and in getting legal aid in England and in Canada to contest the husband's action. Before an appearance was entered, the wife was sent the court's decree nisi. Thereupon the wife filed a divorce petition in England, and at the same time asked for financial relief. By this stage, however, the court in Canada had awarded a divorce, and the decree nisi was made absolute. This enabled the husband to ask the UK court for a declaration that the Canadian decree had already dissolved the marriage.

It considered s 8(2), which read:

"Subject to sub-s (1) of this section, recognition by virtue of this Act or of any rule preserved by s 6 thereof of the validity of a divorce or legal separation obtained outside the British Isles may be refused if, and only if – (a) it was obtained by one spouse – (i) without such steps having been taken for giving notice of the proceedings to the other spouse as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken ..."

The wife had not tried to rely on this as she had been given proper notice of the proceedings. However, s 8(2) went on to state:

"... or (ii) without the other spouse having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to the matters aforesaid, he should reasonably have been given ..."

On the facts it had been clear that the wife had been unable to attend the proceedings, and had therefore been denied the opportunity to take part.

For these purposes, "opportunity" to take part meant both an adequate opportunity to be heard by the court. This had not happened, and the court refused to recognise the Canadian divorce. The equivalent provision in the FLA s 51(3) is in the same terms, and cases like *D v D* and *Durbin-Johnson* show how the courts have been ready to reject applications if wives have been excluded from the divorce process. Yet in *K v K* the court declined to exercise its discretion – despite the fact that the wife had received neither notice nor the opportunity to "participate".

In conclusion, cases like *K v K* and *El Fadl v El Fadl* represent a clear move in favour of putting considerations like "comity" ahead of concerns about process and fairness – and in circumstances that, until recently, would have provided ample grounds for rejecting a recognition petition. This begs the question, of course, how ratification of Protocol 7, article 5 by the UK (expected next year) will affect the position. Will it require our courts to be more circumspect in similar cases in the future?

Recognition: Divorces in Other EC Member States

The recognition provisions in the FLA Part II do not apply to cases involving divorces in other EC Member States – specifically those cases where recognition is dealt with by a different scheme, namely in EC Reg 1347/2000 (on recognition and enforcement of judgments in matrimonial matters or EC Reg 2201/2003: matrimonial matters and parental responsibility).³³

Broadly, this requires that a judgment in a Member State is to be recognised in other Member States without any particular special procedure being required. In general, the grounds on which recognition may be refused are extremely limited. They include, for example, situations in which recognition would be manifestly contrary to the public policy of the Member State in which recognition is sought. However, what is interesting for present purposes is such case-law as there has been on this makes it clear that one of the grounds where this is possible includes cases where a party to the proceedings has not had a fair trial for the purposes of ECHR art 6 – a point illustrated by *Maronier v Larmer* [2003] 3 All ER 848; [2003] QB 620, CA.³⁴

Arguably, if public policy is available as a ground for refusing recognition in cases operating between EC Member States then, by extension, it ought to be available to enable a UK court to decline recognition where it is clear that one party to the proceedings has been excluded from participation. This, it is suggested, would also be consistent with pre-K v K cases like *Joyce* and *Durhur-Johnson*.

The Route to Recognition: Potential Difficulties

On the face of it, unilateral divorce offers a straightforward and easy option for a party to a UK-based marriage to exit that marriage. This may be so where unilateral divorce, for example utilising a talaq divorce, is readily available and the procedural requirements governing its use in the particular jurisdiction are clear and readily satisfied. This also supposes that the talaq, wherever it is pronounced, offers a straightforward, effective means of ending the marriage bond. That is by no means always the case, however. Custom and practice may vary greatly – and there may be difficult issues of timing, for example determining at what point, precisely, a triple talaq or “staged” talaq is completed, and post-pronouncement formalities, reconciliation, etc, are completed.³⁵ This may require a painstaking exercise on the part of the UK court that is being asked to recognise the divorce, with hearings requiring the input of

specialists to assist the court. Furthermore, there may be a legislative overlay that imposes mandatory requirements before the process is completed, and in some jurisdictions court oversight may be required. What may look like essentially *administrative* requirements, such as recording and publication, may in fact require a greater degree of State involvement, aspects of which *can* present barriers to recognition if they are not carefully complied with – as seen, for example, with fulfilment of Japan's *kyogi rikon* – illustrated by the leading case of *H v H (The Queen's Proctor Intervening)* (Validity of Japanese Divorce) [2006] EWHC 2989 (Fam).

One of the main difficulties associated with recognition hearings, and illustrated by the *K v K* case and *El Fadl v El Fadl*, is that it may often be unclear whether a failure to comply with post-pronouncement registration requirements will affect the validity of the divorce. The problem is more than just academic, especially if the failure then impacts on other aspects of the process that prompt the court to question the overall fairness of the divorce – aspects such as the requirement in the FLA for parties to a divorce to have been given notice of the proceedings. Furthermore, if in the jurisdiction in question it is clear that mandatory requirements have *not* been complied with, this may impact on the validity of the divorce, the validity of the husband's remarriage (if he remarries), and, of course, the divorced wife's ability to remarry. It may also have implications for the divorced wife in the UK, for example in informing welfare agencies of her marital status. In Pakistan, for example, a marriage is supposed to be registered in accordance with requirements laid down by the MFLO. This is helpful in a number of ways, for example where, following a *talaq* divorce, the husband has then remarried. The fact of registration may be relevant in resolving uncertainties that divorced spouses and their advisers may have about the parties' marital status in the aftermath of a *talaq* divorce, and would ordinarily help to resolve doubts about the legal effectiveness of a divorce in a particular case. The problem, however, is that despite the sanctions imposed for non-registration, a marriage is not necessarily invalid if it has *not* been registered. The position is similar to that relating to requirements on the entry into polygamous marriage, already discussed. It would appear that, until the 1970s, a failure to register invalidated the divorce. After that, and following the enactment of Pakistan's Zina Ordinance (which provided for severe punishment for repudiated wives who, thinking they were divorced, but were not, could be accused of a range of charges and, not least, *zina*, i.e. extra-marital sex and adultery) the requirements were relaxed at the behest of the courts. The position since then has improved to the extent that the position of divorced wives

in Pakistan is less precarious (and dangerous), helped by the courts' approach to the subject, regarding non-registration as no longer fatal to the divorce.³⁶ The position for women who may want to contest the validity of the divorce, for example in UK recognition proceedings, assisted by non-registration, is *not* helped by this development, of course. The regulation of divorce law in Pakistan, including the position since the Zina Ordinance, and more generally the way that the Quran and Sunna, as the foundations of the Sharia, have shaped modern divorce law (including its more "contested" aspects) is discussed by Jayaid Rehman in his intriguing and insightful commentary on the subject.³⁷

Variations on Unilateral Divorce and the Talaq

In respect of the variant of the talaq that enables a wife to divorce her husband, i.e. the khul (or khoola or khula), it is widely assumed that the process requires court proceedings, and judicial oversight, before it can be effective. Indeed, at the time the FLA was debated and passed, it was assumed that this was what the khul entails. It led the Opposition spokesperson to say:

"The principal objection to a talaq is that it discriminates against women because the procedure is available only to men. If a Moslem woman wants a divorce she must initiate judicial proceedings ..."³⁸

This is not necessarily the case, however, at least in *all* cases, as our legislators seemed to believe in 1986. Indeed, there are a variety of contexts in which a court may treat the wife's divorce as effective without the necessity of court proceedings, and without the husband's consent, as is assumed. In some jurisdictions this is possible as a matter of custom and practice, and, like the talaq, practice can vary greatly. In other countries, the khula is extensively catered for *and* regulated by civil law. For example, in Pakistan, the availability of the khula is recognised in legislation, including the Dissolution of Muslim Marriages Act 1939 – and is regulated to the extent that if it is undertaken without the husband's consent then it *may* be subjected to a greater degree of judicial oversight if it is to be effective. This depends, however, on the grounds on which the divorce is sought. Exceptionally a wife may divorce her husband without consent (albeit in some instances subject to a financial settlement, or forfeiture of financial rights accruing during the marriage). A court-based divorce route is available if certain grounds can be shown, including failure to maintain for a two year period or more; cruelty; unequal treatment within a polygamous union; desertion for a four year

period or more; or entry by the husband into a polygamous union in breach of procedural requirements. In Morocco, the position since reforms introduced by the Mudawwana laws (from 3 February 2004) is that court-based divorce is available to both parties, but divorce is also now subject to a much more comprehensive statutory regime superimposed on existing custom and practice. Before recognition requirements in the UK are satisfied, the court would inevitably be faced with a number of significant issues – and would need to be satisfied on a number of procedural points.

Suffice to say that the picture in relation to unilateral divorce is a very varied one. Family law, in a lot of countries where the talaq is practised and sanctioned, is coming increasingly under pressure to reform – not least because of the pressures of globalisation, and the pressure from women and other stakeholders in the divorce process looking for greater “equality” and processes that respect gender equality. The pressure for change, unsurprisingly, may well focus on the manner and form in which unilateral divorce is effected.

In some jurisdictions this has led to a ~~lot of controversies~~, with vociferous calls for reform being met by equally determined opposition.

Divorce by Text Message?

The issues around this mode of using this system of divorce came to a head in the Malaysian family law system in 2003 when a Syariah judge in Selangor State pronounced that a husband's divorce of his wife had been properly initiated by text message (SMS, or ~~short message service~~) – this being seen as the cyberspace equivalent of serving divorce papers.

Initially, the case was not particularly contentious as unilateral divorces undertaken this way had come before the Syariah courts in Selangor many times. They had also been an increasingly common feature of family law proceedings in other Syariah courts in Malaysia's thirteen States and three federal territories. Not all of the Selangor divorces were upheld, however. The Syariah Chief Justice and other justices had rejected some of them, for example in the absence of clear proof of the husband's identity, or amidst doubts about the husbands' intent and “sincerity” in sending their message.³⁹

The use of the mobile phone to unilaterally divorce a wife might, in principle, raise serious doubts about its efficacy as a way of bring a relationship, albeit one founded on “contract” or a “bond” to an end. It may also be seen by some critics as taking the whole system of unilateral divorce to a new “low”. But is such a variant on the talaq *lawful*? Plainly,

in some jurisdictions the manner in which the talaq is pronounced is regulated by civil law; and in jurisdictions where the manner and form of pronouncement is regulated by mandatory procedures the divorce would undoubtedly be ineffective.⁴⁰ But how have other jurisdictions that permit unilateral divorce treated such developments as telephone and text message divorce? It has caused significant problems in countries like Malaysia and Singapore. Given the close links between Malaysia and the UK, and the number of Malaysians working and residing in the UK, given that the courts have pronounced that divorce by text message is a valid and effective divorce, the issue is more than just academic – and it is quite likely that such a case would come to a UK for “recognition”.

Would such a divorce be capable of recognition here? If *K v K* was rightly decided, then the answer would seem to be “yes”.

The point can be explored, first, by considering the *Latif* case.

Text Messaging the Talaq: the Latif Case

Assisted by the excellent and detailed account provided by Eric Taylor,⁴¹ the problems associated with pronouncing the talaq by text message, and concerns about the procedural propriety of such methods, can be seen by considering the *Latif* case, decided in favour of the divorcing husband in Selangor, Malaysia. The case precipitated a crisis about the use of the talaq when effected in this way in a modern, forward-thinking country like Malaysia. In the era of rapid news, and dissemination of news reports, the case inevitably gained a world-wide audience, and very quickly. The repercussions were felt in other countries in the region, and then much further afield.

The facts were that Shamsuddin Latif had an ongoing dispute with his wife, Azida Fazlina Abdul Latif. They had only been married for eighteen months. She left the matrimonial residence to go and live with her mother. Her husband thereupon sent her a text-message requiring her to return to their home, and, if she did not do so, divorcing her. She did not do so, and he regarded her from that point as “divorced”. On 24 July 2003 the Selangor Syariah Court upheld the divorce, treating this as sufficient to bring the marriage to an end. There the matter would have rested, except that in the same week a government minister pointed out that whilst such divorces may be acceptable under Islamic Law, and Malaysia wanted to respect this, in some circumstances (including those presented by this case) she pointed out that they could be contrary to the country’s Islamic Family Law Act⁴² – indeed a husband who purported to carry out a divorce in such a inconsiderate way could be fined or even

imprisoned. Reports of the case in the media started to trouble Islamic traditionalists as well as legal academics, primarily because such a unilateral divorce, carried out in that way, cut out the role of the kadi (an Islamic lawyer or official). This was the main objection, although some of these commentators did also concede that the manner and form of the divorce, when carried out this way, showed disrespect to the wife, and did not meet the expectations of Syariah law. After the country's Women's and Family Development Minister, Shahrizat Abdul Jalil,⁴³ described the use of SMS messaging as "dishonourable", women's groups in Malaysia took up the issue. The Prime Minister, Mahathir Mohamad, then described the divorce as "contrary to Malay culture and against the spirit of Syariah Law", and the Malaysian Cabinet announced plans to review the divorce laws, and divorce by this method. All of Malaysia's State governments supported this initiative, and also announced that in other cases like this in the future they would look to the courts to impose mandatory jail sentences on such husbands.

In the event, public interest in the issue subsided, the government decided to put the reform process on hold while keeping the issue under review, and legislation did not follow. Most family law jurists in Malaysia consider that divorce by talaq is still available in Malaysia, unquestionably. Furthermore, and in the absence of clear and authoritative court rulings to the contrary, divorce can still be undertaken by SMS message. However, it will generally be necessary for the husband to attend court to "verify" his actions.

The author of this article was lecturing in Malaysia that summer, as in previous years, and, after being told of the case by friends at the University of Malaya, followed these developments in the media. Taylor's account is a very full one, although it might, perhaps, be added that the reason why the government did not introduce new regulatory legislation was almost certainly down to the sizeable backlash by traditionalists against the government's plans for reform.⁴⁴ Nevertheless, as in other centres of the Muslim faith, the talaq as a form of unilateral divorce (despite continuing to be widely used) became a significant talking point, and has undoubtedly started to come under much closer governmental scrutiny. Among other things, the expectation is that husbands should be making greater use of mediation as a prelude to initiating their divorce, as well as in the phase after the initial pronouncement.⁴⁵

Divorce by SMS in Other Countries?

It is interesting that similar concerns about unilateral divorce by text

message have been expressed in other large jurisdictions where there are big Muslim populations, such as India.⁴⁶ A recent BBC report concerned a women's campaign in India in response to cases where Muslim men have reportedly divorced their wives "in minutes", using mobile phone text messages, and, as in Malaysia, have had those divorces upheld. The report highlights differences between practice between India, Pakistan, Bangladesh, Indonesia, and Malaysia. It also provides an informative case study about the experience of a woman, Rehana, with four children who had been thrown out the house by her husband Akram after a 20-year marriage, who then took a new wife. She was not sure if she had been divorced following her forcible removal, but was careful not to answer the phone whenever it rang – particular if she could see that the call was coming from his phone. The report indicates that a majority of the clergy in India (the ulema) appear to support the continuation of the practice, and believe that it is legal and binding when carried out properly in line with the Sharia code as it is observed in India.

It would appear from the BBC's coverage that a majority of the All India Muslim Personal Law Board now thinks that the practice is a "sin": but it would only try to "discourage it", as it did not have the power to impose a ban.

In the rest of this article it is proposed to focus attention on the financial and "welfare" aspects of unilateral divorce. Specifically, consideration is given to Part III of the Matrimonial and Family Proceedings Act 1984 (the "MFPA") and then, briefly, the position in relation to State benefits.

Financial Provision and MFPA 1984

As already noted in the preceding discussion, the issue of overseas divorce and recognition in the UK often runs hand-in-hand with financial support. In many cases, in the process of obtaining the overseas divorce the spouse obtaining it will not have made (indeed will not have been expected to make) financial provision for his wife and dependants. Furthermore, the UK court, when dealing with recognition, will also not have dealt with the matter. It might have been expected that the court, at that stage, would look to the applicant for recognition to have made such provision by the time a petition for recognition is received – or, failing that, to have made recognition *conditional* on such support. Unfortunately, though, this is not the case. The FLA Part II contains no explicit provisions authorising or *requiring* the court to do this, even if in

practice advisers may offer to make provision (as seen in cases like *K v K*; and *Abbassi*).

In the *Abbassi* case, discussed previously, counsel for the applicant for recognition accepted that if the application for recognition failed he would concede liability to make financial provision under the Matrimonial Causes Act 1973. In the alternative, it was accepted that he had financial responsibility under the MFPA Part III if it succeeded. Assisted by those concessions, the court made an order requiring the husband to comply with earlier directions in the ancillary relief proceedings. He was also required to file and serve all the documentation required by his Form E; and file and serve answers to the outstanding questionnaire. This was all required within a tight timetable to which a penal notice was appended. This was, of course, an unusual case. What was not so unusual, however, was that the husband's announcement that he was already divorced came just in time to block the wife's attempt to secure a decree absolute (having already obtained a decree nisi). As Thorpe LJ pointed out in the Court of Appeal, the fact that if the husband was correct it would mean that the wife had been cohabiting in a non-marital relationship made the case particularly problematic. All the allegations about impropriety in that case, and the allegedly bogus, false, and improperly procured evidence, and the concerns about procedural irregularities and non-compliance with procedures in the other jurisdiction, did not prevent the experts concluding that the divorce would have been accepted as valid. As he put it:

"In very broad summary, the experts all noted irregularity and inconsistency in the documentation but were generally of the view that the asserted talak divorce would be recognised as valid in Pakistan."

Perhaps not surprisingly in the circumstances, the husband's counsel accepted the court's order to transfer the case for determination to the other jurisdiction's courts enthusiastically (the trial judge described it as "adventitious"); and the wife's advisers opposed the transfer. For the purposes of financial provision, however, the arrangements were clearly acceptable – and removed much of the usual uncertainty that pervades recognition proceedings. The question, however, is whether the courts are able to withhold recognition if such concessions are not made as a matter of course. It would appear that, under the scheme as it currently stands, this is not something that is a *requirement*.

Public Policy & Financial Provision. As the courts do not, as a matter of course, use their powers to withhold recognition on "public policy" grounds in order to ensure that financial provision is made in every case, the spouse who has been divorced in an overseas divorce may need to go on to utilise the procedures in further proceedings, following recognition,

using the MFPA 1984, Part III. The 1984 Act was introduced to meet a need for such provision, as the Law Commission report *Financial Relief after Foreign Divorce* (1982, Law Com 117) explained. The key recommendation was that English courts should be given power to entertain applications for financial provision and property adjustment orders notwithstanding the existence of the prior foreign divorce, and one that has been recognised by our courts (para 22).

What follows is a discussion of the key requirements involved.

Applications: "Leave" and Interim Maintenance

MFPA applications are by no means easy, or trouble-free. An applicant has it all to do, and applications can fail on a number of counts. Even if the court has jurisdiction (which it may not), and even after leave has been granted, there are a number of potential grounds on which an application can still fail.

The lead provision is s 12. This provides that where a marriage has been dissolved or annulled, or the parties have been legally separated, by means of "judicial or other proceedings" in an overseas country, and the divorce, annulment or legal separation is entitled to be recognised as valid in England and Wales, either party to the marriage may apply to the court for an order for financial relief. This requires the court's leave, however, and this may not be granted unless the court "considers that there is substantial ground for the making of an application for such an order". Leave may be granted subject to such conditions.

In general terms it has been said that an application is a "two-stage process", with a threshold test, namely "whether in all the circumstances of the case it would be appropriate for an order to be made at all"; and then satisfying particular matters calling for specific consideration (discussed below: The s 16 Hurdles). The purpose of this is to "block unmeritorious applications under the Act and avoid abuse of its underlying purpose".⁴⁰ The purpose of the Act is limited, namely to "remit hardships which have been experienced in the past in the presence of failure in a foreign jurisdiction to afford appropriate relief".⁴¹

An important feature of the scheme is that leave can be given even though an order for maintenance payments or property transfer has been made by a court in another country. The significance of this, of course, is that an existing provision, perhaps when made at the time of the divorce, is inadequate. Another important factor is that the party needing the financial support may have difficulties enforcing her rights. It is one thing to get a maintenance order, but an entirely different thing getting it paid.

In *Lamagni v Lamagni* [1995] 2 FLR 452 an applicant's husband had obtained a divorce in Belgium. The wife later petitioned for divorce in the UK, and was successful. However, the Belgian divorce and arrangements took precedence and this prevented her obtaining ancillary relief here.

Initially, her application for relief under the MFPA failed, particularly as a result of the delays there had been, delays caused in part by the difficulties the applicant had experienced in trying to get enforcement. However, her appeal was successful. The reasons for the delays, said the court, should be considered when the application was considered – but they should not have caused the grant of leave to be refused.

Interim Maintenance

If it appears to the court that the applicant or any child of the family is in "immediate need of financial assistance", the court can make an interim order for maintenance. This is an order requiring the other party to the marriage to make periodical payments to the applicant or child at any time after the grant of leave up to the date of determination of the application, as the court thinks reasonable.

The MFPA and Jurisdiction

Jurisdictional requirements are not particularly onerous for applicants. Specifically, the court has jurisdiction to entertain an application if any of the following jurisdictional requirements are satisfied: (a) *either of the parties to the marriage was domiciled in England and Wales on the date of the application for leave, or was so domiciled on the date on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; or (b) either of the parties to the marriage was habitually resident in England and Wales throughout the period of one year ending with the date of the application for leave, or was so resident throughout the period of one year ending with the date on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; or (c) either or both of the parties to the marriage had at the date of the application for leave a beneficial interest in possession in a dwelling-house in England or Wales which was at some time during the marriage a matrimonial home of the parties to the marriage.*

What are more demanding, however, are the hurdles in s 16 that must be satisfied by applicants. Some of these can, in practice, prove to be much more problematic.

The s 16 Hurdles

Before it can make an order for financial relief the court is obliged to consider whether in all the circumstances of the case it is "appropriate" for such an order to be made by a court. If the court is *not* satisfied about this it must dismiss the application.

The court must, in particular, have regard to:

- (a) the connection which the parties to the marriage have with England and Wales;
- (b) the connection which those parties have with the country in which the marriage was dissolved;
- (c) the connection which those parties have with any *other* country outside England and Wales;
- (d) any financial benefit which the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, by virtue of any agreement or the operation of the law of a country outside England and Wales;
- (e) in a case where an order has been made by a court in another country that requires the other party to the marriage to make any payment or transfer any property for the benefit of the applicant or a child of the family, the financial relief given by the order "and the extent to which the order has been complied with or is likely to be complied with";
- (f) any right which the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of another country and if the applicant has omitted to exercise that right the reason for that omission;
- (g) the availability in England and Wales of any property in respect of which an order in favour of the applicant could be made;
- (h) the extent to which any order is likely to be enforceable;
- (i) the length of time that has elapsed since the date of the divorce, etc.

Overseas Provision and Orders

In general, the courts regard the scope of the scheme as quite narrow, as shown by cases where applications have been rejected when provision has already been made by an overseas court – and particularly where this has been done as part of a comprehensive settlement negotiated by the parties' lawyers and generally complied with by the parties. The fact that the parties' circumstances have subsequently changed, for example after

a resumption of cohabitation, but without further arrangements being agreed, or made by the courts, is not something that the courts can deal with under the MFPA scheme.⁴⁹

On the other hand, if arrangements made by the foreign court do not amount to a "clean break", and the provision made is not sufficient and does not reflect the contribution a party has made, for example in bringing up children, even after a relatively short marriage, then an application can be entertained under the scheme. In *M v L (Financial Relief After Overseas Divorce)* [2003] 2 FLR 425; [2003] Fam Law 563 the parties had married in England, and lived throughout the marriage in England between 1966 and 1970, but were divorced in South Africa after a four-year marriage. The South African court had made provision, including maintenance payments and rent-free provision of the husband's flat (facilitated by a lease that lasted until the younger of the two children was aged 22). Assistance for the children continued until after they reached 18, but the former wife felt that it was appropriate to seek further support, particularly as she approached retirement, and having undertaken much of the childcare since the divorce, and had not exploited her earning capacity to the extent she could have done. In these circumstances, and especially as the financial support in South Africa was not a "clean break", the court accepted that an application under the MFPA was appropriate. The Matrimonial Causes Act 1973 s 25, and principles, applied, despite a short marriage and the length of time since the divorce. Taking into account the work done in bringing up the children, and the requirements of fairness, it was right to order the sale of the flat, with payment of a lump sum for repairs and modernisation, and to require payment of a pension of £1,000 per month (with a further capitalisation on "Duxbury" lines to produce a lump sum of £150,000 making up for a shortfall in her old age pension as a result of her employment).

Financial Provision and Property Adjustment

On an application, the court has a wide range of powers. Broadly, these equate to the orders that can be made under the Matrimonial Causes Act 1973, Part II when a divorce, decree of nullity, or judicial separation is granted, including:

- financial provision orders;
- property adjustment orders;
- pension sharing orders.

If the court makes a secured periodical payments order, an order for the payment of a lump sum, or a property adjustment order then it can also make orders for the sale of property under Part II of the 1973 Act. In exercising its powers the court must have regard to "all the circumstances of the case": but first consideration must be given to the welfare of any child of the family under the age of 18, and the other considerations in s 18.

Avoidance of Transactions to Defeat Applications

As might be expected, the scheme gives the court considerable powers for dealing with transactions intended to defeat applications for financial relief. Indeed, the powers are available from the point that leave is granted, and are directed at anything preventing financial relief from being granted or reducing the amount of relief which might be granted (or frustrating or impeding enforcement of orders). If it is satisfied that the other party to the marriage is "about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property" with the intention of defeating the claim for financial relief the court can "make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim" (s 23).

Applications may also be made by a party to a marriage to prevent transactions intended to defeat *prospective* applications (s 24)

The Grant of Leave in Recognition Proceedings

The UK court, when it grants recognition, can if it wishes expedite an application under the MPPA by granting leave in the recognition proceedings. This occurred, for example, in *Eroglu v Eroglu* [1994] 2 FCR 525 when Thorpe J granted leave at the end of his judgment upholding the parties' divorce, obtained in Turkey. In that case a UK-based wife of a Turkish citizen, whom she had married in Turkey, had been divorced in Turkey. The divorce was valid in Turkey. However, when she later petitioned for divorce in the UK, she contended that the divorce in Turkey had been a sham, and had been obtained by fraud after the parties had colluded in gaining it (to help the husband regain privileges which he had lost as a result of the marriage). The husband asked the court to dismiss the petition, relying on the fact that the divorce was effective in Turkey. The wife urged that the Turkish decree should be refused recognition, and also sought financial relief. In the event, the

court (Thorpe J) rejected the wife's arguments, and confirmed the validity of the Turkish divorce.

However, at the same time as granting recognition the court granted the wife leave to apply for financial provision under the MFPA.

The MFPA: Conclusions

The MFPA is, without doubt, potentially problematic for the system's users and advisers – and not just because of the s 16 “hurdles”. The scheme is highly discretion-laden, and even if an applicant satisfies eligibility and jurisdictional criteria, the court can take into account a wide range of factors in order to refuse an application – not least, of course, being the husband's resources and *changed domestic arrangements since* the time of the divorce (including matters of which the applicant may have had little knowledge, possibly over a lengthy period since the divorce became effective). Even if an applicant obtains an order (typically requiring a former husband to make *periodical payments*) it is by no means clear that such payments will be paid, or paid regularly – especially from a former spouse who has left the UK, and has few remaining links with this country. In this respect, the system is not unlike the problems associated with payments of Child Support by non-resident parents. Indeed, some practitioners regard the MFPA scheme, at least in some areas of its operation, as an even worse performer than the Child Support system. Furthermore, once a former spouse has gained recognition in earlier proceedings (which is primarily all he is interested in, particularly if he wants to marry again) it will not be long before he starts to have concerns about being able to meet newer responsibilities, including duties towards his later spouse and child dependants. In this respect the issues are very similar indeed to those around child maintenance.

There are useful anti-avoidance provisions, notably in ss 23 and 24 as discussed. However, the reality is that in many cases a husband who has gone abroad, gained a unilateral divorce without informing his wife using a system that does not require such notice (or, if it does, will disregard such failures), will have rearranged his property and finances long before recognition proceedings begin. For a former spouse who maintains his (or her) connections with the UK, and has assets in the form of property, bank accounts, etc here, the position is more favourable, of course. If not, though, the position of the UK-based former spouse – in most cases a wife – the position is a lot more precarious. Inevitably, as for those who are unable to be assisted by the MFPA, that means support

will come, primarily, either from intra-family sources or from the State welfare system, or both.

Divorced Wives and Children

Advice from Faith Communities

Needless to say, unilateral divorce systems, especially when undertaken without the knowledge and participation of both spouses, and when appropriate welfare arrangements are not in place to assist the wives and child dependants affected, can generate some significant advice needs.

Many people in this situation will turn to their spiritual leaders, and faith communities. In the UK, Islamic centres provide a lot of advice and support through their networks, and counselling on a wide range of aspects. They deliver practical support as well as spiritual advice. Organisations like the East London Mosque and Muslim Centre and its imams provide a sizeable section of the Muslim community in London with advice on a wide range of matters, including matrimonial problems,⁵⁰ and take-up of employment.⁵¹ Other centres also provide information on the web and through web-based advice for enquirers with concerns: for example when their husbands have divorced them, and they face uncertainty about their status and rights to the support they should expect. In some cases this will take the form of case studies⁵² provided for readers. In one case, publicised on the website of the Dewsbury Sharia Council to enable others to understand the issues in question (with the parties anonymised, of course), an enquirer had asked for her divorce case to be dealt with by the Sharia Council in Dewsbury and had been informed that she had received her divorce through the court.

Specifically, she had received a "talaq-e-baain". However, she was not clear what that actually meant – or whether she would get any financial help, during her period of iddat (separation following the pronouncement) from her husband. She pointed out that she and her husband had been living separately before that (for over two years) due to the problems they were having. It had seemed at the end that a divorce was the best solution for their relationship, as communication and contact had broken down. She asked for advice, including advice on the financial point, as her Sharia Council had not dealt with this. Helpfully, the response was that talaq bain meant that she was divorced – and that as the period following the pronouncement had expired as well the marital

relationship was completely ended.⁵² Financial help from the husband from that point would not be due.

In another informative case study, on the same site, a wife sought advice having experienced a range of problems, including infidelity on the part of the husband, regular physical violence, and financial problems linked to the husband's sale of their home (on which she had been paying the mortgage, but had refused to continue to do, and would just pay a share). The advice sought included a query as to whether she would lose her dowry (which in any case he had still not paid) if she initiated the divorce. The advice confirmed that she would, indeed, lose the right to her dower if she initiated the divorce (and would have had to repay it if it had been paid). The advice she received was that she should initiate a civil divorce along with an Islamic divorce in order to achieve a clean separation.⁵³

The Developing Role of Sharia Law in the UK

Interestingly, the Archbishop of Canterbury, Dr Rowan Williams, in his speech "Civil and Religious Law in England: a Religious Perspective" on 7 February 2008 referred to the work done by such Sharia councils. He made the important point that such bodies now play an important role in helping people order and re-order their lives. It was in this context that he made his remarks about the scope for recognising "supplementary jurisdictions" in some areas, especially family law. However, he also appeared to offer a warning, as well, about the potential effect of reinforcing in minority communities "retrograde elements" and "particularly serious consequences for the role and liberties of women". In a key passage he speculated about the possibilities, in the future, for "plural jurisdictions", and the conditions under which they might be permitted. He also said that:

"If any kind of plural jurisdiction is recognised, it would presumably have to be under the rubric that no 'supplementary' jurisdiction could have the power to deny access to the rights granted to other citizens or to punish its members for claiming those rights. This is in effect to mirror what a minority might themselves be requesting – that the situation should not arise where membership of one group restricted the freedom to live also as a member of an overlapping group, that (in this case) citizenship in a secular society should not necessitate the abandoning of religious discipline, any more than religious discipline should deprive one of access to liberties secured by the law of the land, to the common benefits of secular citizenship – or, better, to recognise

that citizenship itself is a complex phenomenon not bound up with any one level of communal belonging but involving them all."

Supportive observations about the Archbishop's views have been provided by some sections of the media, and by some law academics. For example it has been pointed out that the supplementary jurisdiction offered by Sharia courts can be helpful to women who are in "limping marriages" after their husband has moved on to another woman whom he wants to be his wife, but refuses either to acknowledge or divorce his wife: such courts are "often the only answer for such women".⁵⁴

The Value (and Limits) of Sharia Law in the UK

Following the media frenzy over the Archbishop's comments, the Lord Chief Justice, Lord Phillips, joined the debate in a lecture he gave at the East London Mosque. As well providing the Archbishop with some support, he provided some necessary clarification about the scope (and limits) of divorce when it is effected through faith communities' systems ("Sharia Law Could Have UK Role, Says Lord Chief Justice" in *The Guardian*, 4 July 2008).

Among other things, he made it clear that it is "possible for individuals voluntarily to conduct their lives in accordance with Sharia principles without this being in conflict with the rights guaranteed by our law", and that:

"It is possible in this country for those who are entering into a contractual agreement to agree that the agreement shall be governed by a law other than English law. Those who, in this country, are in dispute as to their respective rights are free to subject that dispute to the mediation of a chosen person, or to agree that the dispute shall be resolved by a chosen arbitrator or arbitrators. There is no reason why principles of Sharia Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution."

The full text of his lecture is accessible on the website of the East London Mosque (via www.eastlondonmosque.org.uk/?page=home).

Those remarks have, without doubt, added to the impetus behind moves to revisit the basic elements of the Islamic marriage contract; and develop new initiatives such as Sharia tribunals.

Marriage and Divorce: Expectations and Risk

Marriages fail in every faith community. With marital breakdown come further risks. In the case of unilateral divorce, the risk is perhaps heightened by the divorce process being firmly within the control of one side to the marriage bargain. Similarly, control over the timing of withdrawal of support for the family is also in most cases in the divorcing spouse's control. In most cases the duty to maintain continues while the marriage continues – and until the divorce is completed. Until that happens, the expectation is that a husband should continue to support his wife and children during the period of *iddat*, and pending the stage at which the divorce is complete and is irrevocable.⁵⁵ Interestingly, there are some sources that argue that the duty to maintain may, in some circumstances, continue *after* that.⁵⁶

There are, of course, variations on the divorce scenario. For example, rather than divorcing his spouse (thereby bringing his obligations to support to an end at that point) a husband may elect to just *separate* while, perhaps, maintaining financial provision. This was the position in *El Fadl v El Fadl* [2000] 1 FLR 175 where the focus was on unilateral divorce law and practice in Lebanon. In that case the husband maintained financial support following separation. For most husbands in this scenario doing this will accord with the expectations of his family, kinship circle, and faith community. In *El Fadl*, however, financial support was eventually withdrawn. Once the wife stopped receiving financial support she decided to initiate a UK petition for divorce – only to find that she had already been divorced 16 years later. However, the fact that she had continued to receive some financial support after the divorce did not prevent that divorce being effective in Lebanon; nor did it prevent it being recognised by our courts.

The precise status and scope of the “duty to maintain” in Shariah law and practices is unclear as is readily apparent in recognition cases despite important sources on the matter. This is, to some extent, analogous to the problems associated with the Common Law duty to maintain.⁵⁷ It is far from clear where that duty begins or when it ends, or what, exactly, the parties’ rights may be in terms of taking steps to secure such a fundamental right in domestic partnership law. Indeed, it was a pervasive, but (eventually) unresolved issue in the *Kehoe* case, and one which remained unclear by the time it reached the European Court of Human Rights (see *R (Kehoe) v Secretary of State for Welfare and Pensions* [2005] UKHL 48; [2008] 2 FLR 1014). In the process, the litigation not only highlighted the imprecise nature of the duty to maintain (and, reciprocally, the right to be maintained) at Common Law and even after the legisla-

tive overlay on the Common Law, it still managed to be inconclusive on key matters such as whether our legal system recognises a child's right to be maintained – quite apart from any post-separation and post-divorce rights that a spouse may acquire. Nevertheless, the litigation, like some of the recognition cases being considered, certainly highlights the potential areas which “public policy” has scope for encompassing. Arguably, as with the *Kehoe* litigation, “public policy” ought to be as much about children's right to be maintained as it is about the divorced wife's – a major consideration in addressing issues around the recognition of unilateral divorce without property or financial settlement.

This undoubtedly poses a challenge, as well, for modern Islamic family law, and for the imams and their spiritual advisers who provide day-to-day advice on such matters.

Changes and Reform: The Islamic Marriage Contract

There are discernible trends in the way some jurisdictions are approaching the matter of marriage and divorce. In countries where unilateral divorce is still available, including North Africa, the Middle East, and Pakistan, India, and South-East Asia, there is evidence of closer regulation of unilateral divorce, not least by expecting the divorcing party to attempt reconciliation as a prelude to divorce. There are a number of factors and catalysts involved, and not just what may be a growing secularisation of divorce in some countries (although it is unclear to what extent this is evident in the countries concerned). As traditional systems of intra-family and kinship support break down, however, it is clear that one consequence is that some States and communities simply cannot meet the welfare needs of divorced spouses and families in the post-divorce phase.⁵⁹

Within the Muslim community in the UK, a number of changes have been initiated in 2008, directed in part at reducing some of the undoubted risks and uncertainties associated with some aspects of the Islamic marriage bond, and divorce. This may be seen, for example, in the new *Islamic Marriage Contract*, developed by the Muslim Institute. As one commentator writing in *The Guardian* (8 August 2008) argues, this “sets aside cultural practices” and is starting to give women “the right they are due under Sharia law”. Among other things, the new model, she says, deals with eventualities if “things go awry and the couple divorce, the woman – and it is almost always the woman – experiences great difficulty securing the financial rights guaranteed to her under sharia law”. The terms and conditions of this new contract, signed

at the nikkah stage of marriage, "clarify both husband and wife's rights and obligations in all eventualities".

The risk of a failed marriage is no doubt just one of the worries for brides-to-be, and family members involved in pre-marriage arrangements. As one leading commentator has said, "arranging a marriage is understood to be a risky process, with the dangers that potential spouses' flaws may be concealed, proposals may be rejected, or daughters mistreated". As she says, there is a dilemma in that whilst transnational marriage serves to introduce risks for British brides they are still seen as a way of *avoiding* perceived dangers – for example those that result from "selecting a spouse raised in the West". Her informants suggested that "British-born" spouses may be more likely to "neglect religious knowledge or practices, indulge in 'immoral' activities, or to exhibit a lack of commitment to marriage and the family – in contrast to the more traditional, religious, hardworking or family-oriented spouse they hoped might be obtained in Pakistan". Elsewhere, the same commentator has suggested that the popularity of marriage between trusted close relatives is at least in part a reaction to the various risks involved in selecting suitable spouses, as well as helping to strengthen connections between kin divided by migration (most notably in a paper for the British Sociological Association Conference, "Risk, Trust, Gender and Transnational Cousin Marriage Among British Pakistanis" (York: 22 March 2005). Her research has, among other things, looked at the way marriage arrangements and rituals have been adapted in ways that introduce greater protection for the parties."

Like other jurisdictions, the UK is wrestling with the need to give faith communities as much leeway as possible, and to try to meet the needs and wishes of minorities in the area of marriage and divorce. At the same time, though, it is trying to ensure that parties' basic rights in the divorce process are protected. This is highlighting some of the tensions between a secular, civil divorce system and divorce according to the customs and practices of religious minorities.

In the remaining part of this article, consideration is given to financial aspects of "welfare" in the post-divorce phase.

State Welfare: Facilitating Unilateral Divorce Without Provision?

The difficulties that divorced wives and family dependants face in securing financial provision, a problem aggravated by the disjunction of

the recognition and post-recognition processes and difficulties in securing provision from MFPA proceedings, means that in practice they will have no option but to seek support from other sources, including family members if any are ready and willing to assist. Otherwise, the State welfare system provides the fallback.

In providing support, the welfare system is, of course, actually helping the unilateral divorce system to work. Indeed, it might be argued that without the State welfare system the unilateral divorce system simply would not function, and it would not be long before the legislature would be obliged to review the way the system works; and it would almost certainly have to introduce changes to the FLA system that would have the effect of stopping courts recognising overseas divorces where adequate financial provision has not been made. It would also need to legislate to ensure that the financial aspect of post-divorce support is dealt with at the same time as the merits of recognition are being dealt with – as in other jurisdictions. It would almost certainly be necessary, too, to require courts to start addressing a wider range of “public policy” requirements before making recognition declarations.

It is in this context, and in relation to post-divorce support, that the door opens to discourses on a much wider raft of “welfare” issues around unilateral divorce, bringing in complex matters at the interface of family, welfare, and migration policy – primarily because of the highly restrictive status barriers that the immigration system has constructed, and which have a significant capacity for impacting severely on some very vulnerable claimants. The reality that policy-makers need to start addressing is that some parties can and do suffer extreme hardship, and a range of welfare crises, including financial insecurity, lack of housing, and other needs, after a divorce. The catalyst for this, invariably, is that the main breadwinner, and spouse initiating the unilateral divorce, has failed to make adequate provision for supporting his family members. This is hardship which, in practice, the welfare system then has to relieve, particularly in those cases where other family members are not on hand to offer support; or themselves lack the ability to provide that support. This can be traced back in many cases to the lack of formal requirements in many jurisdictions to cater for such support. There may be good reasons why this is so, and why those systems have evolved the way they have done. Typically, most of them may well look to other institutions to provide the necessary post-divorce support – the family, remarriage, and inter-family support networks rather than the State.

Recognition in France; Equality and Public Policy

Unlike the UK, similar factors to those that have informed changes our welfare system have, in fact, elicited very different policy responses in other countries like France. Increased applications from husbands seeking "recognition" for their unilateral divorces was one of the factors that prompted the French courts, and in particular the Cour de Cassation from 2004 onwards, to stop readily recognising unilateral divorces obtained in jurisdictions like Algeria: a jurisdiction where, until recently, a wife could expect no financial support whatsoever – leaving a wife who remained resident in France to look to the French welfare system for support. Not surprisingly, perhaps, France's courts started to draw the line, and treat this as one of the "inequality" factors that ought to be brought within the public policy grounds for refusing recognition. However, it was not the only consideration that prompted French courts to reconsider the recognition process, as discussed by Gilles Cuniberti.⁶⁹

Unfortunately, the problem whereby the jurisdiction where the unilateral divorce takes place has failed to require a divorcing party to make provision is then compounded in the UK at a *secondary* level when the recognition system is engaged. Specifically, this does not provide a "long stop" by preventing the divorced wife's and children's potential destitution after a divorce (at least in those cases where the divorcing party has the resources that could reasonably be expected to be redistributed to avoid this). As referred to earlier, this problem is made worse by the court's apparent inability (or reluctance) to invoke expectations of a "fair trial" as a pre-requisite to recognition in the way the jurisdiction in relation to intra-EU divorces may be required to respect such requirements. Until ECHR Protocol 7, art 5 is up and running in the UK, and deployed in this jurisdiction to address such "inequality" issues, the courts lack the ability to utilise that as a basis for refusing recognition.

Accessing State Benefits

As in many cases financial support for divorced spouses will end when they are divorced (if not before that, and when the relationship has broken down), those spouses will, inevitably, have to look to the State welfare system for support. In some cases, for example where the husband elects to marry a new partner to form a polygamous union, the expectation is that he will continue to support his other wife (or wives). In other cases, though, he may not – something that is generally not consistent with Sharia law, or the expectations that his faith community

will have of him. This is also reflected in the regulatory requirements in the legislation of countries where unilateral divorce is available. In Pakistan, for example, the Muslim Family Law Ordinance Order provisions are aimed at vetting the feasibility of entering into a further marriage, particularly if the husband cannot support his existing family. The requirement that an existing wife be told of the proposal was aimed at providing her with the opportunity of making representations on the subject when the local union council adjudicates on the proposal. Although, in practice, the MFLO may not provide an effective deterrent to remarriage when a new marriage may not be viable, it nevertheless signals the State's interest in the process, and expectations.

When a husband in a UK-based marriage leaves his spouse and children, he may simply take the view that he is no longer obliged to support her (and them). A husband contemplating leaving his family, or withdrawing support from them, is no doubt going to be less concerned, and less likely to hesitate perhaps, if he knows the State welfare system is going to "provide". In the UK, the system, if it chooses to pursue a husband who has transferred responsibilities to support to the community, has the power to seek reimbursement for the costs that the community incurs when this happens. The fact that the husband may not feel obliged to provide support is not, in law, a defence in such recoupment proceedings.

This was the position, for example, in *Dim v National Assistance Board* [1967] 1 All ER 750. In that case the husband, who was already married, married again and brought his wife and children to the UK. He then left her and their four children. She was then obliged to claim benefits. When the welfare agency sought to recover some of the costs involved he refused to pay, arguing that the word "wife" could not apply to a wife in a polygamous union. His counsel argued that such marriages were not recognised in the UK on the grounds of "public policy".

The issue in the court focused on the provision in the National Assistance Act 1948 s 43 (now in the Social Security Administration Act 1992 ss 106 and 107) which states that:

"Where assistance is given or applied for by reference to the requirements of any person (in this section referred to as a person assisted), the board or the local authority concerned may make complaint to the court against any other person who for the purposes of this Act is liable to maintain the person assisted."

The provision read: "For the purposes of this Act - (a) a man shall be liable to maintain his wife and his children..."

It was argued that the word "wife" could not apply to a *polygamously*

married wife. Similarly, in respect of his alleged failure to support his four children, if there was no valid marriage then the children of that union were not *legitimate* children. Accordingly they could not be "children" within the meaning of the Act; and the father should not, therefore, have to reimburse the agency. The Court of Appeal rejected this, and upheld the agency's claim. Lord Justice Salmon observed that the marriage was, indeed, polygamous in the eyes of UK law as the appellant had another wife who was still alive. Having brought one of those wives and four children to the UK, he "abandoned" them, and for two years they had to be supported by the benefits system. The question was whether the system could look to him for reimbursement? The court held unanimously that it could, his lordship commenting that:

"It would perhaps be as remarkable as it would be unfortunate if a man coming from a country where he is lawfully married to a woman and is lawfully the father of her children may bring them here and leave them destitute with impunity, so that when the National Assistance Board is obliged to come to their assistance, he can avoid all responsibility and thereby throw the whole burden of maintaining his wife and children upon the public. When a question arises of recognising a foreign marriage or of construing the word 'wife' in a statute, everything depends upon the purpose for which the marriage is to be recognised and upon the objects of the statute. I ask myself first of all: is there any good reason why the appellant's wife and children should not be recognised as his wife and children for the purpose of the National Assistance Act, 1948? I can find no such reason, and every reason in common sense and justice why they should be so recognised."

New Challenges for the Welfare System

The *Din* case was important for a number of reasons, and not just in that it reinforced the UK's "duty to maintain", reminding individuals of their responsibilities to their families and to the community. It was also a significant landmark for an altogether different reason. Namely, that the State welfare system had started, by the late 1960s, to adapt to a wider range of responsibilities, including responsibilities to provide a safety-net for needy groups of the kind that featured in the case.

The system was entering a new phase, in the face of major changes and changing demographics, and migration into the UK of a wider range of ethnic groups where polygamy is more prevalent. This meant it had to deal with increasing numbers of needy spouses and families, including

spouses who were parties to a polygamous union rather than the conventional monogamous model characterised by the majority of UK households. More recently, important developments have included the wider availability of support for polygamous unions, and also specifically targeted support to help in "crisis" situations, including cases in which there has been withdrawal of inter-familial support, and "urgent cases", following a unilateral divorce that, as in *Din*, leaves the divorced spouse and family dependants "destitute". There is also recognition that the system needs to adapt in relation to key areas like support for mortgage and other housing costs. A good example of this can be seen in the use of "capital disregards" to facilitate take-up in situations of overcrowded accommodation. For example, the courts now recognise that a husband with a lot of family members and children should be permitted to have at least two houses, at least in circumstances where it is appropriate to treat them as a single dwelling. By doing this he is permitted a capital disregard of the value of both houses that will then enable him to claim benefits like Income Support, Housing Benefit, and Jobseeker's Allowance as in *Secretary of State for Work and Pensions v Miah* [2003] 4 All ER 702. The significance of this, and the judicial policy that informs such decisions, is that the welfare system is extending support to such needy claimants, and incurring a cost to the system. As the current reforms get under way, it is significant that as the system starts to progressively remove support from groups like lone parent Income Support claimants (most recently under restrictions on those whose youngest child reaches twelve, as considered in this issue), fears grow for the vulnerability of ethnic minority lone parent households who may not be well equipped for the labour market and who, in practice, find the barriers to entry into employment and retention very difficult to surmount (something that was highlighted by reports like *Moving on Up: Ethnic Minority Women at Work* (Equal Opportunities Commission, 2007: a study that examined the work experiences of groups like Pakistani and Bangladeshi women).

Some commentators, for example Prakash Shah, have observed that the UK legal system, in a variety of areas like immigration and family law, has not adapted as well as it might to such demographic changes, and changing priorities.⁴⁰ In the welfare law arena this was probably not as valid a point as it was in the immigration law area. Nevertheless, there were court decisions that continued to surprise most observers, including post-*Din* cases like *Bibi v Chief Adjudication Officer* [1998] 1 FLR 375 in which the Court of Appeal upheld a refusal of Widowed Mothers Allowance in a case where the deceased had more than one wife, and one

of them argued unsuccessfully that eligibility for WMA should extend to *all* wives.

In the context of welfare adjudication processes, a reluctance to adapt to the needs of a more diverse community is sometimes put down to the reluctance of individual decision-makers (and policy-makers) to adapt to new realities, and the need for change. More realistically, however, it is usually a problem within the system itself. Indeed, it is not difficult to find, without searching too hard, examples of *structural* problems within the legislation itself and in the underlying policies that shape and maintain it. The point is readily illustrated by the absence of any specific provision within primary legislation of an inclusive definition of the "family" – for example one that embraces polygamous relationships, despite opportunities to include one (for example at the time that the Civil Partnership Act 2004 led to extensions to the meaning of a "couple").⁶² Indeed, up-to-date guidance on benefits like Housing Benefit (as at June 2008) still explicitly disavows any such possibility. This can be seen in the Housing Benefit Guidance Manual (DWP, Amendment, 16 June 2008, para 1.11). It recognises the existence of such a relationship "for HB/CTB purposes", but this is conditional on there being a marriage ceremony in a country which permits polygamy; and the marriage being between the claimant and more than one partner of the opposite sex "the relationship with each partner being that of a married couple" (para 1.41). It then adds, for good measure, that "Any polygamous relationship formed in this country is excluded"; and that in these circumstances a second or subsequent partner is to be treated as a "non-dependant" (HB Regulations, reg 2; and para 1.42). This has been seen by critics as a deliberate attempt to create disincentive or, at the least discouragement, to enter polygamous unions – but one which is hardly very effective if the main purpose was to contain the potential for a proliferation of claims when new unions are entered into. In cases where the claimant (usually the husband but it could be other parties) is "absent from home" for 52 weeks, or the decision-maker considers that he is likely to be absent from home for that period, the remaining partners will be treated as the "members of the household" for award purposes (paras 1.44 and 1.45). Similar guidance applies with other means-tested benefits.

At the same time as such structural problems subsist in the adjudication system, issues of marital status, and particularly polygamous relationships, have still tested the courts from time to time. In general, and particularly in the pre-ECHR era, decisions tended to support the adjudications of decision-makers that excluded access to benefits in a number of scenarios involving claims by those who were a party to what the system regarded as an atypical marriage. In terms of domestic part-

nerships, there is no more "atypical" a domestic partnership than a polygamous union – a problem highlighted by the *Bibi* case, but also in *R v Department of Health, ex parte Misra* [1996] 1 FLR 128, decided shortly before *Bibi*. In that case, a UK-based doctor died leaving wives from polygamous unions. The issue of eligibility for pension, including State as well NHS pensions, arose, with the doctor's wives putting in for both a full State pension in each case and for his occupational pension. Both wives had good claims. Nevertheless, the system was clearly still not ready to accommodate such generosity; the case was resolved (eventually) by confining the award of the State pension to only one of the wives, and dividing the NHS pension between them. In many respects, the issue around access to the system's resources has parallels with other areas of welfare "demand" following separation and divorce, such as access to social housing (highlighted by cases like *Holmes-Moorhouse v Richmond upon Thames LBC* [2008] 1 FLR 1061; (2007) *The Times*, November 19, showing how the system has to devise rules to limit access to housing support). In terms of compatibility with Convention rights and the ECHR, though, it is likely that the system will face increasing demands as it faces increasing numbers of court challenges to refusals of the kind in *Bibi*. For now, though, the government is assisted by decisions of the European Court of Human Rights that have affirmed that, in principle, limits on how far it can be expected to cater for the needs of all of a person's partners and household may be justified.⁶³

What follows is a discussion of specific areas of welfare support that merit attention, especially in the context of unilateral divorce, and situations in which divorce (or entry into a new marital relationship, including polygamous union) impact on parties and generate needs for support. This discussion also considers the inter-play between orders for financial provision under the MFPA 1984, Part III (for example periodical payments under s 17) if these have been made following recognition; and support from the community in the form of State benefits, and Community Care and housing.

Specific Forms of Post-Separation and Divorce Support

Typically, it will be necessary for a wife in the UK (whether she is in a monogamous relationship or one of the spouses in a polygamous union) to access State benefits that are available to single parents. In this respect

the position of a wife who is affected by a unilateral divorce is no different to that of any other UK-based former spouse.

Income Support and HB/LHA

The key benefits available to divorced spouses, and those who can no longer look to their husbands for support, include Income Support (IS) (utilising the "lone parent" category),⁶⁴ and Housing Benefit (HB) or Local Housing Allowance (LHA), which meet rental costs. An IS claimant who is in the lone parent category will not only receive income each week, she will be passported to maximum HB (to meet rental costs); and to maximum Child Tax Credit if she has children.⁶⁵ As a lone parent she will also be eligible for support from her former spouse following an assessment under the Child Support Act 1991, as amended by the Child Maintenance and Payments Act 2008.

If the claimant's former spouse (spouse if the unilateral divorce's formalities are still being completed) is not habitually resident in the UK this feature of the welfare system will not be able to assist her. In some instances the State welfare system "tops up" periodic payments made under MFPA orders – for example where the amounts fall short of the payee's weekly "applicable amount". In reality, though, most UK-based former spouses do not receive any financial assistance from their former husbands – either for themselves or for their children. Where, exceptionally, payments are being made under MFPA orders it is not unusual for those to cease after a short period of payment (something that mirrors the experience of child support recipients, usually after the former spouse has met a new partner and taken on new responsibilities). As with child support, payers may well stop paying when they realise that all their payments do is reduce the value of their former spouse's means-tested benefits.

As far as Income Support is concerned, this will be for many of the wives and dependent children affected by a divorce the main source of income, at least once the claimant is no longer "living together" with her husband, or former husband (whatever the marital status is at that point). The position on post-separation and divorce support is complicated in practice by the possibility that bills are being paid, and costs that would normally be borne out of benefits income are being met. Typically, this will take the form of mortgage payments or utilities bill that are being met by the husband, either directly or through another family member. This can be problematic in a number of ways, not least in that it will engage the complex provisions in the IS (General) Regulations, Chapter VII, and give rise to "income" that should fall to be taken into

account. Broadly, the system will provide potent disincentives to family members and others providing support, primarily by treating such support, unless it comes within narrowly defined exceptions, as "income" – and by punishing those who provide such support with "overpayments" demands, or, possibly, prosecution for welfare fraud.⁶⁶

As with tax credits (considered below) special provision has been made to ensure that the "applicable amount" within the IS assessment does not just cater for divorced wives in monogamous relationships. It also now assists those in polygamous unions, and makes complex arrangements for those exiting such unions. In practice, this is increasingly the type of marriage most commonly affected by unilateral divorces. Given that such payments are often very helpful in meeting a wider range of needs than mainstream IS, if a divorce brings the award to an end, on the basis that it is a "change of circumstances", then this will be a particularly negative development for many lone parent claimants.

The rules for determining the precise applicable amount in such cases are dealt with by special provisions.⁶⁷ There is also special provision for urgent claims to be made – something common in this area, and essential for needy claimants and children.⁶⁸ A major difficulty, however, that can face a claimant already in receipt of polygamy payments is that take-up and eligibility depends on the status of a wife *continuing*, as well as other characteristics of a polygamous household and unit of claim being present. As already noted, if that status changes it will, of course, affect eligibility – and decision makers will expect to be advised of any changes to avoid "overpayments" arising. The transition from the status of a wife in a polygamous union to that of a single parent will be complicated by a number of factors, not least that other adult members residing in the household may be treated as "non-dependants", thereby reducing the value of any award. With increased numbers of family relatives seeking to establish a "right to reside" in the UK on the basis of "extended family member" status (under the Immigration (EEA) Regulations 2006, SI 2006/1003, reg 8), a status that requires a dependency or attachment to the claimant's household, this has been a potent factor affecting take-up and eligibility.

Housing Assistance: ISMI

In some cases where the divorcing husband has failed to make provision for the continuation of mortgage payments, and the house continues to be the family home following the divorce, a wife who is at that stage claiming Income Support will become dependent on the Income Support

Mortgage Interest (ISMI) system (probably assisted by the "abandonment" exception that enables her to avoid having to wait for 39 weeks from the date of the IS claim).⁶⁹ This assumes, however, that she has, at that point, the right to continue residing in the family home, and has taken over responsibility for mortgage payments. A worse case scenario is where she has been forced out of that accommodation ("forced out" catering for a variety of possibilities, including domestic violence). In this case, access to ISMI, for example to facilitate maintenance of payments to a lender, is assisted by the scope for claiming such support from another location as "abandonment" encompasses violence and unreasonable behaviour that forces the claimant out of her primary home, but preserves her right to use the ISMI system to preserve the option of a return to the home. In the overseas divorce context this may be important, for example where the husband later goes abroad for what is more than just a "temporary" visit; and if she is able at that point to return to the house.

In other scenarios, a wife who is forced out of the matrimonial accommodation may be able to access social housing, assisted in some cases by her "priority" under the homelessness scheme. The rigours of this particular area of the Community Care system is illustrated by cases like *Holmes-Moorhouse v Richmond-on-Thames LBC* (referred to previously): a case on access to social housing by parents required to leave the former family home, but who have their children staying with them in accordance with a shared residence order (discussed in the Practice Note, "Residing or 'Staying' with Dad? Priority Need and Eligibility for Housing after Separation and Departure from the Family Home", WB 15.2.

Older Claimants: Pension Credit

In the case of older claimants, Pension Credit (PC) offers yet another major source of assistance. Like IS, it is now the bedrock of State support for the older claimant and those without any income, or who only have modest incomes that need topping up. Typically, it will be available to supplement modest periodical payments made to a divorced wife under an MFPA order – usually from abroad or out of an account in a UK bank, and made under standing order. In some cases, MFPA orders providing for small amounts that have barely changed since the order was first made (often going back many years) need to be supplemented by a benefits top-up, if only to bring the recipient up to the minimum level of weekly income at which she would receive maximum PC or Income Support. For a wife who is living within a polygamous union

who is affected by her husband's further marriage, polygamy payments made with PC payments are not only readily accessible within the State Pension Credit, they are responsive to changes in circumstances that might dictate a need for an increase. However, this assumes that she continues to remain eligible at that point in terms of status and means; and if the person is still within the claimant unit represented by the wives and members of the "union" which was the subject of the original award.⁷⁰ In some cases an award may end, and a new claim may be needed, following a review of the claimant's status. If the husband has left the household in circumstances that are anything more than temporary, and if the wife becomes aware that his departure is anything more than temporary (or if she is aware that she has been divorced), it will be necessary to report this fact as a "change of circumstances". If this is not done there is scope for a recoverable overpayment to arise as the couple rates are higher than the rate at which the benefit is paid to "singles".

In some cases a new claim, based on a position where the claimant is not part of a "couple" within the meaning of the phrase⁷¹ may, in fact, be financially advantageous, as from that point the claimant's resources will not be aggregated with those of her husband.

Tax Credits

A single *working* parent (or claimant without children in some cases) is able to claim tax credits following separation or divorce, and do so as a single claimant, if the HMRC decision-makers consider the other spouse to have exited the household and the separation is in circumstances that make this "permanent".⁷²

A claim for Working Tax Credit will raise the household's income, although the precise amount by which it does this will depend on the means-test. In some cases claimants may already have been assisted by income provided from a WTC claim made by a working husband – and in households where he has more than one wife the value of the award will have been increased by polygamy payments. However, a change of circumstances on the husband's departure, or a divorce (if the wife is aware of this), will have triggered an end to the claim – and in most cases the need for a new claim. An increasing number of claimants in the UK are parents who are members of a polygamous marriage, and they are now helped by the legislation. Accordingly, the Tax Credits (Polygamous Marriages) Regulations 2003, SI 2003/742, now make special provision on the subject, for example requiring claims to be made with all the partners, and with all income and resources *aggregated*. Increased benefits

are paid in a way designed to take into account the needs of all the partners.

Immigration Status:

Barriers to Support for Divorced Spouses

For some claimants, including those who are not UK or EEA State nationals, separation and divorce may be particularly problematic if a claim for support is made for benefits, tax credits, or support from social services (for example social housing) and is barred out on immigration status grounds. At that point, if decisions cannot be successfully contested, recourse may have to be made to local authority social services for help. However, this has also become increasingly restricted in recent years. A significant barrier in this regard is in the Immigration and Asylum Act 1999 s 115. Basically, this applies a blanket ban on eligibility for most forms of benefit and support if a person is "subject to immigration control". Among other things this extends to anyone who

- requires leave to enter or remain in the UK but does not have it;
- has leave to enter or remain in the UK which is conditional on not having recourse to public funds;
- has leave to enter or remain given as a result of a maintenance undertaking.

Exceptions are catered for by s 115(3) and regulations.

The restrictions also apply to community care services, which is important given that benefits may not be available. For example, the National Assistance Act 1948 (the NAA) may be the basis for accessing support in exceptional circumstances, notwithstanding the application of s 115. More precisely, unless the duty to support is barred out excluded by the NAA s 21(1A), local authorities with social services functions must make arrangements for the provision of residential accommodation for not just the elderly and disabled but other adults who are ordinarily resident in their areas and who by reason of "any other circumstances" are in need of care and attention which is not otherwise available to them. In general, that need must go beyond mere financial destitution, and engage the authority's residual duties and s 21(1) in particular (see, as well, Department of Health Circulars like LAC(93)(10) App.1, accessible at the DoH website).

In practice, it is often the condition in s 115 that bars out those subject to a condition at entry that they do not have recourse to public funds that is the basis for most claimants' exclusion, including women who have

separated from their spouses who are UK or EEA nationals. *Oxfordshire County Council v The Queen on the Application of Saima Khan* [2004] EWCA Civ 309, Court of Appeal offers a valuable case study. In that case Mrs Khan was a national of Pakistan. She had leave to enter the UK to join her husband, and lived with him in Oxford. The relationship broke down, mainly as a result of violent behaviour. After trying to strangle her and attacking her with a knife she was forced to flee the matrimonial home – but was then kidnapped, taken by her husband and his family to Bolton, and locked up in accommodation there. After escaping and returning to Oxford she was kidnapped again and brought back. The police intervened, however, and she decanted to a women's refuge. However, her immigration status at that stage, including the condition imposed at entry, meant she was barred out of State benefits. The local authority assessed her needs, as they are required to do, but only gave her limited support. Specifically, it determined that her needs only extended to provision of safe and secure accommodation, a limited amount of money, and legal advice. However, they refused any further assistance under s 21 of the NAA on the basis that she was not presenting with any significant mental or physical needs that engaged any duty to support – and any needs she had were not made worse by anything other than her lack of accommodation and income. Later, however, a GP's letter indicated that she was likely to suffer psychological problems as a result of the domestic violence – and also as one of the effects of the social and family stigma of being separated and then divorced by her husband (an issue that is not uncommon in unilateral divorce cases). In practice, though, as women's shelters and social work studies indicate this is just one of the major stresses such victims experience; and it is then aggravated by the cessation of financial support. In *Khan*, the authority conducted a further assessment of the claimant's needs but, once again, determined that she did not qualify for assistance. In a letter with "reasons" the council's service manager said: (a) that the test of entitlement to assistance under the 1948 Act was whether the claimant's need for care and attention was to any material extent made more acute by circumstances other than the lack of accommodation and funds; and, (b) that although the claimant lacked accommodation and funds, there was nothing to indicate that there were any other circumstances that made her needs more acute.

The claimant then initiated a judicial review of the authority's decision, arguing that: (i) the authority had wrongly decided she was not entitled to assistance under s 21 of the NAA; and, (ii) if she was not so entitled, the authority had a discretion to provide her with financial assistance under s 2 of the Local Government Act 2000. The case was only

partially successful. Mr Justice Moses held that the authority had erred in law when it concluded that domestic violence could not make an applicant's need for care and attention more acute for s 21 purposes. The matter was essentially one of evidence and facts. He quashed the decision refusing to accommodate her. However, he also concluded that in such cases authorities do not have power to provide financial assistance under the 2000 Act. Section 21(1A) in combination with s 115 represents an effective bar to such support. The authority appealed to the Court of Appeal against the first decision and the claimant cross-appealed.

The court overturned the judge's order. The council had been justified in refusing support, and the restriction in s 21(1A) could not be circumvented by resorting to claims under the 2000 Act. It held that claimants like Mrs Khan cannot be assisted by the scheme. Nor did the Human Rights Act 1998 assist in any way; and having barred out support in the form of direct provision of housing the court could not accept that this could somehow be circumvented by any duty to provide financial assistance. In a key passage that is, essentially, bad news for women in Mrs Khan's situation it was observed that:

"It is difficult to believe that Parliament intended to prohibit the direct provision of accommodation to persons like Mrs Khan, but not to prohibit its indirect provision by the giving of financial assistance for the securing of such accommodation ... it has not [been] suggested that Parliament would have had any rational basis for drawing such a distinction, and no material has been placed before the court to suggest that this is what Parliament in fact wanted to do ..."

The "Right to Reside"

A further barrier that is currently operating to prevent support is in the form of the "right to reside" in the Immigration (European Economic Area) Regulations 2006, SI 2006/1003. For a wife who is not a UK or EEA national this can be a potent barrier, particularly from the point she is no longer residing with her spouse, and may have lost her right to reside as a "family member". This is highlighted by the leading case of *Harrow London Borough Council v Ibrahim* [2008] 2 CMLR 841, CA (21 April 2008),⁷⁹ as discussed in the report in this issue. Although that case is currently before the ECJ, following the referral from the Court of Appeal, it is already evident that for a claimant who does not meet the requirements for a "retained" right to reside, for example following a unilateral divorce, before the conditions in reg 10 are satisfied, the only

recourse left is to seek to establish a derived right to reside based on factors such as a child's attendance at a UK school.

What is particularly problematic is the provision in reg 10 as it assists spouses who have ceased to be a family member following divorce. It facilitates retention in some cases, but only if the conditions it sets out can be met. Specifically if:

- "(a) he or she *ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;*
- (b) he or she was residing in the UK in accordance with the regulations at the date of the termination; and either –
 - (i) prior to the initiation of the proceedings for the termination of the marriage (or civil partnership) the marriage or partnership had lasted for at least three years and the parties had *resided in the UK for at least one year during its duration;*
 - (ii) the former spouse or civil partner of the qualified person has *custody of a child of the qualified person;*
 - (iii) the former spouse or civil partner of the qualified person has the right of access to a child of the qualified person under the age of 18 and a court has ordered that such access must take place in the UK; or
 - (iv) the continued right of residence in the UK of the person is *warranted by particularly difficult circumstances, such as he or another family member having been a victim of domestic violence while the marriage or civil partnership was subsisting.*

Needless to say, not all women will be able to meet these conditions. That being so, a derived right to reside along the lines contended for in *Ibrahim* may be the only alternative route to maintaining the right to reside. However, it is far from clear that this is a viable option, particularly for a claimant who is not "self-sufficient"; and, as considered in this article, that is precisely where a unilateral divorce without financial provision may leave women and their dependants.

Conclusions

From the preceding discussion, it will be clear that the use of unilateral divorce has the capability of becoming an important feature of our divorce system, at least for a small but significant group that satisfies current "recognition" requirements. As the courts in *K v K* and *El Fadl v El Fadl* explained in their judgments, there are powerful reasons why

such divorces can and should qualify for recognition, not least out of respect for comity and in order to cater for the changing expectations and needs of the UK's increasingly diverse communities.

Nevertheless, it is undeniable that this can, in some cases, and in less meritorious cases than *K v K*, give rise to injustice – and in a variety of ways. Furthermore, the establishment of what appears now to be a two-track route to divorce poses some significant challenge to other stakeholders, including the State welfare system and those who pay for it. It also raises complex issues for some of the UK's faith organisations that are taking on an increasingly important role in facilitating divorce, and catering for the needs of those affected. This is an aspect of the subject that has been giving rise to some important debates and discourses, not least on the subject of the widening role of bodies like Sharia councils.⁷⁴

If, as is expected, the government finally ratifies Protocol 7 of the ECHR next year, and this includes Article 5 and its requirements on “equality” between spouses in matters of divorce, it will undoubtedly necessitate closer consideration of a range of difficult issues by the courts.

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NOTES

1. For example, The Muslim Law (Shariah Council) UK at its site at <http://shariahcouncil.org/FAQ.htm> provides helpful advice on obtaining an Islamic Divorce in the UK, and describes the overseas route for those who have married abroad. In section C.1 it says: “Apply to the respective courts for a divorce in the country where the marriage took place. This divorce is considered Islamic as well as legally binding [The divorce is acknowledged by British Law as a Civil Divorce].”
2. In Anthony W Dnes and Robert Rowthorn (eds), *The Law and Economics of Marriage & Divorce* (Cambridge University Press, 2002) 30. Cohen includes in his discussion of “unilateral divorce without property settlement” (another of the “pillars”) some forms of “no fault” divorce.

3. In the key passage in *Miller v Miller* Baroness Hale said: "The most common rationale is that *the relationship has generated needs* which it is right that the other party should meet. In the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living which they enjoyed during the marriage ... But another source of need is having had to look after children or other family members in the past. Many parents have seriously compromised their ability to attain self-sufficiency as a result of past family responsibilities. Even if they do their best to re-enter the employment market, it will often be at a lesser level than before, and they will hardly ever be able to make up what they have lost in pension entitlements. A further source of need may be the way in which the parties chose to run their life together ... The needs generated by such choices are a perfectly sound rationale for adjusting the parties' respective resources in compensation ... A second rationale, which is closely related to need, is *compensation for relationship-generated disadvantage*. Indeed, some consider that provision for need is compensation for relationship-generated disadvantage. But the economic disadvantage generated by the relationship may go beyond need, however generously interpreted. ... A third rationale is *the sharing of the fruits of the matrimonial partnership...*" On the wider issues relating to parental duties, see J Eekelaar and M Maclean, *The Parental Obligation* (Oxford: OUP, 1997); and on the many contradictory assumptions about the nature of the marriage relationship and individuals in that relationship, see A Diduck, *Law's Families* (London: Lexis-Nexis, 2003), ch. 3.
4. For a fuller discussion of the role of the courts and the State on divorce, and expectations of divorcing parties, reference may be made to works like J Eekelaar, *Family Law & Personal Life* (Oxford: OUP, 2007); M Maclean and J Eekelaar, *The Parental Obligation* (1997); and B Hale, D Pearl, E Cook, D Monk, *The Family Law & Society* (Oxford: OUP, 2008, 6th ed).
5. Through "disregards" the Income Support and Child Tax Credit systems, in particular, facilitate post-divorce re-ordering by providing income replacement, despite the parent with care having access to realisable capital like a share in the matrimonial home.
6. The case, the scope for court-based child maintenance if parents do not pay their CSA-assessed payments, and other "welfare" aspects, are discussed by K Puttick, *Child Support Law: Parents, the CSA and the Courts* (XPLEMIS).
7. See, in particular, the SSAA 1992 s 106; and the CSA 1991, s 1.
8. See note 1, above. A variation on unilateral divorce, available in the UK to the parties to a UK-based marriage, is also described at this site which is for the wife to agree to be divorced by her husband, in front of witnesses. More recent options are assisted by more formalised procedures regulated by the Arbitration Act 1996 – and which enable the

parties to be bound by the process to which they have agreed. In a Parliamentary answer on 23 October 2008, Bridget Prentice, Parliamentary Under-Secretary of State for Justice, when answering a question from Michael Penning MP, indicated that another option available to disputing parties was to draft a consent order embodying the terms of the agreement, and submit it to a court for approval (which she saw as a way of ensuring that a court could scrutinise financial arrangements).

9. In *El Fadl v El Fadl* [2000] 1 FLR 175 Hughes J made the point, while giving judgment, that there had been "no evidence of forum shopping" (190). But it is difficult to see how, and on what basis, recognition could be declined even if it was apparent that the husband had preferred to seek a divorce in a jurisdiction that was more advantageous to him, probably on his lawyer's advice.
10. During British rule in India, the law permitted divorce in a variety of ways, and in accord with local custom and practice. In *Moonshee Buzulul-Rabeem v Lutefut-oon-Nissa* (1861) 8 MIA 379 such a unilateral divorce was described as "the mere arbitrary act of the husband, who may repudiate his wife at his own pleasure, and with or without cause". See, on this, the commentary provided by Asaf A Fyze, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh* (Oxford: Oxford University Press, 2005), p. 129.
11. FLA s 54. The mere pronouncement of divorce before witnesses is insufficient to amount to "proceedings" – *Chaudhary v Chaudhary* [1985] Fam 19 – as the process requires "some form of State machinery to be involved in the divorce process" or "machinery established by the State, since existing religious machinery recognised by the State is sufficient". However, if the pronouncement before witnesses is then recorded officially that will be sufficient; *El Fadl v Fadl* [2000] 1 FLR 175. See also *Quazi v Quazi* [1984] AC 744.
12. *Kellman v Kellman* [2000] 1 FLR 785. In that case the mail order divorce obtained in Guam was not, at that point, effective in other US States. However, it subsequently gained its "effectiveness" on the basis of equitable estoppel, and by not being contested – assisted by the res judicata doctrine, and the US doctrine of "full faith and credit". Consequently, the wife's UK divorce petition, in which she tried to contest its validity failed. The husband's motion to strike out the proceedings was successful.
13. Gilles Cuniberti, "The Recognition of Foreign Judgments Lacking Reasons in Europe: Access to Justice, Foreign Court Avoidance and Efficiency", *International & Comparative Law Quarterly* (2008) 57, 25–52.
14. Cuniberti, "French Muslims Getting Divorced Back Home", *Journal of Private International Law* (2008): Cases, Family & Recognition Extracts. Protocol 7, art 5 provides: "Spouses shall enjoy equality of rights and

responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution ...” In 2004 the Cour de Cassation ruled that features of the talaq divorce contravene French public policy requirements, and offend equality requirements. In 2007 it confirmed this in four further rulings.

15. The government indicated in 2000 that it would ratify Protocol 7, but that that this will “not be possible until a legislative vehicle is found by which certain minor amendments can be made to family law. There may also be a need for an interpretative declaration or reservation.” See the Interdepartmental Review of International Human Rights Instruments (July 2004, Dept. of Constitutional Affairs), Appendix 4.
16. These are dealt with under separate procedures; see FLA s 45(2). For a case where a judgment was not enforced because of concerns about the lack of a fair trial, see by *Maronier v Larmer* [2003] 3 All ER 848; [2003] QB 620, CA.
17. See *Rayden and Jackson on Divorce & Family Matters* (London: Lexis-Nexis, 18th ed, 2005), ch. 13, para 13.1.
18. “Overseas” does not include divorces within the EC, for which there are separate arrangements; see the FLA s 45(2), inserted by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310.
19. Mr Justice Munby said: “I have to give effect to the policy declared by Parliament in s 16(1) of the Divorces and Matrimonial Proceedings Act 1973 and now in s 44(1) of the Family Law Act 1986. This policy is that, irrespective of the parties’ domicile and religion, informal divorces obtained in this country, that is divorces obtained in this country otherwise than by proceedings in a court of civil jurisdiction, are not to be recognised. It is not for me to question this policy nor would I wish to do so. I merely add that the policy applies indiscriminately to all informal divorces, the religious as much as the non-religious, irrespective of the nature of the parties’ religious or other beliefs.” Cf. the procedure adopted, and outcome, in *Qureshi v Qureshi* [1972] Fam 173 where a unilateral divorce, sent by letter by the husband (who was domiciled in Pakistan), and then confirmed at a meeting at the Pakistan High Commission, was recognised in accordance with ancient (or substantive) Pakistan Law under the pre-1986 scheme.
20. Katharine Charsley, “Risk and Ritual: The Protection of British Pakistani Women in Transnational Marriage”, *Journal of Ethnic and Migration Studies* (Vol. 32), No. 7, September 2006, 1169–1187.
21. In practical terms, it is difficult for a UK-based decision-maker or tribunal, on appeal, to make such collateral determinations of “validity”, as is readily apparent when appealing against a refusal of support. In some States like Tunisia there has been increasing regulation since as early as 1956; see the Code of Personal Status, Tunisia (1956). More recently,

- countries like Morocco have introduced greater regulation, notably under the Mudawwana laws (from 3 February 2004); see Stephanie Bordar and Saida Kouzzi, "The Challenge of Implementing Morocco's New Personal Status Law", *International Human Rights Law Group: Carnegie Endowment for International Peace Arab Bulletin* (2004) Vol. 2, No. 8. In Malaysia, divorce entry into new marriage is regulated by a combination of the country's general law and Islamic Law (the holy law of the Syariah, and the country's Syariah courts). For a useful discussion, see Michael Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (Princeton University Press, 2002) and M Peletz, *Reinscribing "Asian (Family) Values": Nation Building, Subject Making, and Judicial Process in Malaysia's Islamic Courts* (Erasmus Institute: Occasional Papers, No. 1).
22. Polygamy payments to meet the extra needs and costs of polygamous marriages may be claimed and paid with benefits like Income Support, tax credits, and State Pension Credit – but ongoing eligibility is affected, for example when a party is divorced or a new wife joins the polygamous union.
 23. P Shah, "Attitudes Towards Polygamy in English Law" (2003) *International & Comparative Law Quarterly* 52(2) 369.
 24. See *The Route to Recognition: Potential Difficulties*, later in this article; and the sources footnoted.
 25. W Menski, *Comparative Law in a Global Context: The Legal Systems of Asia & Africa* (Cambridge University Press, 2006, 2nd ed), p. 372.
 26. On the principles in Public Law that inform the difference between a "mandatory" procedure, and one that is merely "directory", see leading cases like *R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities (AMA)* [1986] 1 All ER 164; and, generally, Lord Woolf, Jeffrey Jowell, Andréw Lé Sueur, Catherine M Donnelly, *The Smith's Judicial Review* (London: Sweet & Maxwell, 2007, 7th ed); and see the discussion of the characteristics of the MFLQ, regarded in the main as merely "directory" rather than "imperative" in *Quereshi v Quereshi*, discussed later in this article.
 27. *Eroglu v Eroglu* [1994] 2 FCR 525. For an example of a case where recognition was refused, see *Kendall v Kendall* [1977] 3 All ER 471.
 28. Law Com 132.
 29. FLA s 55(1)(a), (b).
 30. FLA s 55(1)(c). The provision refers to subsistence on a "date specified" in the application.
 31. FLA s 55(1)(d) and (e), respectively.
 32. Section 7, Talaq: "(1) Any man who wishes to divorce his wife shall, as soon as may be after the announcement of talaq in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife."
 33. FLA s 45(2).

34. In that case the Court of Appeal made it clear that it would be contrary to public policy to enforce a judgment obtained in breach of the requirements of a "fair trial". It accepted that recognition should not be withheld where public policy was being raised to enable an issue of substantive law to be reconsidered. However, it observed, "There is, however, a distinction in principle between a decision that resolves an issue of substantive law and a decision reached by a procedure that violates the fundamental human right to a fair trial." The court considered, among other things, the principle that proceedings must be conducted in a way that enables both sides to be present and to be heard; and cases like *Krombach v Bamberski* (Case C-7/98) [2000] TLR 247 and *Hendrikman v Magenta Druck* (Case C-78/95) [1997] QB 426.
35. On these points, and other features of marriage in Islamic law, see Ayesha Hasan, "Marriage in Islamic Law", *Family Law* 19 (164) (March 1999). For other valuable sources and commentary, see D Pearl and W Menski, *Muslim Family Law* (London: Sweet and Maxwell, 1998, 3rd edn); C Mallat and J Connors (ed.), *Islamic Family Law* (London: Graham and Trotman, 1990); J Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964).
36. According to the commentary of one of Pakistan's leading marriage and divorce firms, Tahseen Butt & Associates on its website (www.tahseenbutt.com/divorcelawyers_pakistan.html), the failure to notify could invalidate a talaq until the 1970s and early 1980s. Then the introduction of Pakistan's Zina Ordinance, allowing "scope for abuse as repudiated wives were left open to charges of zina (extra-marital sex and adultery) if their husbands had not followed the requirements and registered", led the courts in Pakistan, since the 1980s, to regard the talaq as effective in such circumstances, notwithstanding the failures to comply with the MFLO.
37. J Rehman "The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq" *International Journal of Law, Policy and the Family*, Vol. 21, No. 1 (April 2007), 108-127.
38. See the exchanges on 24 October 1986 between the Solicitor-General and Mr Nicholas Brown MP in the House of Commons (HC Deb 24 October 1986 vol. 102, cols 1439-44).
39. F Khan, "Divorce by SMS Cases Heard in Selangor Syariah Court since 1999" *New Straits Times*, 3 October 2003.
40. See the comments of Mr Justice Hughes in *El Fadl* on the ineffectiveness of a "telephone" pronouncement given the way that Sharia law, in combination with civil laws, operate in Lebanon.
41. "Cellular Phone Divorces: Malaysia Permits Husbands to Divorce their Wives via Text Message", *Rutgers Journal of Law & Religion: New Developments* (October 2005), www.lawandreligion.com/new_devs/RJLR_ND_75.pdf.

42. Malaysia Islamic Family Law Act 1984, Part 5.
43. Datuk Seri Shahrizat Abdul Jalil is a member of Malaysia's United Malays National Organisation (UMNO) and a leader of the Wanita (Women's) wing of UMNO, part of the ruling national coalition. She is a powerful force in Malaysian politics, and in March 2008, despite losing a by-election, became Special Adviser to the Prime Minister for Women and Social Development Affairs, with Cabinet member status, and with a remit that extends to family law issues as they impact on women's and children's rights.
44. Particularly in areas like Kelantan and Terengganu. In KL, and in other more "liberal" centres, the outrage against the rulings, particularly among women's groups and some of the other faiths in Malaysian society, seemed intense. In neighbouring Singapore, talaq divorce by SMS is reportedly no longer permitted, and other restrictions are being developed following the *Latif* case.
45. For valuable insights, see Sharifah Zaleha Syed Hassan and Sven Cedercroth, *Managing Marital Disputes in Malaysia: Islamic Mediators and Conflict Resolution in the Syariah Courts* (Nordic Institute of Asian Studies: NIAS Monographs in Asian Studies 75) (Richmond: Routledge-Curzon, 1997). The text provides practitioners who are new to the subject a fine explanation of the institutionalization of Syariah law, and its impact on family and kinship rights and duties, and the functioning of the important resolution role within the Syariah Court system.
46. G Pandey, "Muslim Women Fight Instant Divorce" (BBC, 2007). Geeta Pandey is BBC correspondent in Delhi.
47. *M v L (Financial Relief after Overseas Divorce)* [2003] 2 FLR 425.
48. Purchas J in *Holmes v Holmes* [1989] 2 FLR 364 at 373.
49. *Hewitson v Hewitson* [1995] 1 FLR 241, CA. *Per* Butler Sloss LJ: "In my judgment it would be wrong in principle and contrary to public policy to extend the narrow compass of an Act designed to meet limited objectives to cover a wider and unintended situation."
50. Information on such support is in the Annual Report accessible at www.eastlondonmosque.org.uk/uploadedImage/pdf/AnnualReport2007.pdf
51. I am most grateful to the Director of the East London Mosque and Muslim Centre, Dilowar Hussain Khan, for the opportunity to gain information about the subject, and this aspect of the mosque's work during a visit (when it was possible to sit in on advice sessions and employment advice work) in November 2007.
52. See the information that is publicly available at the site, accessible at www.islamic-sharia.org/divorce-talaq-talaq-baa'in.html. There are various authoritative sources on this important phase in the divorce, but broadly, as links from the Islamic Sharia site indicate, the talaq-e-baa'in is when the husband has issued a divorce, and it has become irrevocable. The effect is that the nikaah (marital bond) is terminated. The couple may

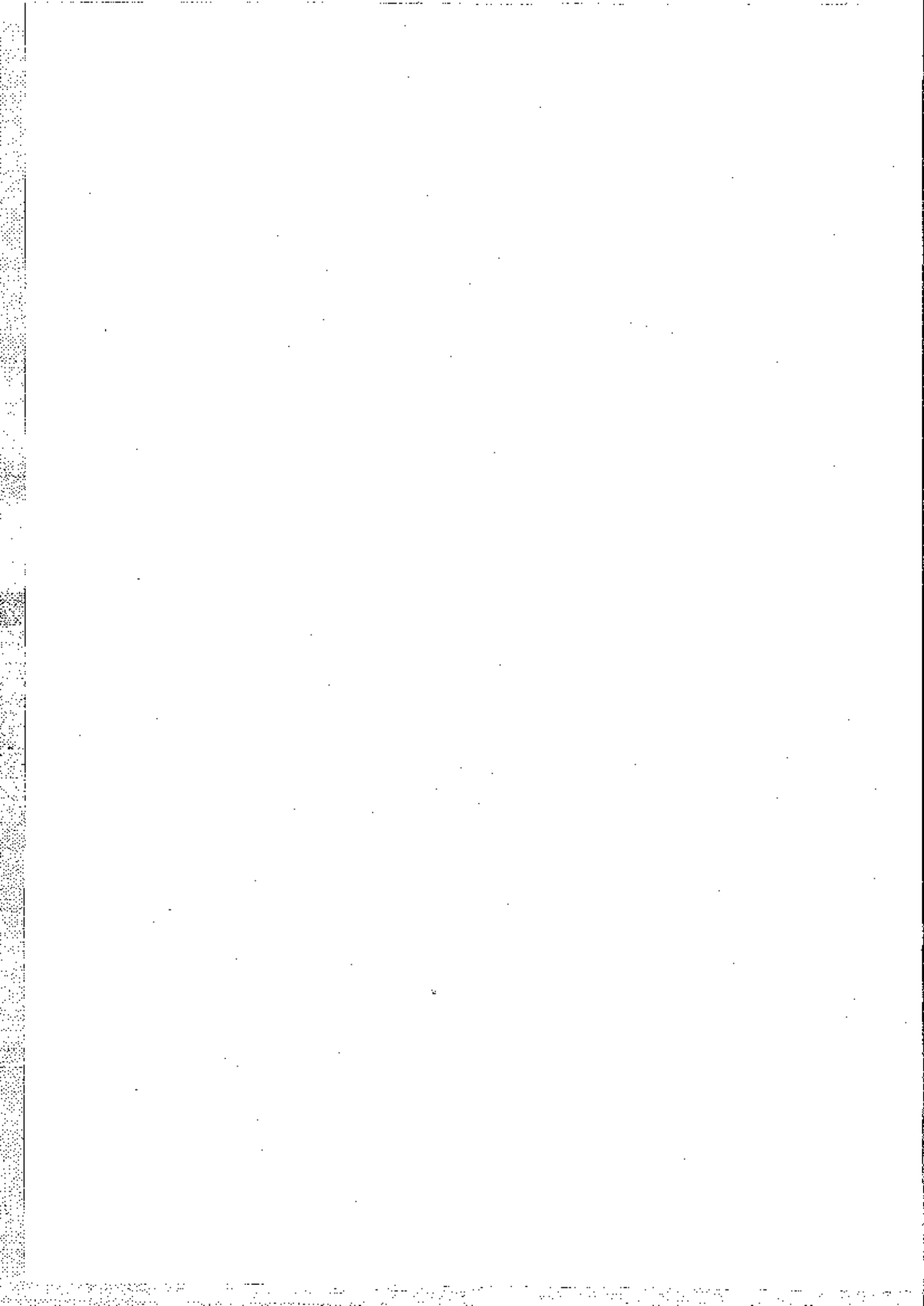
reconcile within the iddah (iddat) period, i.e. the period after her husband has divorced her, during which a woman may not marry. However, even after the divorce is completed the couple may enter into a *new nikaah*.

53. See "Information about Reasons for Divorce & Dowry": www.islamicsharia.org/divorce-talaq/information-about-reasons-for-divorcedowry.html. Answer: "In Islam, if a husband initiates the divorce, he has to pay the full dower amount to his wife. But if the woman initiates it, then it would be the opposite; she has to return the dowry to him (only if she received it) or forsake her right in it (if she did not receive it). All other matters, like his betrayal of you, his illicit relations with the woman are counted as sins for which he has to stand answerable in the court of Allah because he has taken the advantage of living in a non-Muslim country where such relations are not considered as crimes. You are right in seeking divorce from such a person. You should not worry about the money. Allah would compensate you. This is a promise by ALLAH. 'The one who fears Allah, He will make a way out for him and gives him sustenance in a way he cannot even imagine'. (Sura Al-Talaq) You should apply for civil divorce along with Islamic divorce to have a clean separation from your husband."
54. Rhonda Hammond-Sharlot and Penny Booth "Islamic Law in the UK" [2008] Family Law 362.
55. On divorce law and custom and practice, see the information and guidance provided by Sharia Councils in the UK, as well as sources on marriage, and divorce, and the expectations of faith communities, like D Pearl and W Menski, *Muslim Family Law* (London: Sweet and Maxwell, 1998, 3rd edn); J Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964); and C Mallat and J Connors (eds), *Islamic Family Law* (London: Graham and Trotman, 1990).
56. See, for example, *Mohammed Ahmad Khan Shah Bano Begum AIR 1985 SC 985*. "These ayats leave no doubt that the Qur'an imposes an obligation on the Muslim husband to make provision for, or provide maintenance to, the divorced wife ..."; and cf. observations by Sharifah Zaleha Syed Hassan and Sven Cederroth (note 45).
57. K Puttick, *Child Support Law. Parents, the CSA & the Courts* (XPLEMIS), pp. 3-11, tracking the evolution of such a duty since Blackstone's *Commentaries*, Book I, ch. 16, and commentary on early sources since Roman law.
58. This is evident from the debates and consultations that preceded Morocco's Mudawwana laws (they were introduced from 3 February 2004). Among other things, the post-2004 Mudawwana Laws "establish the right to divorce by mutual consent and place polygamy and repudiation (unilateral divorce by the husband) under strict judicial control" according to S Bordat and S Kouzzi, *The Challenge of Implementing Morocco's New Personal Status Law* (Rabat, Morocco: Arab Bulletin Vol 2(4), 2004, Carnegie Foundation). Closer regulation

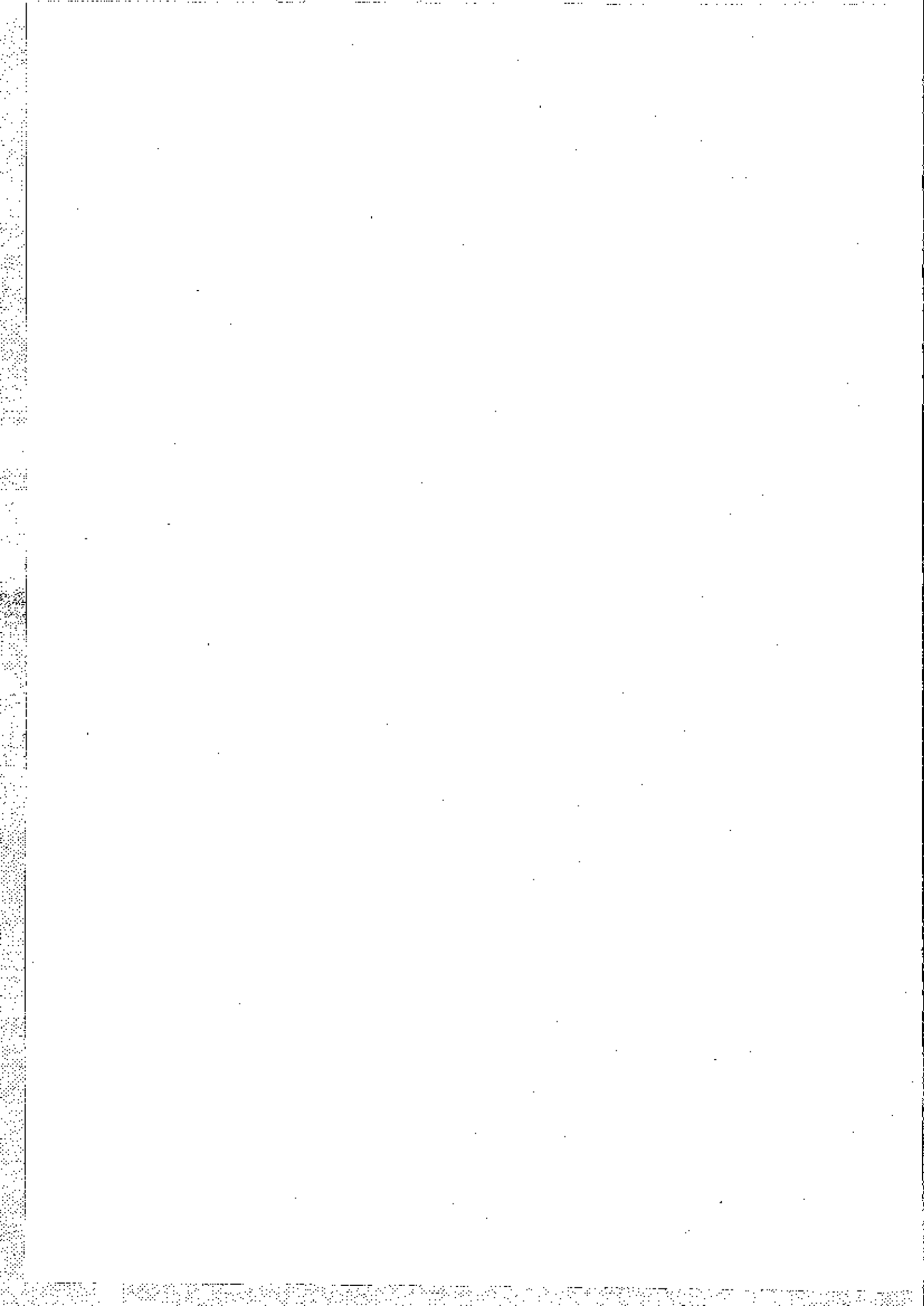
- has also been a feature of reforms to divorce law in Malaysia since the Malaysia Islamic Family Law Act 1984, Part 5.
59. Katharine Charsley, "Risk and Ritual: the Protection of British Pakistani Women in Transnational Marriage" *Journal of Ethnic and Migration Studies* (Vol. 32), No. 7, September 2006, 1169-1187. The same commentator has also suggested that the popularity of marriage between trusted close relatives is at least in part a reaction to the various risks involved in selecting suitable spouses, as well as helping to strengthen connections between kin divided by migration (in a paper for the British Sociological Association Conference "Risk, Trust, Gender and Transnational Cousin Marriage among British Pakistanis": York: 22 March 2005).
 60. Cuniberti, above.
 61. P Shah, "Attitudes towards Polygamy in English Law" (2003) *International and Comparative Law Quarterly* 52(2) 369.
 62. K Puttick, "Social Security, Tax Credits and Child Support" in Andrea Woelke (ed.), *Civil Partnership* (London: Law Society/Law Society Publishing, 2006).
 63. Housing Benefit Guidance Manual (DWP, Amendment, 16 June 2008, para 1.11). See, for example, *Bibi v United Kingdom*, 29 June 1992 (Dec): Appl. 19628/92 where the Commission upheld the State's right to introduce restrictions as a legitimate aim and within ECHR art 8(2).
 64. Income Support (General) Regulations 1987, SI 1987/1967, Schedule 1B, para 1. That route has now become more restrictive following the changes recently made to the lone parent category by the Social Security (Lone Parents and Miscellaneous Amendment) Regulations 2008, SI 2008/3051 (see the *Statutory Instruments* section in this issue).
 65. SI 1987/1967, Sched. 1B, reg 71(1).
 66. SI 1987/1967, Sched. 1B, reg 55.
 67. SI 1987/1967, Sched. 1B, reg 18.
 68. Tax Credits Act 2002 ss 8, 9; and the Child Tax Credit Regulations 2002, SI 2002/2007.
 69. SI 1987/1967, Schedule 3.
 70. See, in particular, the State Pension Credit Act 2002, s 12 and regulations. The key requirements are that the claimant is a husband or wife by virtue of a marriage entered into under a law which permits polygamy; either party to the marriage "has for the time being any spouse additional to the other party"; and "the person in question, the other party to the marriage and the additional spouse are members of the same household". In the context of divorce, eligibility may end; e.g. if as a result of a unilateral divorce they cease to have spousal status. For decision-makers the question, typically, is whether a divorce is legally effective, and whether the person is in the "same household". If a divorce is not effective, and the person still resides in the same household, she may well maintain her

right to payments. Even if she is not, she may be eligible for other benefits such as Income Support.

71. Tax Credits Act 2002 s 3(5A).
72. Tax Credits Act 2002 s 3(5A).
73. The full text of the *Ibrahim* judgment may be accessed online (www.bailii.org/ew/cases/EWCA/Civ/2008/386.html).
74. See, for example, Ihsan Yilmaz, "The Challenge of Post-Modern Legality and Muslim Legal Pluralism in England" (2002) 28(2) *Journal of Ethnic and Migration Studies*, 343–354; Sonia Nûrîn Shab-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Shariah* (London: Nuffield Foundation, 2001); Zaki Badawi, "Muslim Justice in a Secular State", in: M. King (ed), *God's Law Versus State Law. The Construction of an Islamic Identity in Western Europe* (London: Grey Seal, 1995); Lucy Carroll, "Muslim Women and 'Islamic Divorce' in England" (1997) 17(1) *Journal of Muslim Minority Affairs* 97 *et seq*; Pearl and Menski, *Muslim Family Law*, 77–80, 393–8.



WORK 8



K. Puttick 'State Benefits and Tax Credits' Division H in J. Fotheringham (ed) Butterworths Family Law and Scottish Family Law Service, London: Lexis-Nexis

1. Introduction

1. GENERAL

[H1]

The state makes provision for a wide range of benefits and tax credits through the social security system. This system affects virtually every citizen and groups like overseas visitors and nationals residing or working in the UK. It is necessarily an extremely complex area of law. The modern legal framework has its origins in the Poor Law system¹. Following the Report of the Royal Commission on the Scottish Poor Law (1844) changes were made by the Poor Law Amendment (Scotland) Act 1846 and support was provided in cash and kind by parish boards to needy claimants who could show they were resident and 'settled' in those parishes. In this respect the evolution of the social security law system in Scotland mirrored arrangements in England and Wales. Although some commentators have questioned the extent to which 'settlement' requirements were applied consistently it is clear from records of court cases and archives that lack of an established settlement was a common reason for refusing support². Most support depended on a means-test, providing an early model for modern means-tested benefits like income support - a system that, in general, entails a comparison between claimants' resources and their prescribed notional needs. Support then brings those resources up to prescribed levels. The Scottish model included an appeals system from 1845 onwards, with claimants who were refused relief, typically on the ground that they lacked a 'settlement', being able to appeal to the Sheriff. Sheriffs had the power to order the kirk session and heritors to reconsider decisions and make new decisions. Those who were dissatisfied with the *kind* of relief offered, or the amounts could contest decisions before Scotland's Board of Supervision (later the Local Government Boards). Powers in the 1845 Act made it clear that claimants who did not have a 'settlement' could be refused support, and Irish and English claimants without a 'settlement' in Scotland could be forcibly removed. In this respect, the Scottish Poor Law was harsher than that in England where, in 1803, the courts decided that a foreign national and his family was entitled to support on the basis of what the judge described as the 'law of humanity'³. The Poor Law system started to take on many of the characteristics of modern social security, and featured more developed means-tests, by the time the Local Government Board for Scotland and elected parish councils took over responsibility for assessing claims and adjudicating benefits.

Following the introduction of a non-contributory pension by the Old Age Pensions Act 1908, and then a contributions-based benefits scheme under the National Insurance Act 1911, National Assistance provided the forerunner of modern means-tested benefits. This took a variety of forms including non-contributory unemployment benefits like by the time of the depression in the nineteen thirties. The social security system developed significantly throughout the latter half of the twentieth century. In the post-World War II period, the legislation informed by Beveridge's reports *Social Insurance and Allied Services Social Insurance*⁴ and *Social Insurance*⁵ still sought to maintain the contributory principle, ie that benefits should be paid in return for contributions, and that state-managed 'welfare' would command more public support if it is based on reciprocity principles, with minimal 'dependency'. The fact that the citizen had reciprocated for his or her support, particularly through employment and National Insurance deductions, would in Beveridge's view strengthen the system. Realistically, though, as Beveridge recognised, there are groups who are not able to provide such reciprocity. The groups include women with childcare responsibilities, carers, and migrants. For that reason the post-World War II period also saw the further development of non-contributory and means-tested benefits, including family allowances and family credit - the forerunners of the current working tax credit and child credit system, a system which in European terms looks to notions of 'social solidarity rather than just 'contribution'.

The original model of social insurance aimed to provide income and support across the life cycle in order to address periods of interruption in an individual's earning capacity. Thus entitlements based on national insurance contributions addressed the contingencies of unemployment, incapacity for work, retirement and bereavement (so-called 'cradle to grave' support). The core of this concept remains, although much altered and supplemented by more recent benefits schemes. Most of the schemes, and the adjudication systems supporting them, are catered for by core provisions in the Social Security Contributions Act 1992 and the Social Security Administration Act 1992. The contribution-based benefits are now combined with non-contributory benefits and a range of income-related (or 'means-tested') benefits designed to provide an individual and his or her dependants with support to meet income needs. In some cases this may take the form of what is, in effect, a guaranteed weekly minimum income. In the case of an income support claimant, she (or he) will be assured of a weekly income that is assessed by comparing her weekly 'applicable amount' (made up of prescribed allowances, premia, etc) with her 'income' (including earnings from employment, and other sources

such as maintenance and the value of other state benefits that cannot be 'disregarded'). To the extent that such income is less than her applicable amount in any given week, the claimant will be eligible for an award of Income Support that will raise her income resources to the level of the applicable amount. A guaranteed income is also provided, although using different modes of assessment, by other means-tested benefits such as pension credit under the State Pension Credit Act 2002. A major feature of the system, as it now operates, is that a job is regarded as the 'best form of welfare'; and the main role of tax credits, namely the Child Tax Credit and Working Tax Credit, is to provide a guaranteed minimum floor of income for eligible claimants.

European Law & UK Benefits. A further feature of the modern social security system is the increasing influence and importance of EU Law, and human rights law and the Convention rights assured by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) since the Human Rights Act 1998 came into operation from 1 October 2000. In the benefits context, both sources have become increasingly important for clients and advisers. Although Member States' welfare systems are still largely a matter for domestic law, and there is therefore still significant residual sovereignty over this area of the law, there are a number of areas where the European Union has gained increasing competence. For example, following the addition of Title IV to the Treaty Establishing the European Community (TEC), the EU was able to legislate on a wider range of matters within the competence 'freedom, security and justice', including immigration and asylum matters⁶. This fast-developing area of EU law-making has resulted in a range of measures across a widening spectrum of legislative activity, including the establishment of minimum rights to support for asylum claimants⁷ and rights to support for third country nationals with long-term residence⁸ in the host State.

In practical terms, the most important development in this area has undoubtedly been EU secondary legislation that continues to implement the 'free movement' rights of European Economic Area (EEA) nationals and their family members – a Treaty-based right, but one which is subject to limitations and conditions. As well as conferring a right of residence on this group, including family members of EEA nationals who are third country nationals, the key legislation in Directive 2004/38 accords them social rights including the right to work, and claim benefits. However, this is subject to limitations both in the directive itself and in national legislation. Directive 2004/38 is a particularly important basis for a right of residence for family and extended family members, and it is that right of residence, or 'right to reside' in the UK implementing legislation that provides a gateway to key benefits entitlements, including income support, pension credit, and other means-tested benefits as well as access to social housing and other assistance. In the family advice context, however, some clients may have to demonstrate that they have retained a right of residence if they are to qualify for welfare support, and this may not be easy in every case – particularly for clients who cannot satisfy the requisite 'residence' and other eligibility criteria before their separation, spouse's departure from the country or death, divorce, or termination of marriage or civil partnership. Newer, but still developing, criteria for establishing a right of residence, and therefore right to support, have been developing in the area of derived rights, for example where third country nationals are primary carers of children who are in the UK education system – or are entitled to have their EU citizenship rights protected. This is considered in more detail in Section 5.

The other major source of European Law affecting take-up of benefits is the ECHR. Convention rights started to have an impact on the benefits system within a short time of the Human Rights Act 1998 coming in to operation from 1 October 2000. Examples in the family welfare context include the role of article 14 (discrimination) in conjunction with Article 1, Protocol 1 (Interference with possessions) in ensuring that widowers as well as widows should be able to claim bereavement benefits, as shown in the *Willis* case⁹; and article 8 (right to family life) in enabling a disabled claimant to enforce a local authority's duty to carry out 'improvements' to her family's accommodation¹⁰; or assisting a claimant from overseas and his wife (an European Economic Area national) to access support from the Income Support system where it was necessary to fill a lacuna in the legislation following the claimant's loss of residence rights, and therefore right to access assistance from the Income Support system¹¹.

¹ On the Poor Law and its operation, see Rosalind Mitchinson, *The Poor Law in Scotland: The Experience of Poverty 1574-1845*, Edinburgh: Edinburgh University Press, 2000; Robert Cane, *The Scottish Poor Law 1745-1845*, Edinburgh: Scottish Academic Press, 1981; For later periods, see Ian Levitt, *Poverty and Welfare in Scotland 1890-1948*, Edinburgh: Edinburgh University Press. On the Poor Law's operation in England, see Sir William Holdsworth, *A History of English Law (Vol 1)*, London: Methuen & Co, 1955; Michael Rose, *The English Poor Law 1780-1930*, Newton Abbott: David & Charles, 1971; and Lynn Hollen Lees, *The Solidarity of Strangers: The English Poor Laws & the People 1748-1950*, New York: Cambridge University Press, 1997.

² Records of Poor Law cases are kept by many of the major Sheriffs' Courts, and records of proceedings in the period 1846-1933 are in the National Archive of Scotland Archive (Ref SC6/82). These suggest that issues of residence, and whether claimants had acquired and maintained a 'settlement' (the gateway to eligibility for support), coupled with disputes between parish boards as to which was legally responsible for a claimant's welfare, could be as hard fought as they were in England. In England, Blackstone referred to the complex provisions, including those in the Statute 13 & 14 Car II c 12, regulating the acquisition of a settlement under the law of settlements, and the 'infirmary'

of expensive lawsuits between litigating neighbourhoods and the process of 'removals' (Blackstone, *Commentaries on the Laws of England* (1765-1769) Vol 1, ch xi, pp 362 et seq).

- 3 Lord Ellenborough in *R v Inhabitants of Eastbourne* (1803) 4 East 103, clarifying observations attributed to Holt LCJ in *St Giles Parish v St Margaret's Parish* E2 Geo 1, 1 Sess Cas 97 suggesting that a foreigner was unable to acquire a 'settlement', and it was therefore lawful to allow him to starve.
- 4 Cm 6404, 1942.
- 5 Cm 6550, 1944.
- 6 See now the Treaty on the Functioning of the European Union (TFEU), especially Title V, arts 67-80.
- 7 Directive 2003/9 on minimum standards for the reception of asylum claimants.
- 8 Directive 2003/109 on the status of third country nationals who are long-term residents.
- 9 *Willis v United Kingdom* [2002] 2 FLR 582, ECtHR.
- 10 *R (Bernard) v London Borough of Enfield* [2003] HRLR 4.
- 11 Commissioner's Case R (IS) 4-09 (31 October 2007).

[H2]

The state benefits system has continued to evolve at a relentless pace, with substantial new legislation. Perhaps the two core themes which best characterise recent developments are: a stated aim to simplify and modernise decision-making and administrative procedures, particularly since 1998 and reforms that started with the Social Security Act 1998 and continued, more recently, with the Tribunals, Courts and Enforcement Act 2007; and a range of substantive measures designed to assist the transition into work for those who have been reliant on out-of-work benefits ('welfare-to-work'). The Welfare Reform Act 2007 introduced a new raft of welfare-to-work measures, and signalled the system's increasing emphasis on 'conditionality' when benefits are paid, ie the expectation that groups such as lone parent Income Support claimants, and those who are in receipt of incapacity benefits (including the Employment and Support Allowance from October 2008), must demonstrate that they are actively taking steps to gain paid employment when this can reasonably be expected. Further changes made by the Welfare Reform Act 2009 mean that lone parents will be progressively taken out of eligibility for Income Support, and be expected in most cases to claim Jobseeker's Allowance (and be subject to jobseeking requirements). If they are incapacitated from work, they may claim Employment and Support Allowance. Details and a timetable are in the relevant regulations, and 'guidance'¹. Reforms introduced by the Welfare Reform Act 2009, Part 1, also provide for a number of changes to working age benefits, including a 'work for your benefit' scheme²; provision on lone parents³; eligibility in some cases for Jobseekers Allowance without having to seek employment⁴; and changes to jobseeking requirements and requirements to engage in work-related activity as a condition of entitlement when at least one member of a couple is able to work⁵. The Coalition Government has made it clear that it proposes to develop the measures in the Welfare Reform Act 2009 aimed at introducing greater 'conditionality' in the social security system. Like the previous government, it wants to reduce the number of claimants on incapacity benefits. The government's first major reform initiative is the Welfare Reform Bill 2011 which, if enacted, will streamline the benefits system by replacing many of the current benefits with a 'universal credit'⁶.

¹ See in particular, the Social Security (Lone Parents and Miscellaneous Amendments) Regulations 2008, SI 2008/3051. Guidance is provided in 'Changes to Income Support for Lone Parents and JSA for All Parents: Information Pack', accessible at: www.jobcentrepplus.gov.uk/JCP/stellent/groups/jcp/documents/websitecontent/dev_016029.pdf.

² Jobseekers Act 1995, ss 17A and 17B, added by the Welfare Reform Act 2009, s 1.

³ Welfare Reform Act 2009, s 3.

⁴ Welfare Reform Act 2009, s 4.

⁵ Among other things, where a person is a member of two or more joint claim couples, provision is made whereby only one of those couples is to be treated as a joint-claim couple. Regulations enable the members of the joint-claim couple to nominate themselves for this; or, in default, the Secretary of State may make the determination; Jobseekers Act 1995, s 1B(2), (3), added by the Welfare Reform Act 2009, s 4(3) of the 2009 Act.

⁶ The Bill received a 2nd Reading in the House of Commons on 9 March 2011. The legislation gives effect to proposals in *21st Century Welfare* (July 2010, Cm 7913); and in the White Paper *Universal Credit: Welfare that Works* (November 2010, Cm 7957).

[H3]

The Department of Work and Pensions (DWP) administers most of the benefits system on behalf of the government. However, in most cases day-to-day administration is undertaken by agencies of the department. Decision-makers (formerly known as Adjudication Officers) deal with the majority of DWP benefits on behalf of the Secretary of State for Work and Pensions. The key agencies are Jobcentre Plus, and the Pensions Service. Jobcentre Plus deals with clients of working age. The Pensions Service deals with people over pensionable age and is a dedicated service for current and future pensioners. It provides state financial support to over 11 million pensioners at a national and local level.

The DWP operates through various executive agencies such as the Pension, Disability and Carers Service (the PDCS). The PDCS administers claims for a range of key benefits, and has other functions including the provision of guidance to claimants. Services are provided by a number of sections within the PDCS, including the Pension Service. The Child Maintenance and Enforcement Commission (C-MEC), which was set up under the Child Maintenance and Other Payments Act 2008, is now responsible for the child maintenance system. As the commission says in its publicity, it is committed to trying to make parents who are separating or divorcing aware of their options, whether using private or statutory options. This part of its remit is delivered through a section known as 'Child Maintenance Options'. Although the Child Support Agency (CSA) still functions it only does so as part of transitional arrangements pending its complete replacement by C-MEC. The commission works closely with Jobcentre Plus, particularly in relation to parents with care and non-resident parents who are also in receipt of benefits.

HM Revenue and Customs (HMRC) now administers a growing range of benefits, including Child Benefit, Statutory Maternity Pay, Statutory Paternity Pay, and Statutory Adoption Pay, as well as Child Tax Credit, Working Tax Credit, and Pension Credit. In some cases, for example Statutory Maternity Pay, Statutory Paternity Pay, and Statutory Adoption Pay, administration may largely be the responsibility of the claimant's employer. Nevertheless, HMRC oversees them and has adjudicatory and other powers; and some of those powers have become more extensive in recent years. For example, under the regulations that extend rights to Additional Statutory Paternity Pay to parents of children adopted from overseas, an employer who decides not to make any, or any further, payments of additional statutory paternity pay to such an employee (or former employee) must provide details of the decision and the reasons for it. HMRC officers may then determine issues relating to the person's entitlement¹.

Throughout this division we refer to social security and social security offices where both agencies are involved, and the Pensions Service, Jobcentre Plus, C-MEC or other specific agency when this is necessary. We refer to the DWP when looking at a common function, for example in the context of appeals and review where in most cases the defendant will be the Secretary of State for Work and Pensions.

¹ Additional Statutory Paternity Pay (Birth, Adoption and Adoption from Overseas (Administration) Regulations 2010, SI 2010/154, reg 12.

2. CATEGORIES OF BENEFITS

[H4]

Benefits can be categorised in a number of ways. Broadly, they fall into three main groups:

- **Contributory:** requiring the claimant or, perhaps, a spouse or civil partner, to have paid national insurance (NI) contributions, or to be treated as if such contributions have been paid.
- **Non-contributory:** where the benefit is not dependent on contributions, and in many cases there is no means test
- **Income related/means-tested:** where the claimant's resources (income and capital) are taken into account and affect eligibility or the amount of benefit, tax credit, etc payable. In some instances the resources of others such as spouses, civil partners, or others, are sometimes treated as available to the claimant, and 'aggregated'.

In some cases, a benefit that is normally 'contributory', such as Employment and Support Allowance (which replaced Incapacity Benefit from October 2008, subject to transitional arrangements) is available on a non-contributory basis (what may, be perhaps, be seen as a 'hybrid').

However, perhaps the most useful approach for this work is to view benefits and tax credits according to their purpose. Firstly, a range of benefits (some based on national insurance contributions, others not) compensate for the loss of earning capacity. Examples of these earnings-replacement benefits are State Retirement Pension, Employment and Support Allowance, Carer's Allowance and contribution-based Jobseeker's Allowance.

Secondly, other benefits that are income-related and support income needs (and can include a wide array of benefits, tax credits and in-work assistance to supplement earned income) are aimed at supplementing other sources of income. Examples include income support and income-based

jobseeker's allowance (both of which may be claimed by groups working part-time below prescribed weekly hours, and subject to income and capital limits), Housing Benefit, Local Housing Allowance, Council Tax Benefit, Working Tax Credit, and Child Tax Credit.

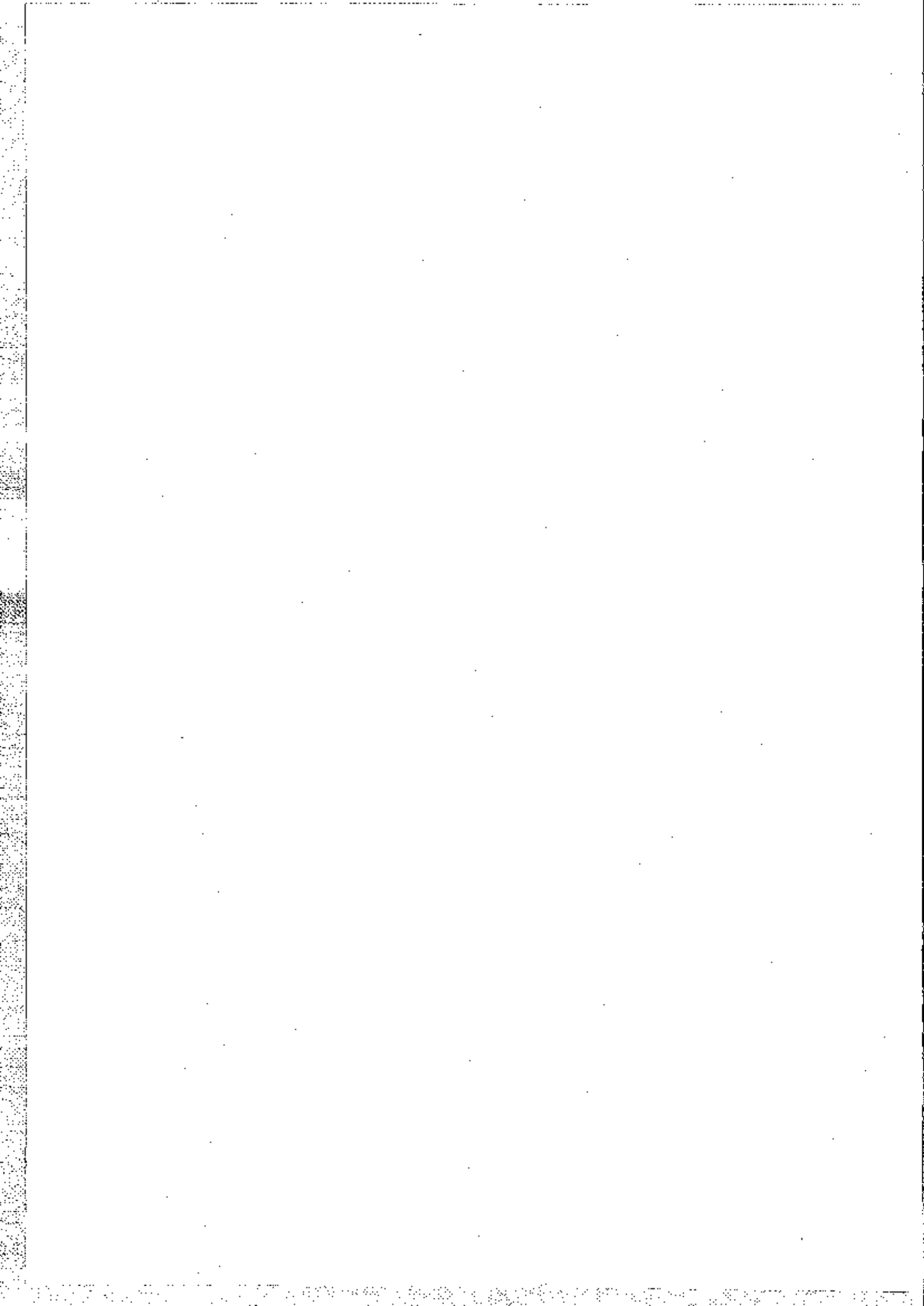
Thirdly, certain benefits are designed to compensate for the extra costs which are associated with particular circumstances and needs. Disability-related needs are supported by such benefits. In this case they are neither income-related nor earnings replacement benefits. Nor are they dependent on NI insurance contributions. Examples include Attendance Allowance, Disability Living Allowance, and Child Benefit.

Understanding benefits in terms of their purpose gives a good starting point for understanding both what the basic rules for each benefit must encompass and how they interact to address the circumstances of any particular household. It is important not to view any benefit in isolation. In most cases clarifying entitlement for any particular client will involve considering a number of benefits and their interaction.

3. ORGANISATION OF THIS DIVISION

[H5]

Social Security Law is complex both in the substantive rules of entitlement for the various benefits, and in the procedural rules for decision-making and administration of benefits...



3 Income-Related Benefits

1. GENERAL

Introduction

[H201]

A number of benefits, including income support, jobseeker's allowance (income-based), housing benefit (HB), council tax benefit, working tax credit, and child tax credit are designed to bring the level of income available to a claimant or household up to income levels prescribed by the State benefits system. None of these benefits are based on NI contributions, and none are taxable. The benefits are not directly or necessarily linked to a claimant's situation in the way earnings replacement benefits are. Rather, they involve an assessment of the claimant's financial resources, in other words a 'means test'. In general terms, 'means-testing' means the process of determining eligibility for support after comparing the claimant's (and his/her dependants') notional 'needs' with the resources available to them, or required by law to be treated as available to them. This is particularly relevant where the resources of the claimant may include, or be treated in law as including, other members of the household – for example, where the claimant 'living together' with another person as part of a 'couple'.

With income support, housing benefit, and council tax benefit, the term 'applicable amount' is used to describe the 'needs' side of the equation. 'Income', normally assessed by reference to net earnings and most forms of resources in the nature of income, is the other side of the means-test equation. In the case of income support, for example, the applicable amount comprises a combination of 'allowances', 'premiums', and mortgage interest housing costs if the claimant is eligible for these under the Mortgage Interest Support scheme. Income resources generally include most forms of income including net earnings, maintenance, and State benefits, unless excluded. Important exceptions, where the income is excluded from the means assessment, include disability living allowance (DLA) and attendance allowance (AA). With tax credits, means-testing principles also operate, and there are different rules dealing with the inclusion or exclusion of particular benefits for example, child benefit is excluded, as are DLA and AA. In some cases a claimant may be deemed to have 'notional' income, for example capital that is in his or her possession exceeds prescribed limits. If a non-dependant who is in remunerative work is living in the household this may lead to a reduction in the level of support available through means-tested benefits like IS. With some benefits, for example housing benefit and CTB 'income' includes the value of tax credits being received by the claimant.

The means test, and the way it is conducted, accounts for much of the complexity of these benefits.

In the rest of this chapter consideration is given to a number of features, including migration-related barriers, couple and status, the concept of the 'household', and living together rules that are relevant to all means-tested benefits. There is then a discussion of particular benefits, starting with income support.

Residence and migration status

[H201.1]

Income-related benefits are generally dependent on the claimant satisfying the requisite 'presence'¹ and residence requirements; and he or she should not be a 'person from abroad' (which in the legislation includes someone who does not have 'habitual residence')². This area of income-related benefits legislation is now replete with migration status requirements and 'gateways', such as the 'right to reside' in the UK. Certain groups are not treated as persons from abroad, for example 'workers' for the purpose of EC Directive 2004/38; self-employed persons under that Directive; family members of workers and self-employed persons; refugees; and a person who is not subject to immigration control within the meaning of the Immigration and Asylum Act 1999, s 115(9). Special rules may apply when assessing claims, and in particular when determining a person's 'applicable amount'. Examples are where couples, or partners in a polygamous marriage, are temporarily separated; or where one member is abroad, or one member of the couple is subject to immigration control³.

Immigration Control, 'Residence' and Ineligible Groups. As a result of the Immigration and Asylum Act 1999, s 115, those who are 'subject to immigration control' within the meaning of s 115(9) are not entitled to income support or any of the other means-tested and non-contributory benefits listed in s 115(1). The restriction operates while he remains a person to whom the section applies, a proviso in that sub-section that makes it possible for a person who may have lost the requisite migration status to regain eligibility. This is an important feature of the scheme, particularly for groups like non-UK or EU nationals who may have lost their right of residence based on their status as a 'family member' of an EEA national – but then regained a new basis for 'residence', and thereby come back in to eligibility for benefits support or other forms of social assistance. Asylum claimants and their family members

are not eligible for Income Support, and indeed are taken out of eligibility for mainstream benefits pending determination of their application for refugee status. If they are eligible, support is provided in accordance with the scheme in the Immigration and Asylum Act 1999 Part VI (ss 94-127)⁴. Those who have made successful asylum claims, and acquire 'refugee' status, are eligible for mainstream benefits like Income Support, as they are taken out of the definition of 'person from abroad' by the Income Support regulations⁵.

Claimants for means-tested benefits like Income support must be 'habitually resident'. Specifically, a claimant must be 'habitually resident' in the UK, the Republic of Ireland, the Channel Islands or the Isle of Man unless exempt from this requirement⁶. The contention that the requirement for a right to reside discriminates against some EEA nationals on grounds of nationality was rejected by the Supreme Court in *Patmalinec v Secretary of State for Work and Pensions*⁷. The court declined to address the concerns of the EU Commission in its 'reasoned opinion' that the UK's right to reside scheme is discriminatory, as it was 'too early' to have to do so⁸.

¹ For Income Support, see the Social Security Contributions and Benefits Act 1992, s 124. For Housing Benefit a claimant must be liable for to make payments in respect of a dwelling in Great Britain 'which he occupies as his home'; Social Security Contributions and Benefits Act 1992, s 130(1).

² Income Support (General) Regulations 1987, SI 1987/1967, Reg 21AA. Without such an exemption a 'person from abroad' has an applicable amount of 'nil'; see Sch 7, para 17 to those regulations. The habitual residence rule may affect a number of groups in the family context such as entrants with a 'right of abode' in the UK (as in *Nessa v Chief Adjudication Officer* [1999] 4 All ER 677, HL: a case of a widow and children coming to the UK to settle permanently, but who was held to have 'person from abroad' status pending completion of an 'appreciable period of residence' in the UK). British citizens who have been 'resident' outside the EU can also be required to complete a period of residence UK before being able to access benefits like IS (as in *Gingl v Secretary of State for Work and Pensions* [2002] 1 CMLR 587). For a fuller discussion of this, and exceptions to the requirement, see works like CPAG's *Welfare Benefits and Tax Credits Handbook 2011-12* (13th edn), ch 58; or K. Puttick *Welfare Benefits & Tax Credits: Law and Practice* (9th edn) pp 292-295.

³ SI 1987/1967, Sch 7 (Applicable Amounts in Special Cases). A further dimension to this is the risk to 'family member' status under the Immigration (European Economic Area) Regulations 2004 as residence and social security rights are dependent on maintaining that status. Moving abroad, or living apart for more than temporary periods may jeopardise that status – as would judicial separation or divorce. This is implicit in reg 14(2) which stipulates that 'A family member of a qualified person residing in the United Kingdom under paragraph (1) or of an EEA national with a permanent right of residence under regulation 15 is entitled to reside in the United Kingdom for as long as he remains the family member of the qualified person or EEA national' (emphasis added) if the right to reside is lost, a family member who is not an EEA national may then need to assert a new basis for it. The trigger for this, and for an adverse determination, is usually a claim for benefits or housing. A claimant for benefits or local authority social housing who is 'homeless' can, at that point, rely on derived rights – for example the fact that her children have started education in UK schools; see *Teixeira v Lambeth London Borough Council* [2008] EWCA Civ 1088, [2009] HLR 9, [2009] EU LR 253.

⁴ Section 95 provides that support may be provided or arranged for claimants and their dependants if they appear to be 'destitute' or 'likely to become destitute'.

⁵ SI 1987/1967, Reg 21AA(4)(g).

⁶ Social Security (Persons from Abroad) Amendment Regulations 2006, SI 2006/1026. The argument that an economically inactive EEA national could derive a right of residence from EU Law directly, thereby side-stepping the requirement for a 'right to reside' under the UK's scheme for implementing Directive 2004/38, was rejected in *Abdirahman v Secretary of State for Work and Pensions* [2007] 4 All ER 882, CA. Earlier ECJ cases that appeared to support the claimants' case, such as *Martinez Sala v Freistaat Bayern* (Case C-85/96) [1998] ECR I-2691 and *Trojani v Centre Public d'Aide Sociale de Bruxelles (CPAS)* (Case C-456/02) [2004] ECR I-7573, could be explained on the basis that their residence rights in each case derived from national rather than EU law; and the exclusion of economically inactive claimants was undoubtedly among the 'conditions and limits' on free movement included in the Treaties (now TFEU art 20(2)(a) and art 21(1)). These are also provided for by EU secondary legislation, notably Directive 2004/38 art 7. See para [H241] and CHAPTER 5 PEOPLE IN SPECIAL CIRCUMSTANCES.

⁷ [2011] 1 WLR 783, UKSC. Baroness Hale pointed out that it was apparent from *Trojani* that those seeking State support because of their lack of resources were unable to look to art 18 of the Treaty (now TFEU art 21) as a basis for a right of residence.

⁸ EU Commission Notice IP/10/1418 Free Movement of Workers: Commission Requests UK to End Discrimination on Other Nationals' Right to Reside as Workers' (Brussels, 28 October 2010), discussed by K. Puttick 'Paying their Way? Contesting 'Residence', Self-sufficiency, and Economic Inactivity Barriers to EEA Nationals' Social Benefits: Proportionality and Discrimination', *Journal of Immigration, Asylum and Nationality Law* 2011 25(3), 280 at 291 et seq.

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Habitual residence test and the 'right to reside'

[H241]

In order to be entitled to income support, and some other income-related benefits such as Pension Credit, a claimant must be 'habitually resident' in the UK, the Republic of Ireland, the Channel Islands or the Isle of Man. This generally means the claimant must have the 'right to reside' to avoid having the status of a 'person from abroad', and being treated as having an applicable amount of 'nil'. A key change to residence requirements was made by the Social Security (Persons from Abroad) Regulations 2006 which was aimed at ensuring that groups like EEA nationals in the UK should not be able to claim means-tested benefits like Pension Credit and Income Support while they are 'economically inactive', ie not in employment or self-employment. The restrictions in the 2006 Regulations modified requirements in means-tested benefits schemes, including the IS (General) Regulations¹. Some claimants will be exempt from this requirement. Some, including certain European Economic Area nationals who have 'qualified person' status (as a worker, self-employed person, etc), will have a right to reside – but only for as long as they can maintain that status, for example after leaving employment, and fulfilling the conditions required on retirement, temporary incapacity, or jobseeker status². Other claimants, however, may still be required to demonstrate that they are habitually resident, and this can be problematic – particularly in the reception phase after arrival in the UK. Even claimants who have a demonstrable 'tie' to the UK. In relation to groups entering the UK from outside the requirements are even more stringent. For example, even claimants who have a demonstrable 'tie' to the UK, perhaps as a result of having a 'right of abode' and a clear intention to take up permanent settlement, are subject to the need to demonstrate habitual residence – as established by the House of Lords in *Nessa v Chief Adjudication Officer*³. Such claimants may be required to be resident for 'an appreciable time' (which in practice may be at least three months). Repeat claims may be needed until a claim is successful.

The Right to Reside. The importance of the right to reside as the gateway to income support and other means-tested benefits was highlighted in *Abdirahman* when the Court of Appeal made it clear that lawful residence in the UK is not the same thing as a right to reside⁴. The claimants in that case, one of whom claimed income support, housing benefit, and council tax benefit, and the other claimed pension credit, were residing lawfully in the UK. However, they were not able to show that they had 'qualified person' status (for example as a worker, jobseeker, self-employed person, or as an EEA national who is self-sufficient) under the regulations. Accordingly, they did not satisfy the habitual residence test. This meant they only had the 'lesser status' of a 'person from abroad'. The key conclusion, after considering leading European Court of Justice (ECJ) case law, was that article 18 (the right of EEA nationals to live in other EU countries) cannot be relied on as the basis for a right to access benefits, particularly by those who are not 'self sufficient'. The court rejected arguments that by refusing benefits in circumstances that a UK national would get them was discriminatory under article 12 of the Treaty Establishing the European Community. The article was not engaged. Even if it was, the court concluded the discrimination would be 'justified'.

In some cases, a person who has enjoyed a right to reside on the basis of being the spouse or family member of an EEA national (but without him or herself being an EEA national) (reg 7), or being in a durable relationship' (reg 8(5)), can lose that right, for example after ceasing to live together with him or her – and will at that point lose the right to claim benefits or work unless a new right to reside can be established on the basis of the provisions on retention (reg 10)⁵. Among other things, these may enable a person who has been married to a UK or EEA national to retain a right to reside on termination of the marriage or civil partnership. However, the pre-conditions are strict. In the case of divorce they require that prior to the initiation of proceedings the marriage (or civil partnership) had lasted for at least three years and the parties to the marriage or civil partnership had resided in the UK for at least one year during its duration. Other routes to retention operate, for example where the person has custody of a child of the qualified person, or a right of access, and a court has ordered that such access must take place in the UK. A right to reside may also be necessitated by the person's 'particularly difficult circumstances', such as domestic violence while the marriage was subsisting⁶. A person from outside the EU who is living in the UK unlawfully, for example after a failed asylum claim, is likely to find the 'extended family member' route difficult⁷. Extended family members, unlike family members, of an EEA national do not, in any case, have an automatic 'right to reside'⁸.

Retained and Derived Residence Rights. The difficulties of demonstrating a retained or derived right in the separation and divorce context have been highlighted by the case of *Harrow LBC v Ibrahim*, a case in which a spouse of an EEA national working in the UK lost her right to reside when her husband left

his employment, and then left the UK. Having separated she attempted to access housing for herself and family. The application was refused by the council on the basis that she did not have, by then, a right to reside. Her appeal to the county court was successful, on the basis that she maintained a right based on a combination of EC law and the fact that she had custody of children who, by then, were attending UK schools. Following a referral to the ECJ, the Grand Chamber of the ECJ ruled in favour of Mrs Ibrahim's claim for a derived residence right. The court observed that 'the right of residence in the host Member State of children who are in education there and the parent who is their primary carer is not subject to the condition that they have sufficient resources and comprehensive sickness insurance cover is supported by Article 12(3) of Directive 2004/38, which provides that the departure or death of the citizen of the Union does not entail the loss of the right of residence of the children or the parent who has actual custody of them, irrespective of their nationality, if the children reside in the host Member State and are enrolled at an educational establishment for the purpose of studying there, until the completion of their studies.' The court also went on to make it clear that such a derived right is not subject to 'self-sufficiency' requirements (paras 58, 59)⁹.

Family Members and Dependants. Means-tested benefits like Income Support and Pension Credit may be claimed by family members and extended family members of EU/EEA nationals who are their dependants – and it does not matter whether they were dependent on his or her household on arrival or became dependent later. The point is illustrated by a Court of Appeal decision that also provided a rationale for providing such claimants with rights to welfare support, making it clear that the main objective is to facilitate the EU national's free movement rights. In *Pedro v Secretary of State for Work and Pensions*¹⁰ the claimant was a Portuguese national, aged 62, who joined her son who was working in the UK. When she reached the age of 60, and became ineligible for secretary of state refused her claim on the ground that she did not satisfy the necessary residence criteria under the State Pension Credit Act 2002, s 1(2). This was reversed on appeal by a tribunal which found on the evidence that she had become a dependant of her son, with the requisite residence rights to claim the benefit. A commissioner's decision to the effect that she could not be a family member for the purposes of art 2(2)(d) of Directive 2004/38 was overturned by the court. Having regard to the purpose of the Directive, which was to facilitate his right of free movement in the EU, she acquired a right to reside. Without this interpretation, nationals of other member States might be discouraged from working in other Member States – an interpretation assisted by *Metock v Minister for Justice, Equality and Law Reform*: C-127/08¹¹. Furthermore, art 2(2)(d) did not specify when the dependency had to have arisen; nor did it require that the relative had to have become a dependant in her country of origin.

For claimants who are EU or EEA nationals living in the UK, but unable to demonstrate that they have a right to reside, for example, because they are not working, are not family members of a qualifying person, and cannot demonstrate any kind of 'dependency', it will be difficult to demonstrate eligibility for means-tested benefits like Pension Credit. In the case of *Patmalniece*¹², a Latvian national won her appeal against a refusal of Pension Credit on the basis that the tribunal (composed of the President of the Appeals Tribunals) considered it was direct discrimination to refuse her the benefit when a UK national in a comparable position would be eligible. The Secretary of State won an appeal to the Commissioners, who held that although the refusal of support was discriminatory it was indirect discrimination. Furthermore that discrimination could be 'justified' in the case of an economically inactive claimant. An appeal to the Court of Appeal was unsuccessful. Both the Commissioner's and the court's judgments indicate that this is an area of the welfare adjudication where anti-discrimination provisions, including those in Regulation (EEC) 1408/71, art 3(1) or which derive from art 12 of the EC Treaty (Nice), are not engaged or, if they are, any direct and indirect discrimination can be 'justified'. The need to protect the nation's finances of the host State justified limiting the scope of arts 12 and 18; and limitations on residence rights under Directive 90/364 were proportionate to the legitimate objective of protecting the welfare system's resources, particularly in the case of claimants who are not 'self-sufficient' – a conclusion assisted by the comments of the court in *Abdirahman*¹³. Furthermore, in the Court of Appeal, *Moses LJ* appeared to equate unemployment to a 'failure to integrate' at the end of his judgment. The Supreme Court upheld the decision of the Court of Appeal. The majority of the court concluded that, whilst the discrimination provisions in Regulation (EC) 1408/71 (Regulation 883/04 from 1 May 2011) were engaged, the discrimination was indirect rather than direct (a conclusion assisted by a recent European Court judgment in *Bresson v Gouvernement de la Communauté Française*: C-73/08¹⁴). It could be 'justified' in the case of a claimant who is not self-sufficient and has therefore not satisfied integration requirements since arriving in the UK.

Economic Integration & 'Proportionality'. Support from the Income Support scheme may be available to dependent family members, including those not explicitly within the definition of 'family member'. Plainly expectations of economic integration have become more significant in the aftermath of cases like *Patmalniece*, and earlier Court of Appeal decisions like *Kaczmarek v Secretary of State for Work and Pensions*¹⁵, a case in which a care worker who had left employment on maternity leave, but who delayed her return to remunerative employment, was ineligible for Income Support. The claimant was treated as no longer economically 'active', and therefore ineligible for a right to reside, notwithstanding difficulties in relation to her new child's health and in arranging childcare which affected her ability to maintain jobseeking requirements. The court did not accept that the period of time spent in the UK, and in employment, was sufficient evidence of 'integration'. It went on to hold that the decision to refuse support was not 'disproportionate', a conclusion assisted by the right of entrants to acquire an unconditional right to support once they had been lawfully resident in the UK

for five years. The availability of permanent residence status helped to determine whether a claimant with less than this period of lawful residence was eligible for support, and in the claimant's case it was not possible to rely directly on Treaty provisions to provide a basis for a right of residence, and therefore support from the benefits system.

In some cases, it may be possible for particularly vulnerable groups in 'family' situations to be treated as having the requisite right of residence needed to access benefits like Income Support assisted by a combination of Treaty provisions and 'proportionality' principles, as illustrated by Commissioner's Case R (IS) 4-09. In that case the claimant, a non-EU national became seriously ill. His wife, a French national with a 'right to reside' as she was employed in the UK gave up her job to look after him. As no income was coming in to the household he claimed Income Support. The claim failed on the basis that as she was no longer economically active, and lost her residence rights, his residence rights as her 'family member' also ended. An appeal to the Commissioner was successful. Despite the absence of any explicit 'carer' category in the legislation (EU as well as UK) he concluded that a right of residence could be established on these facts, and in order to fill a lacuna in the scheme. Nor, he held, did it matter that at that stage both parties were no longer 'self-sufficient'.

Claimants in other groups which are not explicitly catered for in either the EU or UK legislation have not fared so well. The courts have held, for example, that even if EEA nationals have been economically inactive since their arrival, if they end their employment in circumstances in which they are not explicitly eligible for retention of 'worker' status under Directive 2004/38, then it is 'illegitimate judicial legislation' to stretch the meaning of the legislation to accommodate them by holding that they have retained 'worker' status and thus continue to have a 'right of residence' for the purpose of claiming Income Support. In *St Prix*¹⁶, a French teacher who had been working in the UK until six months into her pregnancy she ceased work. Surprisingly, perhaps, art 7 of the Directive does not expressly cater for pregnant workers, and an examination of the travaux préparatoires indicates, in fact, that pregnant women were specifically excluded from the ambit of 'worker' and retention provisions. Following *Dias*¹⁷, the Court of Appeal concluded that if a claimant does not come within one of the groups assisted by art 7(3)(a)-(d) she thereupon ceased to be a 'worker'. It declined to accept that a pregnant person has an illness or temporary incapacity, and could therefore retain worker status on that basis. As she was not a 'worker' at the relevant time she was not assisted by Regulation 1612/68, art 7 as she was not taking maternity leave on the basis of rights under an employment contract. If this constituted discrimination it was indirect rather than direct discrimination. Following the *Patmaince* decision, this could be 'justified'.

Family Membership and 'Dependency'. In many cases it may be far from clear whether a person is a 'dependant', especially if they have income of their own, or access to other resources and assets which are realisable. Claims may be particularly difficult to adjudicate when the claimant maintains a link in another EU country where she or he may also have familial or other support. The Court of Appeal in *Pedro* concluded that the question of whether or not a person has acquired the status of 'dependent family member' is a question of fact, applying guidance in ECJ cases like *Lebon*¹⁸.

For unmarried partners the requirement is that they demonstrate that they are in a durable relationship before a right to reside, and thus access to means-tested benefits like Income Support, can be established (Immigration (European Economic Area) Regulations 2006, reg 8(5)). For those in a new relationship this can be problematic, especially if the relationship comes under pressure, and lacks the characteristics of a stable relationship.

Such 'stability' was regarded as essential in one of the few decided cases, to date, namely Case CIS/612/2008 (14 August 2008). In that case Judge Jacobs held that the parties had not satisfied the criteria that he decided should be applied. The claimant had come to the UK from Spain in October 2005 to look for work. While in his first year here, during which he was entitled to be a JSA claimant during the reception period, he claimed and was paid jobseeker's allowance until October 2006, but by then it was accepted he was 'incapacitated' as a result of mental illness. Having formed a relationship with another Spaniard, who was pregnant with their baby, he then claimed income support. This was refused on the basis that he did not have a 'right to reside' at that stage.

He argued on appeal, unsuccessfully, that he was in a 'durable relationship' with his partner, who was also Spanish, and who had been living and settled in the UK for a long period. Judge Jacobs accepted that the couple were partners, but not that they were in a 'durable relationship'. In the course of his judgment he said that the word 'durable' imposed two requirements. 'The person must (i) be a partner of a Union citizen; and (ii) be in a durable relationship with that person. They are cumulative; (ii) is additional to (i). A couple are likely to be partners if they are living together with each other in the same household as husband and wife. There is no doubt that the couple in this case were partners by the time of the Secretary of State refused the claim for income support.' Judge Jacobs went on to observe that 'There were a number of factors in favour of the tribunal's decision. (i) They had only known each other for a year by the time of the decision under appeal. (ii) The course of how their relationship developed was not spelt out, but it is reasonable to infer that it developed over time and not immediately on first meeting, so that it had lasted less than a year by the date of decision. (iii) It was interrupted by a separation of two or three months. (iv) The claimant felt unable to commit himself before early 2007, for a variety of reasons. (v) The lack of certainty on the claimant's part is shown by his willingness to sleep in a car rather than stay full-time with Ms G. (vi) The claimant admitted that his mental state was affecting his decision-making. (vi) The stresses of pregnancy and mental health problems might present additional strains on the relationship.' He accepted that there

were considerations that assisted the claimant, for example the fact that they were having a child, and that they both had mental health problems which he suggested 'might lead to mutual understanding and support' However, on balance, he could not accept that the relationship was a durable one. In particular, he concluded that the tribunal was 'entitled to find that the relationship had not been shown to be durable, given the past history and the current strains on it'¹⁹.

'Extended' Family Membership. The concept of 'extended family member' is far from clear. For example, whilst groups like half-brothers and nephews may not be 'family members' within the scope of reg 7 of the Immigration (European Economic Area) Regulations 2006, they may be eligible under reg 8 as 'extended family members', subject to demonstrating dependency on the UK or EEA national's household. It is also uncertain whether host EU States like the UK are able to restrict able-bodied claimants who, instead of having a dependency of necessity, chose to be dependants in order to acquire a right of indefinite residence (and gain related social rights to benefits, and the right to work). These are among the points referred to the ECJ in a recent case²⁰.

- ¹ Income Support (General) Regulations 1987, SI 1987/1967, reg 21AA. The applicable amount of a 'person from abroad' will normally be 'nil'; see Sch 7, para 17 to the 1987 Regulations. Other benefits follow a similar model. The meaning of this test in practice has largely been developed by case law.
- ² Immigration (European Economic Area) Regulations 2006, SI 2006/1003, regs 5, 6(2)-(4). Those who have previously been working, but on a 'self-employed' basis (or in a job where they have been unable to demonstrate that they are an 'employee') are generally unable to assert a retained right to reside as an unemployed worker. This will prevent eligibility for support as a jobseeker or from the Social Fund; see *R (on the application of Tilianu) v Social Fund Inspector* [2010] EWHC 213 (Admin), [2010] 3 CMLR 246.
- ³ [1999] 4 All ER 677, [1999] 1 WLR 1937, HL.
- ⁴ *Abdirahman v Secretary of State for Work and Pensions* [2007] 4 All ER 882, CA.
- ⁵ The right to reside enables a number of groups, including workers who have retained that status after leaving employment temporarily; family members and extended family members of EEA nationals with a right to reside; and those who have acquired... 'permanent residence' after five years' continuous residence, to reside and work in the UK, work, and claim benefits. See, regs 6-15 of the 2006 Regulations.
- ⁶ Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 10(5)(d)(i).
- ⁷ *KG (Sri Lanka) and AK (Sri Lanka) v Secretary of State for the Home Department* [2008] EWCA Civ 13, (2008) Times, 7 February.
- ⁸ Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 8. Claimants who argue that they are extended family members may have to 'satisfy' stringent 'dependency' or other requirements in order to satisfy eligibility criteria; see *Bigia v Entry Clearance Officer* [2009] EWCA Civ 79, [2009] 2 CMLR 1144, 153 Sol Jo (no 8) 29.
- ⁹ *Harrow LBC v Ibrahim* [2008] All ER (D) 279; [2008] EWCA Civ 386, CA; and Case C-310/08 [2010] All ER (D) 248 (Feb), ECJ Grand Chamber. See also *Telxela v Lambeth LBC*, para [H201]. Following the case, the DWP issued important guidance about the scope of both judgments, for example, making it clear that support for spouses and family members that have retained a 'right to reside' also assists Housing Benefit claimants; see Housing Benefit & Council Tax Benefit Circular A10/2010.
- ¹⁰ [2009] EWCA Civ 1358, (2010) Times, 5 January.
- ¹¹ [2009] QB 318, [2009] All ER (EC) 40, ECJ Grand Chamber, [2009] All ER (EC) 40, ECJ Grand Chamber.
- ¹² *Patmalinece v Secretary of State for Work and Pensions* [2009] EWCA Civ 621, [2009] 4 All ER 738, [2009] 3 CMLR 1271, [2011] UKHL 11 (Supreme Court).
- ¹³ For commentary on the 'right to reside', the *Patmalinece* case at the tribunal and Commissioner's stages, see K Puttick 'Precarious Welfare: Access to Benefits and Support by EEA Nationals Residing in the UK', *The Adviser*, 130 November/December 2008; and K Puttick 'Paying their Way? Contesting 'Residence', Self-sufficiency, and Economic Inactivity Barriers to EEA Nationals' Social Benefits: Proportionality and Discrimination', *Journal of Immigration, Asylum and Nationality Law* 25(2) 280. The appeal to the Supreme Court coincided with the start of an investigation by the EU Commission into the operation of the UK's right to reside scheme, and its compatibility with the requirements of Directive 2004/38 and the residence and linked social rights accorded to EEA nationals and their family members. This does not, in formal terms, affect the operation of key provisions on support for spouses, family members, and dependants in UK implementing legislation like the Immigration (European Economic

Area) Regulations 2006, SI 2006/1003, or our courts' and tribunals' interpretation of the legislation.

14 [2010] 3 CMLR 20.

15 [2009] 2 CMLR 3.

16 [2010] UKUT 131 (AAC) Judge Ward, [2011] EWCA Civ 806.

17 [2010] 1 CMLR 4, CA. The court in *Dias* rejected the contention that art 7(3) itself was discriminatory.

18 *Centre Public d'Aide Sociale, Courcelles v Lebon*: 316/85 [1987] ECR 2811, [1989] 1 CMLR 337, ECJ.

19 For discussion of this and other aspects of extended family membership as a route to acquiring a 'right to reside' and access to benefits, social housing, etc see K Puttick 'Precarious Welfare: Family and Extended Family Members' 'Right to Reside', Support, and Work' The Adviser, 131 January/February 2009.

20 *MR (EEA Extended Family Members) Bangladesh* [2010] UKUT 449 (IAC). As Mr Justice Blake pointed out when making the referral, to succeed in their appeals the appellants needed to be able to rely on EU legislation, namely Directive 2004/38, as it was unclear whether UK national legislation could assist them.

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3. WORKING TAX CREDIT AND CHILD TAX CREDIT

Introduction

[H244]

As a result of the Tax Credits Act 2002, working tax credit and child tax credit were introduced from 6 April 2003.

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[H246]

Residence and 'Couple' Status. Only claimants who satisfy the system's residence requirements are eligible for support, and in practice this can be problematic for some groups. In the first place, if the claimant is part of a 'couple', then the claim must be made jointly;¹ and this generally means that both members of the couple must be in the UK at that time². This may be difficult if one of the couple is living or working abroad for other than short periods. Entitlement under an award made after a couple has claimed jointly will cease if one of the couple is no longer able to make a joint claim – for example after one of the couple has ceased to be eligible, or after ceasing to live together as a couple in circumstances where HMRC determine that the parties are living apart and this is likely to continue. For some groups, for example claimants from another EU/EEA country, the expectation is that a couple who have claimed jointly must continue to be living together as a couple in the UK if presence requirements are to be satisfied, and eligibility is to continue. HMRC decision-makers operate in accordance with provisions in the Tax Credits Act 2002 which are slightly different to those in other social security legislation. Specifically, for tax credits purposes a 'couple' means:

- (a) 'a man and woman who are married to each other and are neither –
 - (i) separated under a court order, nor
 - (ii) separated in circumstances in which the separation is likely to be permanent,
- (b) a man and woman who are not married to each other but are living together as husband and wife,
- (c) two people of the same sex who are civil partners of each other and are neither –
 - (i) separated under a court order, nor
 - (ii) separated in circumstances in which the separation is likely to be permanent, or
- (d) two people of the same sex who are not civil partners of each other but are living together as if they were civil partners.'

CTC, 'Family Allowance' and Residence. With increasing numbers of EU citizens working and residing in the UK, and then returning for periods of residence in their home countries, there are a number of UK benefits which may be accessible by those claimants even after they have ceased to be 'present' or residing in the UK. In some cases CTC has been paid with other benefits such as long-term Incapacity Benefit to those who are no longer resident here. This has been on the basis that CTC is a 'family allowance' under Regulation EC 1408/71, art 1. Whilst recognising the important role that CTC can play in supplementing household income, particularly for claimants with low incomes, and who are responsible for the care of children, the status of CTC as a 'family allowance' has never been entirely clear. It has now been held¹ that whilst CTC is part of both the UK's and EU's social security systems, and comes within 'social advantage' provisions, art 1 defines family allowances as periodical cash benefits granted by reference to the number, age, and other characteristics of the household's family members. For some kinds of support, for example, where pensioners receiving State income from sources like incapacity benefits also claim CTC, CTC may not be within the definition. Access may be restricted, and this will take groups like pensioners who are no longer resident in the UK (whatever their future intentions), and who rely on Regulation 1408/71, arts 77-79 to claim family allowances, out of eligibility. However, it should be noted that CTC remains a 'family benefit' for some purposes. Furthermore, as a result of changes that came into effect in May 2010 family benefits may be claimed after the claimant has returned to another EU State, and while residing in that State².

¹ Tax Credits Act 2002, s 3(3)(a). The legislation says a claim 'may' be made jointly: but guidance suggests that couples will normally be expected to make a joint claim, taking into account resources that should properly be aggregated."

² Tax Credits Act 2002, s 3(5A):

³ *PF and SF v HM Revenue & Customs* [2010] UKUT 48 (AAC) (CTC/1853/2009).

⁴ This is the effect of 'co-ordinating provisions' in Regulation EC 883/2004 and changes under the regulations that came into force from 1 May 2010.

5 People in Special Circumstances

1. GENERAL

[H401]

The rules for the benefits described in Chapters 2, 3 and 4 above provide a commentary on key benefits in the UK system, and discuss eligibility criteria. In certain circumstances special rules may affect entitlement to certain benefits, or the right to be paid them.

2. PEOPLE COMING FROM ABROAD OR GOING ABROAD

Coming from abroad

[H402]

People coming to the UK from abroad may have their entitlement to benefits affected in a number of ways. If they are 'subject to immigration control' they may be excluded from entitlement for that reason. This is the result of a pervasive restriction on access to benefits (including non means-tested as well as means-tested benefits) that is in the Immigration and Asylum Act 1999¹ and in primary and secondary legislation dealing with specific benefits. In addition, some benefits are subject to specific restrictions on eligibility. For example, in the case of Income Support, like other means-tested benefits, a 'person from abroad' is treated as having an applicable amount of 'nil' – and cannot, therefore, be paid IS while that status continues².

Other Sources of Support. Other forms of welfare assistance are also barred out for those who are subject to immigration control, and this includes support from local authorities' social welfare services under various welfare measures like the Social Work (Scotland) Act 1968 (see s 120 of the 1999 Act). Asylum claimants are generally removed from eligibility for mainstream benefits support unless and until they are able to demonstrate 'refugee' status. Instead, they may be eligible for assistance under the separate support system catered for by Part VI (ss 94–101) of the Immigration and Asylum Act 1999. Support normally requires the claimant to be destitute, or likely to become destitute. Accommodation may be arranged in appropriate cases. Local authority support under the National Assistance Act 1948 and other community care legislation is barred out by s 21(1A) of that Act and restrictions in the Nationality, Immigration and Asylum Act 2002, s 54 and Sch 3. It may be provided, exceptionally, if the person's needs go beyond destitution – for example if they have serious health problems. However, the scope for such residual support is limited to cases of significant needs, as made clear by the Lords judgment in *R (M) v Slough Borough Council*³.

¹ Immigration and Asylum Act 1999, s 115. For exceptions to this general rule see the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, SI 2000/636, reg 2, Schedule.

² Income Support (General) Regulations 1987, SI 1987/1967, reg 21AA.

³ [2008] UKHL 52, [2008] 1 WLR 1808. Given that the claimant's needs were being met by the NHS no local authority duty was engaged. There may still be cases where exceptional support needs are not being met which engage residual support duties, as illustrated by cases like *R (Pajazitli) v Lewisham LBC* [2007] EWCA Civ 1351 (requiring agencies to assess the claimant's needs by asking whether claimants satisfied the 'destitution plus' test: an approach that also required them to answer the test correctly).

[H402.1]

Further restrictions on support for people from abroad are in the Nationality, Immigration and Asylum Act 2002, s 54 and Sch 3, particularly if they are 'overstayers', or they are in the UK in breach of immigration law. However, this is now subject to human rights-related exceptions which enable decision-makers in authorities and welfare agencies to avoid being in breach of Convention rights or EU law. In the family context, in particular, there are important restrictions in the 2002 Act that can prevent accommodation, financial, and other support being provided to a children in need and parents of those children, under the Children Act 1989, s 17 and analogous provisions in the Children (Scotland) Act 1995, s 22, for example where the parent has 'overstayed', or no longer has residence rights¹. The Human Rights Act 1998 in conjunction with Sch 3, para 3 of the 2002 Act, may require an agency or local authority to provide (or maintain) support where not to do so would entail a breach of the claimant's Convention rights. In this respect, article 8 may be particularly potent, as illustrated by leading cases like *Clue*². In that case a local authority had refused to provide support to a Jamaican mother and her children (British citizens who had been born in the UK since her arrival) pending determination of her application for indefinite leave to remain. The authority considered that there was no interference in their 'family life' as this could be enjoyed in Jamaica rather than the UK. It was held that support should have been provided. Except in 'hopeless or abusive cases' support should be

provided in such cases, and the authority was not able to pre-empt the result of a claimant's application for indefinite leave, which is a matter for the Home Office to determine, not welfare agencies and local authorities. Although the Court of Appeal accepted that it was necessary for welfare agencies like local authorities to make an assessment of immigration status for some purposes, it was contrary to the 'division of functions' allocated by Parliament for them to decide if a claimant for support was eligible for leave to remain. Accordingly, support should be provided pending that determination in order to avoid a breach of article 8.

- 1 See, in particular, the Nationality, Immigration and Asylum Act 2002, s 54 and Sch 3, paras 1(g), (i), 2, 3, and 7.
- 2 *R (Clue) v Birmingham City Council* [2010] 4 All ER 423, [2010] 2 FLR 2011, CA.

[H402.2]

EEA Nationals and 'Family Members'. A national of a European Economic Area country, or a country with which Great Britain has a reciprocal agreement on social security matters, may be entitled to certain benefits. If conditions for a right of residence are met, and are maintained¹, he or she is not a 'person from abroad', and is therefore not barred from benefits. Similarly, a 'family member of such nationals, including the spouse or child (who may be from a third country), also has a right of residence and right to work in the UK; and can access benefits and tax credits². However, that right depends on certain underlying conditions being met and retained. Also, on the 'Mattern' principle, in order to maintain the spousal/family connection EU law requires both parties to reside together in the host state if the right of residence of one party (for example a non-EU national) depends on the right of residence of the other party (*Mattern v Ministre du Travail et de l'Emploi*: C-10/05³. In the event of divorce, death of a spouse who is an EEA national (and from whom a right of residence 'derives') or coming within one of the other exceptions in the legislation that facilitate retention of residence rights, the spouse who is not an EEA national may acquire her own right of residence, independent of the spousal connection. However, this requires the strict conditions for retention of a right to reside that are in the Immigration (European Economic Area) Regulations 2006 being satisfied⁴. Provision is made, for example, for retention of a right to reside by a divorced spouse as long as 'prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration'. Other retention options are available in reg 10, for example if the former spouse has custody of a child of the EU/EEA national; or a right of access in the UK to a child of the EU/EEA national. In practice the strict conditions for retention can and often do bear down hard on a spouse or partner who divorces in the one year 'reception' phase following arrival in the UK – or before she or he can meet the other conditions for a retained right to reside.

- 1 Directive No 2004/38/EC and the Immigration (EEA) Regulations 2006, SI 2006/1003 give EEA nationals and their family members 'free movement' rights that are Treaty-based. However, eligibility is subject to the conditions and limitations in the Treaty (arts 20 and 21 TFEU, ex arts 17, 18 TEC), and restrictions in Directive 2004/38, including expectations that claimants should not be, or at risk of becoming, a burden on the social assistance systems of the host State. Eligibility is subject to the conditions and limitations in the Treaty (arts 20 and 21 TFEU, ex arts 17, 18 TEC), and restrictions in Directive 2004/38, including expectations that claimants should not be, or at risk of becoming, a burden on the social assistance systems of the host State.
- 2 As a result of the 'right to reside' that is given to spouses, children, and other family or extended family members by Directive 2004/38, and the Immigration (EEA) Regulations 2006, SI 2006/1003, regs 7-10.
- 3 [2006] Imm AR 471, ECI.
- 4 Immigration (EEA) Regulations 2006, SI 2006/1003, reg 10. Reg 10(5)(d)(i), for example, provides for retention of a right to reside by a divorced spouse as long as 'prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration'. Other retention options are available in reg 10, for example if the former spouse has custody of a child of the EU/EEA national; or a right of access in the UK to a child of the EU/EEA national. However, it may be difficult for some groups, including spouses who are third country nationals, to satisfy the demanding conditions for retaining residence rights: See [H166] and K. Puttick 'Precarious Welfare: Family and Extended Family Members' 'Rights to Reside', Support and Work', *The Adviser* 131 Jan/Feb 2009 9; and K. Puttick 'Recognition of Overseas Unilateral Divorce after K v K: the Implications for Divorced Spouses and Child Dependents' Financial Support, State Welfare and Public Policy', *Welfare & Family: Law & Practice* 2008 15.4 32, 98-100.

[H402.3]

'Residence' and Migration Status Gateways and Barriers. To be eligible for benefits, and to be a person with a 'right to reside', some EU citizens, notably those from the newer Accession States since May 2004, must have been working and registered in accordance with the requirements of the Home Office's Worker Registration Scheme. If they cease work before completing a year's continuous service they will not be eligible for benefits like income support¹. In the leading case of *Zalewska* the Lords, by a majority, held that the scheme required a national from an A8 country (Poland) who had experienced domestic violence, and had significant needs, to have completed 12 months continuous, registered service before she was eligible to claim Income Support. Although she had worked for 12 months not all of that period was in registered employment, so she remained a 'person from abroad'. They rejected the argument that the scheme was disproportionate or discriminatory. In that case the claimant had experienced domestic violence – a factor that can, in some circumstances, enable a person to establish a right to reside that is independent of the spouse or family member that is responsible for the violence (reg 10(5)(d)(iv)), but which would not have assisted Ewa Zalewska in her particular situation given that her partner would not have had a right to reside, and her status did not derive from her association with him. In practice, the domestic violence route is limited, and only assists those who can satisfy the other criteria in reg 10. In particular, it only relates to the 'continued right of residence in the United Kingdom of the person ...'. The threshold that has been set is also high, and represents a significant hurdle to get over for many claimants. Retention must be 'warranted by particularly difficult circumstances ... while the marriage or civil partnership was subsisting'.

Although the WRS scheme ended from 1 May 2011, this was subject to transitional provisions². The government has also made it clear that it will impose transitional controls on access to the labour market in accordance with Accession Treaty provisions to any entrants from other States joining the EU in the future (Written Ministerial Statement on the Closure of the WRS Scheme, Home Office 10th March 2011). Accordingly, the principles that have been developed and the case law may still be relevant. It is also open to a Member State to reimpose controls if labour market conditions or 'disturbances' merit this. The EU Commission approved such restrictions in the case of Spain after an application in July 2011 as a result of Spain's high unemployment, and the large number of Romanian nationals (nearly a million according to the EU) residing in Spain.

¹ In the leading case of *Zalewska v Northern Ireland Department for Social Development* [2008] UKHL 67 the Lords, by a majority, held that the scheme required a national from an A8 country (Poland) who had experienced domestic violence, and had significant needs, to have completed 12 months continuous, registered service before she was eligible to claim Income Support. Although she had worked for 12 months not all of that period was in registered employment, so she remained a 'person from abroad'. They rejected the argument that the scheme was disproportionate or discriminatory. In that case the claimant had experienced domestic violence – a factor that can, in some circumstances, enable a person to establish a right to reside that is independent of the spouse or family member that is responsible for the violence (reg 10(5)(d)(iv)), but which would not have assisted Ewa Zalewska in her particular situation given that her partner would not have had a right to reside, and her status did not derive from her association with him. In practice, the domestic violence route is limited, and only assists those who can satisfy the other criteria in reg 10. In particular, it only relates to the 'continued right of residence in the United Kingdom of the person ...'. The threshold that has been set is also high, and represents a significant hurdle to get over for many claimants. Retention must be 'warranted by particularly difficult circumstances ... while the marriage or civil partnership was subsisting'.

² Accession (Immigration and Worker Registration) (Revocation, Savings and Consequential Provisions) Regulations 2011, SI 2011/544. WRS requirements are still relevant to claims for support in the period before revocation.

[H402.4]

The Right to Reside and 'Qualified Person' Status. European Economic Area nationals residing in the UK, but who are not workers or economically self-sufficient, cannot access income support, housing benefit, council tax benefit, or pension credit; and the fact that they may be lawfully in the UK, and residing here, is not sufficient, as they must also have a 'right to reside', for example as a worker or workseeker¹. Similarly, while family members and extended family members have a right to reside on the basis of their familial connection, the right is susceptible to being lost in some contexts, for example if the EU/EEA spouse gives up his job and leaves the country – or if there has been separation in circumstances in which the relationship has clearly ended, and the parties are living apart in different countries. At that point, the non-EEA national's position may be difficult; and she or he may have lost the right to work, and to access State benefits like Income Support (as well as the ability to access local authority housing support). Among other requirements, the expectation in Regulation 2004/38 is that such claimants must be economically active, or self-sufficient in order to retain their right of residence and therefore right to support from the host State. One uncertainty has been whether a right of residence can be retained on an alternative basis, namely the provisions of Regulation 1612/68, art 12 if the claimant – a provision that assists primary carers of children of

former workers if those children have started in the UK's education system. This was an issue highlighted in the case of *Harrow London Borough Council v Ibrahim*: C-310/08². After the Court of Appeal in that case referred to the ECJ, the Grand Chamber of that court ruled that Mrs Ibrahim could establish a derived residence right on the basis that her child had started in UK education and needed a parent to assist her realise her right to continue in that education. Furthermore, the right of residence is not subject to a condition that the person must have sufficient resources and comprehensive sickness insurance cover: a consideration that can also assist parents who are EEA nationals, but who would also normally be subject to requirements that they are either economically active or 'self-sufficient' and not liable to be or become a burden on the host Member State's social assistance system, as in *Teixeira*: C-480/08, decided at the same time as *Ibrahim*. A similar result to that in *Teixeira* was achieved in the *Zambrano* case, another important case in the 'family' context. In that case, a Colombian parent of a child who had acquired Belgian residence while the family lived in Belgium was accorded a derived right of residence in order to protect the EU citizenship rights of the child. More precisely, the European Court ruled that art 20 of the Treaty (TFEU) precludes a Member State from refusing or withdrawing a right of residence (and social benefits, including the right to work) to a third country national who is the parent of an EU citizen if the effect of this would be to prevent him or her enjoying citizenship-related rights, including residence in a Member State. Arguably, this opens up a new, 'citizenship' based dimension to derived residence rights, although unlike *Ibrahim* and *Teixeira* (where the parties were plainly not economically active or 'self-sufficient') Mr Zambrano had been in employment, and was able to return to employment subject to the authorities issuing him with a work permit³. The case is significant in that the *Zambrano* family were not even 'beneficiaries' of free movement rights. Interestingly, the result was reinforced by 'family unity' rights under ECHR article 8, although the case came too early for the family to rely on the EU Charter of Fundamental Rights that now apply and which are legally enforceable under the Treaties, including article 7 (respect for family life) and article 24 (children's protection and 'best interests'): clearly a new dimension to residence and support rights as provides a further basis that assists in the assertion of residence and linked social rights in appropriate cases.

¹ *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657 (also reported as R(IS) 8/07). The claimants only had a right to reside, and therefore eligibility for means-tested benefits like Pension Credit, if they were 'qualified persons' within the meaning of the Immigration (European Economic Area) Regulations 2004, SI 2004/1219. A claimant from an EU country who has ceased work involuntarily must normally make a valid claim for Jobseeker's Allowance in order to retain a right to reside as a workseeker. However, it has been held by a three-judge panel of the Upper Tribunal, having regard to the purpose of the scheme and to assist those who have been affected by an economic dismissal or other involuntary unemployment, that it is sufficient to indicate that work is being sought, and trigger a registration in that way for residence rights to be retained; see *Secretary of State for Work and Pensions v FE* [2009] UKUT 287 (AAC) (CIS/184/2008).

² [2010] 2 CMLR 51, [2010] ELR 261, (2010) Times, 26 February.

³ *Zambrano v Office National de l'Emploi (OneM)* [2011] ALL ER (EC) 491. *Teixeira* is reported at *Teixeira v Lambeth LBC* (C-480/08) [2010] 2 CMLR 50, Grand Chamber.

[H402.5]

Regardless of immigration status, many benefits have residence and presence requirements (including the 'habitual residence test') which mean that there is no entitlement until the claimant has lived in Great Britain for a period of time¹. In the case of tax credits, there are 'presence' and residence tests².

Residence, Integration & 'Proportionality' Requirements. Even if a claimant is an EU national, and lawfully residing in the UK, she may be excluded from means-tested benefits, including so-called 'hybrid' benefits that straddle the divide between social security and social assistance (such as Pension Credit) if she is not self-sufficient, and has not worked and therefore satisfied 'economic integration' requirements since arrival. Although this may engage provisions in measures like Regulation (EC) 1408/71 (Regulation 883/04 from 1 May 2011) which bar out indirect discrimination, the discriminatory treatment involved can be 'justified'. This was confirmed in the Supreme Court case of *Patmalinec*³. Since that case, it has been held that groups like pregnant women who have been in employment, but who have given up that employment before giving birth, are unable to retain 'worker' status as this is not explicitly catered for in the free movement provisions in Directive 2004/38, art 7. Even if this is discriminatory, as a result of the *Patmalinec* decision such discrimination is indirect, and can therefore be justified. As the claimant is no longer a 'worker', and is not able to derive a right to maternity leave from her contract of employment or the employment relationship, she is unable to claim the protection of the provisions in reg 7 of Regulation 1612/68². However, less favourable treatment of EU nationals who are in employment, for example by withholding the 50 Plus element used in the calculation of WTC has been held to be discriminatory under Regulation (EC) 1608/68 (and not justified) in a tax credits case³. The details on all these points are complex and vary according to different benefits, and expert advice should in most cases be sought.

- 1 As in *Nessa v Chief Adjudication Officer* [2000] Fam Law 28, HL. Habitual residence required that a person should reside in the UK for an appreciable period of time in order to establish her residence before eligibility for IS could be shown. The test has been applied in later cases like *Gingi v Secretary of State for Work and Pensions* [2002] 1 CMLR 20, CA.
- 2 The Tax Credits Act 2002, s 3(3) requires that a claimant must be 'in the United Kingdom'. Regulations made under s 3(7) prescribe when a person is to be treated as in, or not in, the United Kingdom. A requirement to be 'ordinarily resident' is imposed by the Tax Credits (Residence) Regulations 2003, SI 2003/654, reg 3(1). Groups like European Economic Area workers are generally eligible for tax credits if they are working legally in the UK (and they are not subject to the one-year employment continuous service requirement that applies to other means-tested benefits like income support). As long as a child tax credit claimant has a 'right to reside' in the UK, he or she may claim the benefit. Guidance on this is in the Tax Credits Technical Manual, para TCTM02003 (accessible at the HMRC website).
- 3 *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, discussed in K Puttick, 'Discrimination, Integration and the "Right to Reside" after Patmalniece', *The Adviser*, 145 May/June 2011, pp 8-13.
- 4 *St Prix v Secretary of State for Work and Pensions* [2011] EWCA Civ 806. Although the decision is harsh, and on the face of it discriminatory, as a construction of the scope of art 7 it is clearly correct, particularly given that the travaux préparatoires before the article's enactment confirms that pregnant women were excluded from the scope of 'worker' status and retention provisions – and the decision was assisted by the precedent set by *Dias v Secretary of State for Work and Pensions* [2010] 1 CMLR, CA. The European Court in that case (Case C-325/09: Judgment of the Court 31 July 2011) also held that the claimant had not acquired 'permanent residence' given that she had not satisfied the conditions for residence in Directive 2004/38 art 16(1), (4) that enabled her to acquire that status based on legal residence. Therefore she had not acquired an unconditional right to benefits support.
- 5 *MR v HMRC* [2011] UKUT 40 (AAC) (26 January 2011).

[H402.6]

Exceptionally, and assisted by the deployment of principles established in *Baumbast*¹ and 'proportionality' requirements, a right of residence for the purpose of claiming Income Support may be asserted. This was shown in a case where an EU national had to give up her employment in order to care for her husband. From that point, both members of the couple had ceased to be self-sufficient. The judge in that case was able to identify a lacuna in the scheme that facilitated the acquisition of a residence right². In the later case of *Kakzmarek*³ in the Court of Appeal, however, an attempt to base a right of residence directly on the treaty and free movement provisions failed where a Polish national had qualified person status, first as a student and then as a worker in a care home for three years. She argued that this was sufficient to demonstrate the required level of 'integration' in the UK host community, and that it should not therefore matter that she had ceased work after a period of maternity leave – especially as she intended to return to paid employment as soon as she was able to. Having lost her 'right to reside' it was not disproportionate to bar her out of benefits. This was assisted by the introduction of a new right of permanent residence after five years residence, and this helped the court to gauge the parameters of proportionality. In this context it was not disproportionate to refuse support to refuse support to a claimant who had ceased to be a jobseeker and was no longer economically active, and would still require a further two years of residence before she could acquire permanent residence (and at that stage rely on social assistance unconditionally).

More recently, the Upper Tribunal has sought to clarify the position of claimants in circumstances that are not explicitly catered for, either by Directive 2004/38 or the UK legislation. It is unclear, for example, whether a claimant who has clearly had long-term residence in the UK, and therefore appears to be well settled in terms of 'social integration' criteria (for example on the basis of previous self-employment, the need to avoid creating obstacles to the 'right of establishment', and to secure apparent derived rights based on children who have made a start in the UK education system) should be accorded a right of residence. On the face of it, the cumulative effect of such features of their circumstances would indicate that they should be treated as having a right of residence, and therefore access to State benefits. However, given our courts' apparently strict stance on the need to satisfy 'economic integration' criteria, and to maintain their connection to the labour market as an employed person, or else in terms of activity in a self-employed capacity (thereby contributing to the community, and avoiding becoming dependent on the State welfare system), their status is far from clear. This was the issue in the case of *Secretary of State for Work and Pensions v LC (IS)*⁴. In that case the claimant came to the UK before Poland acceded to the EU, established herself in self-employment that was clearly within the scope of the Treaty provisions (art 49 TFEU, ex art 43 TEC), continued in self-employment at different time after Poland's accession in 2004, and subsequently became a primary carer of her child. Her child had, by this stage, started in the UK education system – a factor suggesting that she also may have acquired a derived right of residence on the principles

established in the *Teixeira* case, although this was uncertain given that the case law on such derived rights has generally focused on primary carers or the partners of primary carers who have previously had 'worker' status. A key consideration in such cases is also the need to ensure that free movement and the right of establishment are not impeded. It was unclear, however, whether such self-employment, and particularly intermittent self-employment, could be equated in EU and UK law with 'employment'. On the strength of these factors it would appear that the claimant was clearly sufficiently established to merit a right of residence, and therefore eligibility for Income Support. Nevertheless, it is perhaps indicative of the uncertainties in this area of benefits system that the judge in the Upper Tribunal opted to refer the case to the Court of Justice of the EU,

¹ *Baumbast and R v Secretary of State for the Home Department* (Case C-413/99) [2002] ECR I-7091, [2002] 3 CMLR 23, ECJ.

² R(IS) 4/09 (Judge Rowland).

³ *Kaczmarek v Secretary of State for Work and Pensions* [2009] 2 CMLR 3, CA.

⁴ [2011] UKUT 108 (AAC).

[H402.7]

EU Guidance on 'Proportionality'. Soon after the decision in *Kaczmarek*, the EU Commission issued guidance to Member States' authorities, including welfare agencies, about the application of free movement provisions. Among other things, it reminds decision makers that decisions which affect access to social assistance should be taken 'proportionately'. To this end, a 'proportionality test' is recommended. This emphasises the need for several key questions to be addressed, and these encompass considerations referred to in Recital 16 of Directive 2004/38 when deciding whether a claimant has become a burden on the host State's social assistance system and is at risk of losing their right of residence (and therefore their right to continue accessing support)¹. A key point is whether it is a 'case of temporary difficulties'. The process should also take into account the duration of residence, the personal circumstances of the claimant, and the amount of aid granted when deciding whether the beneficiary has become an unreasonable burden on the social assistance system. The guidance, particularly when considered in conjunction with the key points in Recital 16 to Directive 2004/38 (highlighting the need to consider factors like the duration of residence and the personal circumstances of claimants before decisions on residence are made), suggests that UK guidelines and practice² may be out of kilter with EU requirements³.

More recently, the 'non-regression' principle, a strand of 'proportionality' requirements, has been invoked when contesting the refusal or withdrawal of a right to reside. However, in *Miskovic* the Court of Appeal rejected a case where the appellant sought to rely on this. It concluded that requiring a former failed asylum claimant who had previously been allowed to work while he applied for asylum to comply with the employment requirements of the Worker Registration Scheme (WRS) was not unreasonable or 'disproportionate'. Nor was it unreasonable to refuse to allow him aggregate any of the time he had spent in employment while he was an asylum claimant to count towards completion of the 12 months WRS-registered employment before benefits could be claimed⁴.

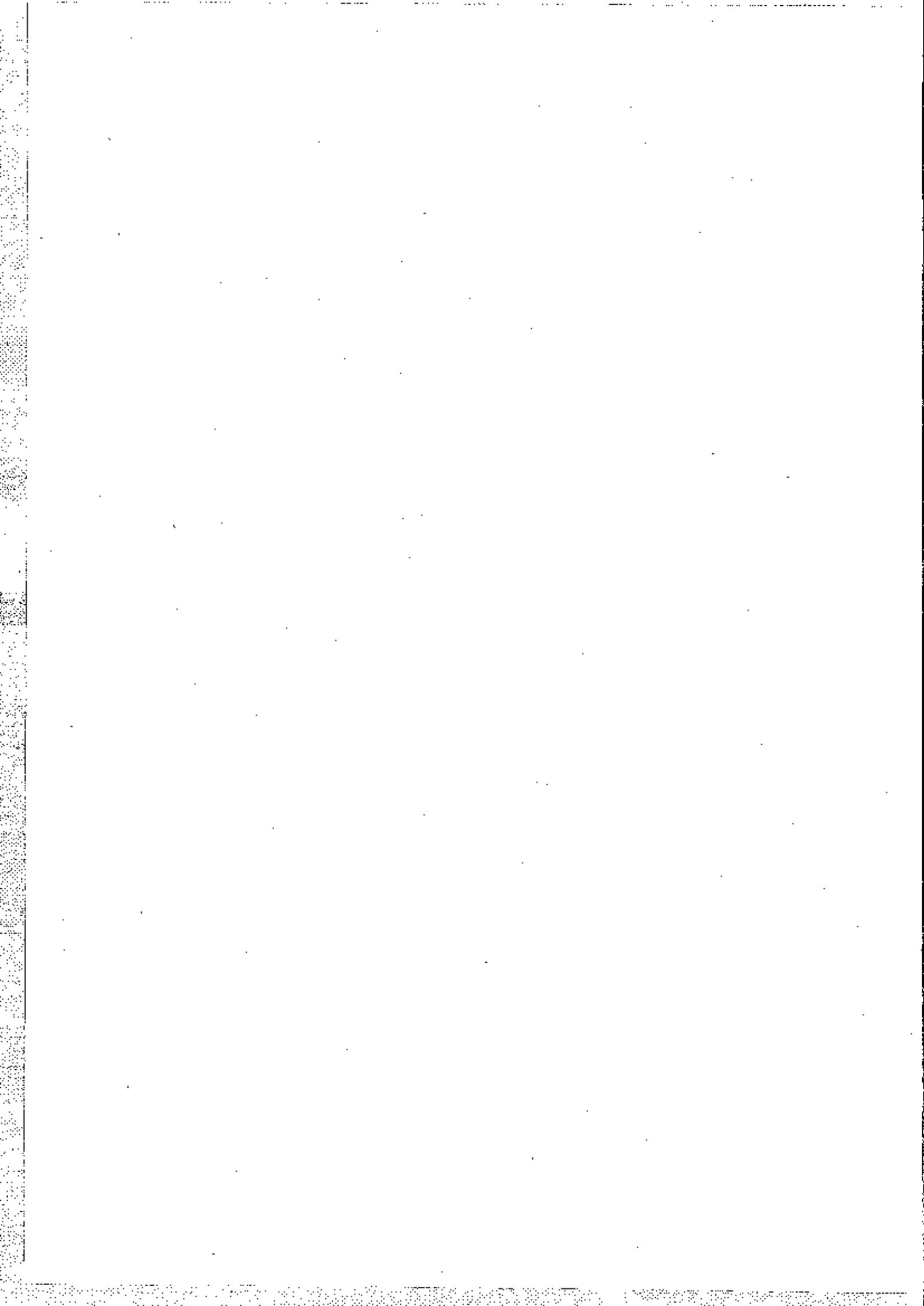
¹ Section 2.3 of the 'Communication from the Commission to the European Parliament and the Council on Guidance for Better Transposition and Application of Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States', Brussels 2.7.09 COM (2009) 313 Final. It is not clear whether the operation of UK adjudication procedures have implemented this and other aspects of 'proportionality' requirements; and the issue did not have to be considered by the Supreme Court in *Patmalnieca*.

² For DWP guidance to decision-makers, see 'Habitual Residence and the Right to Reside' in the *Decision Makers Guide*, Part 3, Vol 2, ch 7 (updated Feb 2011).

³ For a fuller analysis of this, discussion of DWP guidance to decision-makers on determining issues of 'residence' and eligibility for support, and relevant case-law, see K. Puttick 'Paying their Way? Contesting 'Residence', Self-Sufficiency, and Economic Inactivity Barriers to EEA Nationals' Social Benefits: Proportionality and Discrimination Requirements', *Journal of Immigration, Nationality and Asylum Law* (2011) Vol 25(3).

⁴ *Miskovic v Secretary of State for Work and Pensions* [2011] 2 CMLR 20, CA.

WORK 9



Discrimination, 'integration' and the Right to Reside after Patmalniece

In this article Keith Puttick considers the way the Right to Reside and Integration requirements affect European Economic Area (EEA) claimants who have not been economically active, and looks at the scope for discrimination provisions to assist claimants after the Supreme Court case of Patmalniece.

As the Patmalniece case¹ highlighted this year, there are a number of groups of EEA nationals in the UK who are barred out of 'special non-contributory benefits'² including mainstream sources of support like Income Support, Pension Credit, etc. This is as a result of the way Right to Reside (RtR), habitual residence and integration requirements operate. This is particularly problematic for claimants who have not been in employment ('economically active') since arriving in the UK, or who have worked or been self-employed but have not then retained a RtR under the UK's legislation dealing with retention after ceasing employment, retiring, or becoming permanently incapacitated from work.³ In some cases EU Law can confer a *derived* residence right on such claimants, for example if they are caring for a child or other person who has a RtR or residence rights under EU law. This was illustrated last year in the Ibrahim case.⁴ Ms Ibrahim was a Somali national married to a husband who had acquired Danish citizenship. She and her children had been permitted to enter the UK to join him. However, he ceased to be a 'qualified person' after claiming Incapacity Benefit, and he did not retain a RtR after leaving the UK. The ECJ held that as the principal carer of children who were 'installed' in the UK, and who had started their UK education, she acquired residence rights in *that* capacity. The children's right to complete their education, and the carer's right to reside in order to facilitate this, were both assisted by the equal treatment provisions in Reg 1612/68.⁵

Before considering the role that equal treatment and anti-discrimination measures play in assisting claimants who are EEA nationals or their family members, it is necessary to consider the Patmalniece case, and the recent European Court discrimination case of Bressol, in more detail.

PATMALNIECE & DISCRIMINATION

Galina Patmalniece came to the UK in June 2000. She claimed asylum on the basis that Latvians of Russian origin, like her, faced persecution. However, by January 2004 all attempts to establish refugee status had failed. She was destitute apart from a Latvian pension of about £50 a month. Even when compared to asylum claimants who were assisted under the National Asylum Support Scheme at the time, she had very little income on which to live. Four months later, after Latvia joined the EU from 1st May 2004, she claimed Pension Credit (PC). However, this was refused as the State Pension Credit Act 2002 s.1(2) required claimants to be 'in Great Britain'; and she could not satisfy this requirement unless she was a 'worker' or 'qualified person', or could show she was habitually resident. The President of Tribunals allowed her appeal on the basis of direct discrimination within art 3 of Reg 1408/71. He concluded that as UK nationals did not face this obstacle then EU nationals should not have to do so either. He held the requirements to be 'unlawful and of no effect'. Commissioner Mark Rowland then allowed an appeal by the Secretary of State.⁶ He accepted that the RtR requirements imposed on PC claimants, which all UK nationals but only some EEA nationals could pass, was discriminatory. However, unlike judge in the 1st Tier tribunal he treated the discrimination as *indirect* rather than *direct*. This meant it could be justified as a proportionate means of achieving a legitimate aim, namely the protection of the UK's

public finances. As Pension Credit had the characteristics of social assistance there was no obligation to support a claimant who was not self-sufficient.

The Court of Appeal rejected a further appeal.⁷ A key issue for the court was whether the anti-discrimination provisions in Reg 1408/71 could assist the claimant. It noted how the court had previously considered the position of Income Support and Pension Credit claimants in *Abdirahman*.⁸ Although the claimants in that case were EU nationals and were lawfully resident in the UK, they did not qualify for a RfR. The court concluded that the discrimination complained of did not come within the protection of the EC Treaty. The IS claimant could not show that she had residence rights under UK legislation, nor could she show that she had a residence right under EC Treaty art 18, particularly as she was not self-sufficient. This was underlined by *Dir 90/364*⁹ which enabled a Member State to make it a condition of the grant of a right of residence to nationals of other Member States that they have sufficient resources to avoid becoming a burden on its social assistance system. In *Kaczmarek*¹⁰ the claimant had been a student, and then worked for three years. However, she had later *become* economically inactive, and claimed IS. She relied on art 18 to establish a right of residence, arguing that it was disproportionate to deny her a right of residence given that she had satisfied social integration requirements on the basis of her past work and status. The appeal failed, and the court held that it was not a disproportionate response to bar her out of support. It made no difference that she had been working before becoming economically inactive

DID REG 1408/71 ASSIST?

Unlike the claimants in *Abdirahman* and *Kaczmarek*, Galina Patmalniece relied on Reg 1408/71, particularly the equal treatment provisions in art 3(1). Despite this, the result was eventually the same. Giving the leading judgment in the Court of Appeal, Lord Justice Moses concluded that the conditions for Pension Credit were not overtly based on the nationality of the claimant. He said that the fact that nationals from other member States could qualify, whether as workers, members of the same family, or for other reasons, 'precludes such a conclusion'. Although the restrictions were indirectly discriminatory, they could be justified. The UK, as the claimant's country of residence, could impose conditions of entitlement that required either 'economic integration or a sufficient degree of social integration'; and these did not affect her eligibility to her Latvian pension (as this could be 'exported' under art 10(1) of Reg 1408/71), or disadvantage her in the exercise of freedom of economic migration within the EU. He commented that the requirement for claimants to have a RfR if they were not within the scope of the State Pension Credit Regulations 2002¹¹, ie if they did not have 'worker' or 'qualified person' status, had been added from 1st May 2004 in changes made by the Social Security (Habitual Residence) Amendment Regulations 2004¹² as a result of changes aimed at excluding claimants without resources, and who had not worked, living on income-related benefits.

There was then a further appeal to the Supreme Court.

DISCRIMINATION: SUPREME COURT'S REASONING

Giving the leading judgment of the Supreme Court, Lord Hope (at para 20) said that there were three issues raised by the appeal:

- (1) Did the conditions of entitlement to benefit in reg 2 of the 2002 Regulations give rise to direct discrimination for the purposes of art 3 of Reg 1408/71?
- (2) If they gave rise only to indirect discrimination, was that discrimination objectively justified on grounds independent of the appellant's nationality?

(3) If the indirect discrimination would otherwise be objectively justified, was that conclusion undermined by the favourable treatment given by reg 2(2) to Irish nationals?

On the first issue, he said that the disadvantage that nationals of other Member States encountered when trying to meet the requirements of reg 2(2) 'is due entirely to their nationality' and had a RtR been the sole condition of entitlement 'it would without doubt have been directly discriminatory on grounds of nationality' (para 29). However, he thought that the effect of reg 2(2) had to be looked at in the context of the scheme in s.1(2)(a) of the State Pension Credit Act 2002 and reg 2 'as a whole'. On that basis, while most UK nationals were habitually resident, others were not. Although they could all meet the RtR requirement in reg 2(2) because of their nationality, nationality alone did not enable them to meet the requirement in reg 2(1). He said that in cases involving 'composite' tests like this, the approach to be taken was assisted by the case of *Bressol*.¹³

In *Bressol*, changes in French education policy had resulted in an influx of students from France to Belgium. In order to protect its finances, Belgium had introduced additional conditions on access that did not apply to Belgian nationals. The court had rejected the Advocate-General's conclusion that this was direct discrimination. The court had looked at the conditions 'cumulatively' (para 34), and had then gone on to consider whether such a difference was objectively justified. This, he said, had made it 'plain beyond doubt' that the case was one of *indirect* discrimination. There was an 'obvious similarity', he said, between the conditions imposed on non-Belgian nationals in *Bressol* and the circumstances in which a person is 'treated' as being in Great Britain by reg 2 of the 2002 Regulations. The Pension Credit scheme, he said, had been 'constructed in a way that made it more likely to be satisfied by a UK national than by a national of another Member State. Applying the reasoning in *Bressol*, this was not direct discrimination on grounds of nationality. However, as the scheme puts nationals of other Member States at a particular disadvantage, it was indirectly discriminatory. As such, it had to be justified (para 35).

JUSTIFICATION

The test to be used in deciding justification in indirect discrimination cases, said Lord Hope, was provided in *Bidar*.¹⁴ In that case, the ECJ held that the criteria for granting assistance to cover the maintenance of students risked placing primarily nationals of other Member States at a disadvantage. This was because the condition requiring them to have residence in the United Kingdom prior to their studies was likely to be more easily satisfied by United Kingdom nationals. This could be justified only if it was based on 'objective considerations independent of the nationality of the persons concerned and was proportionate to the legitimate aim of the national provisions'. Accordingly, the focus was on the Secretary of State's reasons for the difference in treatment in the pension Credit scheme. Did they provide an objective justification for it? If they did, was the justification based on considerations that were independent of the nationality of those concerned?

In finding for the Secretary of State, Lord Hope had regard to the government's stated reasons for introducing the RtR when it responded to the concerns of the Social Security Advisory Committee in 2004 (Statement by the Secretary of State made to the SSAC, Cm 6181, para 14, as discussed by Moses LJ at para 10 of the Court of Appeal judgment). The 'underlying purpose' of the restrictions had been 'to safeguard the United Kingdom's social security system from exploitation by people who wished to come to this country not to work but to live off income-related benefits'; and that it was 'not unreasonable to concentrate benefits on people who have a particularly close connection with the UK or to expect people to have a right to

reside in the UK before they become entitled to income-related benefits funded by the UK tax-payer' (para 38). The government also considered (at paras 57, 58) that its proposals were compatible with EU Law, as there would be no difference in treatment as between nationals of the A8 accession states and other nationals, and given that residence requirements as a condition of access to income-related benefits would also apply to UK nationals. The requirements would therefore 'apply equally to nationals of all Member States'. Furthermore, Pension Credit was an income-related benefit to help people in need, and it was not inconsistent with Reg 1408/71 to refuse it to those who could not acquire a RtR - an approach supported by the court in *Trojani*¹⁵ and *Dir 90/364*.¹⁶

Lord Hope accepted these points. He observed that the Secretary of State's wish to prevent exploitation of welfare benefits by those living in the UK but not working here was a legitimate reason for imposing the right of residence test; and this was supported by Advocate General Geelhoed's opinion in *Trojani* (at para 70) that it is a basic principle of Community law that persons who depend on social assistance will be taken care of in their own Member State'. He went on to assess the questions of whether the justification offered was 'relevant' in the Pension Credit context, whether it was 'sufficient' and operated in a way that was 'independent of the nationality of those concerned'. On these points he accepted the case made by the Secretary of State. He also rejected the argument that, as entitlement to Pension Credit is extended to Irish nationals, it was discriminatory not to extend it to nationals of all other Member States (primarily because the favourable arrangements made for Irish nationals is protected by art 2 of the Protocol on the Common Travel Area).

OTHER JUDGMENTS

Lady Hale also decided that the decision in *Bressol* meant that the case had to be treated as one of indirect discrimination. This meant the differences in treatment had to be prohibited unless they could be objectively justified. She adopted the test in *Bidar* for determining whether differences in treatment could be justified, and then considered the history of the introduction of the habitual residence test since 1994, and the reasons for the introduction of the right to reside. She said the RtR had been introduced because the habitual residence test in its earlier form did not deal with longer-term access to income-related benefits paid out of general taxation when claimed by those living indefinitely in the UK without being economically active. She noted how in *Trojani* it had been decided that a claimant from another EU country, when applying for a benefit because of lack of resources, did not derive a right to reside from art 18 of the Treaty. A lack of resources took him outside the terms of *Dir 90/364*. Nor did she find anything in *Trojani* to suggest that 'mere presence, without any right to reside in the host country, was sufficient. 'All the emphasis in the relevant paras 40-45 is on residence and not presence and moreover on formally approved residence'. Lord Brown agreed with Lord Hope and Lady Hale.

The only dissent came from Lord Walker. Even when classified as indirect discrimination, he considered that the provisions in reg 2(2) of the State Pension Credit Regulations 2002 were 'probably aimed at discriminating against economically inactive foreign nationals on the grounds of nationality. Whether or not that was the intention of those who framed them, they have that effect... Even though classified as indirect discrimination, it is not capable of justification because the proposed justification, once examined, is founded on nationality' (para 79).

EU COMMISSION 'DISCRIMINATION' NOTICE

Interestingly, on the issue of compatibility of the RtR system and EU law, the European Commission has recently invited the UK to submit observations on the

compatibility with EU Law of the imposition of the RtR test for benefits within the scope of Reg 1408/71. The notice, issued last year¹⁷, expressed the Commission's concerns about the way the RtR system has been operating, and requested the UK to 'end discriminatory conditions on the right to reside as a worker which exclude from certain social benefits nationals from eight of the ten Member States (Czech Republic, Hungary, Slovakia, Slovenia, Latvia, Lithuania, Estonia, Poland) that joined the EU in 2004'. It clearly considered the requirements 'discriminatory', and a breach of transitional arrangements on free movement as well as 'the obligation to ensure equal treatment on the basis of nationality'.

If the Commission is not satisfied with the UK's observations a 'reasoned opinion', and the UK's remedial action, the Commission can bring the matter before the Court of Justice of the EU. In the Patmalniece case, Richard Drabble QC for the intervener (the AIRE Centre) argued that the Commission's notice was a further factor adding doubt about the compatibility of the RtR with EU law. Although he referred to the notice in his judgment, Lord Hope clearly decided that it was too early to draw any conclusions on this particular development (para 40).

CONCLUSIONS

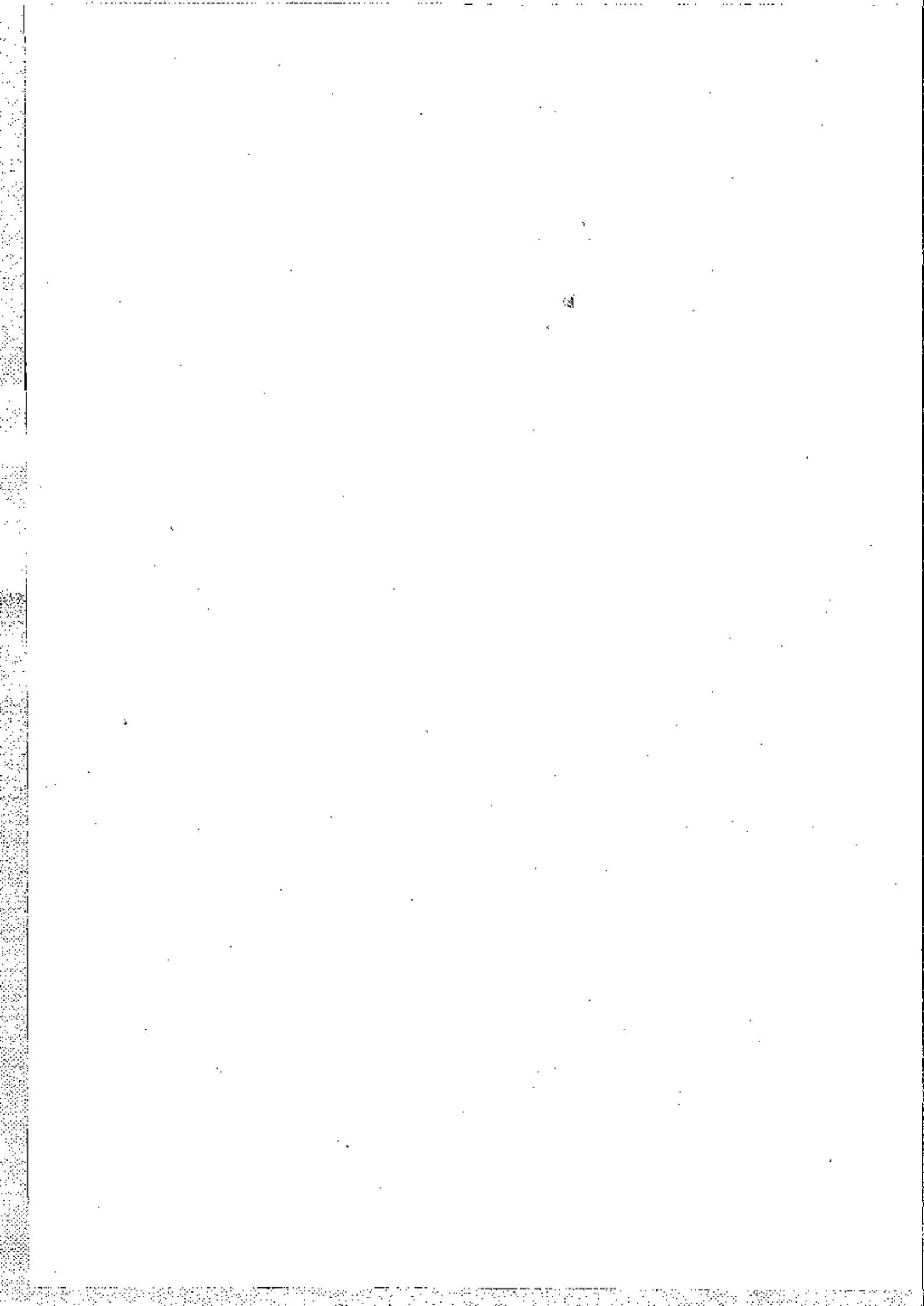
From 1st May 2010 all EU nationals' rights in relation to rights under the EU's system for co-ordinating social security systems are dealt with by Reg (EC) 883/04. Reg 1408/71 will just apply to EEA nationals, namely those from Norway, Switzerland, Iceland, and Liechtenstein. Under Reg (EC) 883/04 most benefits other than special non-contributory benefits¹⁸ are fully 'exportable'. Take-up of support in host States will be assisted by Reg (EC) 987/09 and the 'elements for determining residence'.¹⁹ In some situations this may help groups like retirees who have previously worked in another EU State, but have not worked since arriving in the host State, and where there is a dispute between agencies in different states about the issues of 'residence'. It remains to be seen whether there will be any easement in the operation of national residence requirements such as the UK's RtR, and the exceptions built in to Treaty provisions and free movement rights (including self-sufficiency requirements). With effect from 1st May 2010, there will also be a number of changes to the RtR regime. In particular, the Worker Registration Scheme will end, and this means workers from A8 countries will generally be able to claim access means-tested benefits without satisfying WRS registration and requirements. However, other restrictions on take-up, including the requirements directed at barring out those who do not have a RtR, or have not retained it, are set to continue.

In the meantime, the equal treatment provisions in Reg (EC) 883/04²⁰, operating in tandem with other measures like Reg 1612/68²¹, will continue to assist claimants and their advisers. The scope for relying on Reg 1612/68, particularly if rights under Reg 883/04 are not engaged – for example in tax credits cases, given that tax credits are not within the scope of protection of Reg 883/04 – was illustrated in a recent case²² where a Polish worker, aged 62, started work in the UK through an agency. He had been issued with a certificate under the Worker Registration Scheme, and was awarded WTC. However, he was refused the 50 Plus element on the basis that he did not meet the requirement in reg 18(4) of the 2002 Regulations that a claimant must have been in receipt of one of the benefits specified in reg 18(5) for at least 6 months. Judge Turnbull ruled that this was indirectly discrimination, and contrary to art 7 of Reg. 1612/68 EEC in that the provision requires migrant workers to receive the same social advantages as national workers – and HMRC had been unable to justify this, for example by advancing reasons why the 50 Plus element could not have been extended to persons who had been in receipt of equivalent qualifying benefits abroad.

FOOTNOTES

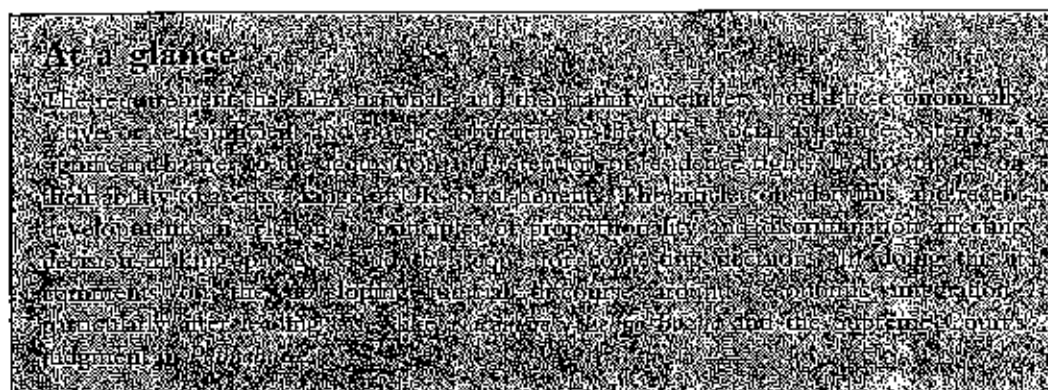
- ¹ *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11.
- ² Since 1st May 2010 equal treatment provisions, as part of the EU's system of co-ordination of social security, are now mainly in Reg (EC) 883/04 on the co-ordination of social security systems: Official Journal of the EU, OJ 2004 L166/1, arts 4, 5.
- ³ Immigration (European Economic Area) Regulations 2006, SI 2006/1003, particularly regs 4-6, and 14. Reg 5, for example, assists claimants who have been working but then reach the age they can take State Pension or early retirement, or are affected by permanent incapacity from work. However, it does not assist a number of key groups such as lone parents who cannot be available for work. The argument that this is discriminatory was rejected in *R (Maryam Mohammed) v Harrow LBC* [2005] EWHC 3194 (Admin). On the difficulties claimants and advisers face in the operation of the RtR system, see Keith Puttick 'Precarious welfare: access to benefits and support by EEA nationals residing in the UK' Adviser 130, 8-10; and 'Precarious welfare: family and extended family members' 'Right to Reside', support and work' Adviser 131, 9-16.
- ⁴ *Harrow London Borough Council v Ibrahim and Secretary of State for the Home Department* [2010] 2 CMLR 51, ECJ.
- ⁵ Regulation (EC) 1612/68 on freedom of movement for workers within the Community: Official Journal of the EU, OJ 1968, L257/2, art 12.
- ⁶ CPC/1072/2006 (11 June 2008).
- ⁷ [2008] 1 WLR 254, Court of Appeal.
- ⁸ [2007] EWCA Civ 857.
- ⁹ Directive 90/364 on the right of residence: Official Journal of the EU, OJ 1990, L180/26 90/364.
- ¹⁰ [2009] PTSR 897.
- ¹¹ SI 2002/1792.
- ¹² SI 2004/1232.
- ¹³ *Bressol v Gouvernement de la Communauté Française (C-73/08)* [2010] 3 CMLR 20.
- ¹⁴ *R (Bidar) v Ealing London Borough Council* [2005] QB 812.
- ¹⁵ *Case C-456/02 Trojan v Centre Public d'Aide Sociale de Bruxelles* [2004] 3 CMLR 820.
- ¹⁶ See note 9, above. Self-sufficiency requirements are now in Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States: Official Journal of the EU, OJ 1990, L158/26.
- ¹⁷ EU Commission Notice IP/10/1418 'Free movement of workers: Commission requests UK to end discrimination on other nationals' right to reside as workers' (Brussels, 28 October 2010).
- ¹⁸ On special non-contributory benefits, see Reg 883/04, art 70. As in Reg 1408/71, these are benefits which have the characteristics of social security and social assistance. They include means-tested benefits like Income Support and Pension Credit.
- ¹⁹ Regulation 987/09 laying down the procedure for implementing Reg (EC) 883/04 on the co-ordination of social security systems: Official Journal of the EU, OJ 2004, L284/1. Art 11 provides for agreement between institutions of Member States taking into account matters such as duration and continuity of presence, and the person's 'situation' including matters such as the nature of any activity pursued, family status and ties, housing situation, etc.
- ²⁰ See, in particular, the equal treatment provisions in arts 4-7.
- ²¹ Reg (EC) 1612/68 on the freedom of movement for workers within the Community Official Journal of the EU, OJ 1968 L257/2.
- ²² *MR v HMRC* [2011] UKUT 40 (AAC) (26 January 2011) (CTC/1180/2009) <http://www.bailii.org/uk/cases/UKUT/AAC/2011/40.html>.

WORK 10



Paying their Way? Contesting 'Residence', Self-sufficiency, and Economic Inactivity Barriers to EEA Nationals' Social Benefits: Proportionality and Discrimination

Keith Puttick



Introduction

Citizens of the European Union enjoy the Treaty-based 'right to move and reside freely within the territory of the Member States'. However, this is subject to the 'conditions and limits' defined by the Treaties and the measures adopted thereunder and which have been adopted to give them effect.¹ Arguably the most potent limitation affecting EEA nationals' residence in another Member State comes when they need to access support from that host State's social assistance systems. The general expectation is that claimants should either be in employment or self-employment, or else have sufficient resources to avoid becoming a burden on those systems. The requirement is integral to the scheme in Directive 2004/38 and affects many aspects of the three stages of 'residence' provided for by the Directive and the UK implementing legislation, the Immigration (European Economic Area) Regulations 2006 (the '2006 Regulations').²

1 In the UK this means EU nationals other than those of the UK, as well as citizens of Iceland, Norway, Liechtenstein, and Switzerland.

2 TFEU art 20(2)(a) (ex art 17 TEC) and art 21(1) (ex art 18 TEC).

3 SI 2006/1003. A detailed commentary on the transposition was provided by Helen Toner in 'New regulations implementing Directive 2004/38' (2006) *LJNL* Vol 20 158-178. The European Casework Instructions (ECI) on the UK Border Agency's web-site provides guidance on how the agency interprets the legislation. The Directive generally refers to 'Union citizens' whereas the 2006 Regulations refer to 'EEA nationals'. This article will refer to EEA nationals.

residence for up to three months (the 'initial period') (art 6), residence for more than three months (the 'extended period')(art 7), and permanent residence (arts 16–18).⁴

Resources and 'becoming a burden'

The initial period is unproblematic unless the EEA national or family member becomes an unreasonable burden on the host State's social assistance system (art 14). In this event, the 2006 Regulations state more explicitly that they will cease to have the right to reside under the regulations.⁵ During the extended period, a right of residence is secure as long as the person is a 'worker' or a 'self-employed person' – two of the categories of 'qualified person' in the 2006 Regulations.⁶ 'Worker' status can be acquired and maintained even if the hours are limited and wages received are at or below the host State's minimum subsistence wage,⁷ or if in-work support to supplement low wages is claimed.⁸ All the other groups, ie the 'self-sufficient', enrollees at privately or publicly funded establishments accredited or financed by the State, and family members of EEA nationals, are subject to requirements requiring them to have comprehensive sickness cover and 'sufficient resources not to become a burden on the social assistance system'. The right of residence only continues while the conditions in art 7 are met (art 14). Member States may verify if the conditions are being fulfilled, but this may not be carried out 'systematically' (art 14(2)).

Permanent residence, the third key residence right in the typology, is dealt with in Chapter IV and the key provisions in arts 16–18 (implemented by reg 15 in the UK). The policy that informed acquisition of the new right of permanent residence based on five years residence appeared to be largely directed at applicants satisfying social integration criteria.⁹ Nevertheless, expectations of 'economic integration' in cases like *McCarthy* and *Lekpo-Bozua* seem to have come to the fore.¹⁰ In the area of retention of residence rights by family members, and their acquisition of permanent residence, for example in the event of death or departure from the host State of the EEA national, or in the event of divorce, annulment of marriage or termination 'of registered partnerships, requirements that applicants must have sufficient resources to avoid becoming a burden on the social assistance system are more explicit.¹¹ In other contexts such as applications for housing assistance, it has been held by the Court of Appeal that EEA nationals who are not economically active or self-sufficient have not 'resided

4 Regulations 13,14, and 15 of the 2006 Regulations, respectively.

5 Regulation 13(3)(b).

6 Regulation 6(1). The others are jobseeker, self-sufficient person, or student. 'Worker' status continues in the circumstances set out in reg 6(2), for example temporary inability to work because of illness or accident; or involuntary loss of employment after a year's employment or more, registration as a jobseeker, and then unemployment for no more than six months (or proof that he/she is seeking employment and has 'a genuine chance of being engaged'.

7 *Genç v Land Berlin* (Case C-14/09) [2010] 2 CMLR 44.

8 *Kempf v Staatssecretaris van Justitie* (Case 139/85) [1987] 1 CMLR 764.

9 As indicated by the recitals to Directive 2004/38. See, in particular, recital 17.

10 In *McCarthy v Secretary of State for the Home Department* (Case C-434/09), 5 May 2011, CJRU Advocate-General Kokott made it clear in her Opinion for the European Court that even if Mrs McCarthy had been a beneficiary of free movement rights she would have been ineligible for permanent residence as she was economically inactive and relied on UK State benefits (Opinion, 25 November 2010). There were no indications, she said, that 'for an uninterrupted period of five years in the past Mrs McCarthy worked in the UK or had sufficient resources for herself and her family, which would be the basic precondition for acquisition of a right of permanent residence' (para 44); and she did not consider that an applicant could enjoy advantages provided for by the directive such as family notification in respect of her spouse without meeting the requirement of economic self-sufficiency (para 56). The self-sufficiency requirement in art 7 of the Directive also prevented the acquisition of permanent residence in *Lekpo-Bozua* (note 12).

11 Articles 12, 13; and see *Ames v Secretary of State for the Home Department* [2011] EWCA Civ 552.

legally' for the purpose of acquiring permanent residence, even after nine years residence. They cannot rely on the Treaty for a right of residence and remain 'subject to immigration control' unless they acquire 'qualified person' status under the 2006 Regulations.¹²

The UK's system of social benefits mapped on to 'qualified person' status when the 2006 Regulations implemented Directive 2004/38. The Social Security (Persons from Abroad) Amendment Regulations 2006¹³ amended key benefits regulations so that a 'person from abroad', ie someone who is not habitually resident in the UK, Channel Islands, Isle of Man, or Republic of Ireland was ineligible for support. In order to be habitually resident a person must generally have a 'right to reside'. By explicitly providing that a person with 'qualified person' status is taken out of the restriction, the regulations provide that an EEA national in the UK who does not have, or ceases to have, 'worker' status (and does not qualify for that status under any other category) is removed from eligibility for State support.¹⁴

The 'qualified person' gateway

An example of the 'model' for the way that 'person from abroad' status works, and has been mapping on to 'qualified person' status since 2006, is provided by reg 21AA of the Income Support (General) Regulations 1987.¹⁵ The regulations put 'worker' at the top of the list of groups taken out of 'person from abroad' status. This perhaps underlines successive governments' expectations that EEA nationals should be working or otherwise reciprocating for any support they receive and thereby 'contributing' to the UK economy. It also reflects policies aimed at combatting the so-called 'pull factor', despite long-standing doubts about whether there is such a factor – or, if there is, the role it plays.¹⁶ The financial saving in restricting access to non-contributory benefits funded from taxation is also an important policy driver, and this has parallels with the Coalition government's recent proposals to limit access to support for non-EU entrants seeking settlement as part of the non-EU family migration route.¹⁷

Claimants can, of course, look to EU sources for a right of residence, including secondary legislation like Regulation 1612/68 art 12, assisting groups like primary carers of children who have started in the UK education system after one of their parents had worker status.¹⁸ Direct reliance on the Treaty itself can also assist, as in the *Baumbast* case,¹⁹ and when it is necessary and

12 *Lejko-Bozina v Hackney LBC* [2010] HLR 46, CA. As a result of being economically inactive, accessing NHS medical care, and being what the court called 'an indirect beneficiary of social assistance', the EEA national was ineligible for a right of residence under art 7 of the Directive. This, in turn, meant she was a 'restricted person' under s 184(7) of the Housing Act 1984. The court rejected the argument that by not taking steps to remove her she had acquired a right of residence by 'waiver'.

13 SI 2006/1026.

14 This gives claimants a 'nil' applicable amount, and no support; Sch 7, para 17.

15 SI 1987/1967. Regulation 21AA lists the groups taken out of 'person from abroad' status.

16 Discussed by Catherine Phuong 'Cloring Sangate: the legal implications of the asylum dispute between France and the UK' (2003) Vol 17, No 3 IANL 157.

17 *Family Migration: A Consultation* (UK Border Agency, 13 July 2011). As part of the proposal to extend the probationary period before spouses and partners can apply for settlement, and 'to reduce burdens on the taxpayer', access to non-contributory benefits would be postponed for three years (Executive Summary, Section 2, para 1.11).

18 *Hanew London Borough Council v Ibrahim (Secretary of State for the Home Department Intervening)* [2010] 2 CMLR 51 (Case C-310/08), ECJ (Grand Chamber). Her derived right was reinforced by ECHR art 8, and was held not to be dependent on demonstrating self-sufficiency given that integration of the family, once installed, should be on the best possible terms. See also *Teixeira v Lambeth LBC* [2010] 2 CMLR 10 (Case C-480/08) confirming that a right of residence acquired by a parent who has been a worker at a time when the child resided with her can be obtained after she has ceased employment. Furthermore the right of residence, once acquired, can be retained without having to satisfy the self-sufficiency requirements in art 7 of Directive 2004/38.

19 *Baumbast v Secretary of State for the Home Department* (Case C-413/99) [2002] 3 CMLR 23.

appropriate to fill a perceived lacuna in the residence scheme in order to assist groups like carers who have had no alternative but to resign from their employment in order to look after sick family members (an issue revisited later in this article).

In such cases proportionality and discrimination requirements have featured in the operation of the restrictions; the key legislative provisions need to be considered.

The 'residence' gateway: proportionality and discrimination

Although resort to benefits like Income Support or Pension Credit (a similar benefit, but paid to older claimants) raises the question of whether the claimant has become, or is at risk of becoming an unreasonable burden on the social assistance system, it is implicit that there should be an effective process evaluating this, and one that adequately addresses factors like the scale, extent, and likely duration of support.²⁰ Aspects of UK practice appear to be suspect in this respect, particularly as it is far from clear that UK agencies' decision-makers deploy, or deploy consistently, any kind of structured approach that enables all the three criteria that the directive and the guidance expect should be properly addressed. Furthermore, there are a number of scenarios in which claimants can be treated as either having had no right of residence, or as losing one as a result of seeking support.²¹ Similar eligibility issues can arise in relation to support for working claimants, for example through tax credits, when eligibility is adjudicated, checked or reviewed.²²

In the face of such approaches by adjudicating agencies, the scope for contesting them (and invoking proportionality, discrimination and Convention rights) are important, and this is now considered.

The courts and the 'right to reside'

The UK courts have generally been supportive of the right to reside scheme, including the way 'qualified person' and person from abroad' status is used. In the leading case of *Abdirahman*²³ the court made it clear that without 'qualified person' status, most claimants are effectively barred out of even the most basic support. In dismissing the appeals of two claimants who were not in employment and who did not otherwise qualify for qualified person status, the court said it was not enough for them to be lawfully present. They also had to be 'resident' on the basis expected by the right to reside scheme.²⁴ Although the court accepted that the scheme did not impact on claimants' ability to acquire a right of residence directly from the Treaty, this was held not to be an option for economically inactive residents given the limitation in Directive 90/364 (now in Directive 2004/38) that beneficiaries of free movement should not be an unreasonable burden on the public finances of the host State – a condition they considered to be

20 The 'becoming' factor is underlined by the wording of art 7(1)(b) and reg 4(1)(c) of the 2006 Regulations; and see EU Commission guidance: 'Keeping the Right to Reside' in *The Right of Union Citizens & their Family Members to Move and Reside Freely within the Union: Handbook on Integration for Policy-Makers and Practitioners* (p 14) (Directorate General for Justice, Freedom & Security, May 2007, 2nd ed); and COM (2009) 313 Final.

21 'Habitual Residence & Right to Reside' in the *Decision-Makers Guide*, Part 3, Vol 2, ch 7 (DWP, updated February 2011), para 071234/5.

22 Eligibility for in-work support through the tax credits system is dealt with by HM Revenue and Customs decision-makers. 2011 cases have highlighted how EEA claimants continue to experience discrimination, for example in the withholding of Working Tax Credit 'elements'; see *MR v HMRC* [2011] UKUT 40 (AAC) (26 January 2011): <http://www.bailii.org/uk/cases/UKUT/AAC/2011/40.html>

23 *Abdirahman v Secretary of State for Work and Pensions* [2007] 3 CMLR 37, Court of Appeal.

24 A distinction also drawn by Baroness Hale in the Supreme Court in *Potamianou v Secretary of State for Work and Pensions* [2011] UKSC 11; 1 WLR 783 at 816.

proportionate to the legitimate aim of protecting the host State's public finances, and reinforced by observations made in *Trojani*.²⁵

The Court of Appeal accepted that the discrimination provisions of the Treaty were engaged when an EU national is refused support for reasons that are not applied to host State nationals²⁶ – but said this only assisted those with a right of residence under the Treaty or national law, or where the authorities had approved the residence (as in *Trojani*). If schemes were indirectly discriminatory (as had been conceded by the Secretary of State earlier in the appeal), the court considered there was sufficient evidence to establish 'justification' on the basis of the government's response in 2004 to the Social Security Advisory Committee's report.²⁷ Lloyd LJ went further and also derived support from judicial pronouncements on 'benefit tourism' and irregular status. He quoted comments of Sedley LJ in *R (Morris) v Westminster City Council (No 3)*:²⁸ 'The problem is in all significant respects a problem of foreign nationals either coming to this country (benefit tourism) or overstaying their leave to be here (irregular status) in order to take advantage of the priority housing status accorded to homeless families. Measures directed at this, I accept, require no explicit justification, whether because they are an aspect of immigration control or because they are an obviously legitimate response to a manifest problem.'

Retention issues: *Baumbast*, lacuna-filling and proportionality

In practice, many of the contentious aspects of the subject focus on problems of retention of residence rights. Both the directive and 2006 Regulations enable 'worker' status to be kept after involuntary loss of employment. Jobseekers must maintain jobseeking conditions. However, the scheme is restrictive, and makes it difficult for some groups like carers and single parents with particularly demanding childcare needs.²⁹ Judges have been reluctant to entertain arguments that the retention scheme is discriminatory and incompatible with the Sex Discrimination Act 1995, for example because of its impact on women with childcare responsibilities.³⁰ Other judgments have been more supportive when it has been possible to fill a perceived lacuna in the retention system with the help of proportionality principles. In one such 'carer' case,³¹ the claimant was a Cameroonian national who, while an asylum claimant, married a French national working in the UK. Her 'worker' status meant she had a right to reside. This, in turn, meant that he had a right of residence as her family member. However,

25 *Trojani v Centre Public d'Aide Sociale de Bruxelles* (Case C-456/02) [2004] 3 CMLR 820. An approach approved by Baroness Hale this year in *Patmalisire* (at 818), discussed later in this article.

26 *R (Bidar) v East London Borough Council* (C-209/03) [2005] QB 812; and *Gzeczzyk v Centre Public d'Aide Sociale d'Otignies Louvain la Neuve* (C-184/99) [2002] 1 CMLR 19. In *Bidar* refusal of maintenance to students with a right to reside under art 18 of the Treaty, but who were treated as not 'settled' in the UK, was discriminatory in terms of art 12 on nationality grounds. The ECJ accepted States could expect a degree of integration into the host community, but a blanket ban breached art 12.

27 *Social Security (Habitual Residence) Amendment Regulations 2004 (SI 2004 No. 1232): Report by the Social Security Advisory Committee and Statement by the Secretary of State for Work and Pensions*, London: The Stationery Office, April 2004 (Cm 6181).

28 [2005] EWCA Civ 1184.

29 See, for example, *R (Maryam Mohamed) v Harrow LBC* [2006] HLR 18.

30 As in Commissioner's Case CIS/599/2007 (7 December 2007) when the judge dismissed an appeal against a decision that the claimant had lost her right to reside after deciding to delay her return to work to look after her child who had diabetes. He thought the decision was proportionate given that she would be unemployed for more than just a short time. On discrimination, he 'lacked jurisdiction'.

31 Case R. (R) 4-09 (31 October 2007).

after he became seriously ill she gave up her employment to care for him. The level of care she provided meant she had to give up her employment, and having no other resources her husband had no choice but to look to the benefits system. Decision-makers immediately decided that both of the couple had lost their right to reside. Judge Rowland concluded that a right of residence could be asserted in these circumstances, and lack of 'self-sufficiency' should not be 'determinative in every case' (paras 36, 37).

Later cases, however, have been more circumspect in allowing appellants to take the *Baumbast* route, as seen in the Court of Appeal decision in *Kaczmarek*,³² a case in which Maurice Kay described the issues as 'labyrinthine'.

Kaczmarek: into the labyrinth...

In *Kaczmarek*, the claimant was a Polish national who started her residence in the UK as a student in April 2002. She started working in a nursing home in June 2003, but then stopped working in July 2004, and took a period of maternity leave from August 2004, intending to return to employment after that. This was put off, however, as her child was unwell and needed care from her. She was, in any case, unable to afford childcare, making it difficult for her to remain in employment – a barrier that is currently set to affect a lot more workers in the UK.³³ In the event she did not resume employment until October 2006. In the meantime she claimed Income Support. Her claim was rejected on the basis that, by the time she claimed, she no longer had a right of residence.³⁴ Although she had only intended to be out of the labour-market for a short while, it was long enough for decision-makers to treat her right of residence as at an end.

On appeal, she contended that the decisions refusing her support were disproportionate, and that in any case a right of residence could be founded directly on arts 12 and 18 EC of the Treaty – particularly, as she argued, she could show 'a level of social integration and settlement' that the European Court envisaged in *Trojani*.³⁵ Her appeal failed. Although the court in *Trojani* had indicated that lawful residence 'for a certain time' could assist, Maurice Kay LJ (at para 16) took this to refer to qualifying periods giving rise to an express right of residence. By the phrase's juxtaposition with 'or possesses a residence permit', he considered that it was being advanced as 'one of two ways in which an economically inactive migrant may rely on art.12 as a result of specific and substantive entitlement'. In any case he thought it undesirable to use art 12 as a way of producing 'an open-textured temporal qualification', and considered that eligibility should be 'a matter for normative regulation rather than discretion or subjective evaluation on a case-by-case basis'. He rejected proportionality as a basis for allowing the appeal, distinguishing *Baumbast* as that case involved a working claimant who was largely self-sufficient. Approving the reasoning of Judge Rowland, he thought that to permit residence to be based on art 18 when EU legislation had excluded a particular class of persons from eligibility would be to 'attack the Directive'. Although art 18 could be relied on to supplement the Directive, before a national court or tribunal the limitations in a directive could not be removed (paras 20–22). In a novel approach, he also considered that if a claimant gained an

32 *Kaczmarek v Secretary of State for Work and Pensions* [2009] 2 CMLR 3, CA.

33 As a result of changes in the Welfare Reform Bill 2011 support provided to low-paid workers through the childcare element of Working Tax Credit is likely to be cut.

34 Without a right of residence she was a 'person from abroad', and ineligible for support.

35 *Trojani v Centre Public d'Aide Sociale de Bruxelles (CPAS)* (C-456/02) [2004] All ER (EC) 1065.

unconditional right to support by acquiring permanent residence, it was difficult to argue that it was disproportionate to exclude someone who had become economically inactive after three years residence.

Proportionality principles also featured in the House of Lords case of *Zalevska*.³⁶ In that case, Baroness Hale and Lord Neuberger dissented from the majority's decision and considered that to deprive a worker of benefits after she had been employed in the UK for twelve months (just because four months of this period had not been in WRS-registered employment) was disproportionate – particularly as the main aim of the WRS was primarily just to monitor the numbers of A8 nationals in work, and the sectors they worked in.

Given the difficulties that claimants have experienced in this area of the social benefits system, and uncertainty about how decision-makers and courts in the UK approaches should map on to EU requirements, it was helpful when in 2009 the EU Commission provided guidance.

Economic inactivity, resources and proportionality 'tests'

In 2008 an EU Commission report³⁷ described the transposition of Directive 2004/38 as 'disappointing'. On aspects relating to social assistance, it noted that a common problem was the failure to take decisions 'on the basis of personal circumstances' (para 3.4.2). Guidance on the implementation of the legislation then followed in 2009. It included points about the way restrictions on access to social assistance should operate, including proportionality aspects.³⁸

The centrepiece of the Commission's guidance focuses on the suggestion that States should use a 'proportionality test' to assess what the Commission clearly sees as the key issue, which is whether a person whose resources are no longer 'sufficient' and who has been granted subsistence support 'is or has become an unreasonable burden...'. The source of the claimant's resources is generally irrelevant as long as it is available.³⁹ It then reminds Member States' authorities of what is said in Directive 2004/38, recital 16, ie that 'The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system...'

The guidance adds a number of specific points (Section 2.3.1), as follows:

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- 36 [2009] 1 CMLR 24, House of Lords. More recently, in *Miskovic v Secretary of State for Work and Pensions* [2011] 2 CMLR 20, CA a decision requiring a former failed asylum seeker who had been permitted to take up employment under the WRS scheme, and who argued that this period of employment should have been aggregated with work done for WRS purposes (an argument relying on the 'regression' strand of proportionality principles) was held not to be disproportionate.
- 37 Report from the Commission to the European Parliament and the Council on the Application of Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States', Brussels 10.12.09 COM (2008) 840 Final.
- 38 Section 2.3 of the Communication from the Commission to the European Parliament and the Council on Guidance for Better Transposition and Application of Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States', Brussels 2.7.09 COM (2009) 313 Final.
- 39 *Commission v Belgium* (Case C-408/03) [2006] 2 CMLR 41 where it was held that to expect an EU citizen to hold sufficient resources personally as a condition of a right of residence and access to support would be a disproportionate interference in that person's fundamental rights under Art 18 of the Treaty. This is consistent with *Mahad (Ethiopia) v Entry Clearance Officer* [2010] 1 WLR 48, Supreme Court, when determining if family members have adequate resources for the purposes of the Immigration Rules at 281, 297, and 317 and avoiding recourse to public funds.

(1) *Duration*

- For how long is the benefit being granted?
- Outlook: is it likely that the EU citizen will get out of the safety net soon?
- How long has the residence lasted in the host Member State?

(2) *Personal Situation*

- What is the level of connection of the EU and his/her family members with the society of the host Member State?
- Are there any considerations pertaining to age, state of health, family and economic situation that need to be taken into account?

(3) *Amount*

- Total amount of aid granted?
- Does the EU citizen have a history of relying heavily on social assistance?
- Does the EU citizen have a history of contributing to the financing of social assistance in the host Member State?

Finally, the guidance makes it clear that only actual receipt of social assistance benefits is relevant when determining if a person is a burden on the system.

Clearly such guidance does not have legislative effect. Nevertheless, it must be regarded, as a form of quasi-legislation that at one level is 'soft' law but which, in practice, has a significantly more formal status as it supplements and reinforces existing legislation.⁴⁰ It is an authoritative source, given the Commission's role in ensuring that the proper functioning and development of the Union, and shaping the way it expects Member States' obligations to be fulfilled. Commission measures against a State it considers has failed to fulfil an obligation include the use of a 'reasoned opinion' following an opportunity for the State to submit its observations (TFEU, art 226).⁴¹ A comparison between what EU law envisages and UK practice suggests that there may well be a significant deficit in terms of compliance.

In the remainder of this article consideration is given to discrimination aspects of the UK's 'residence' regime, and its impact on take-up of social benefits.

The right to reside: discriminatory?

The scope for invoking legislation and principles relating to direct or indirect discrimination has been clear for some while, and certainly since the introduction of the habitual residence test in the 1990s and cases like *Collins*.⁴² However, the precise scope of anti-discrimination measures, for example those in art 3 of Regulation 1408/71, has been less clear. A key question is whether the discrimination that obviously permeates most UK social assistance schemes should be classed as 'direct' or 'indirect'. If the latter, then it is capable of 'justification'.

40 G Ganz *Quasi Legislation* (2nd edn, London, Sweet & Maxwell, 1987).

41 A process that has been initiated against the UK with regard to aspects of the RIR scheme seen as discriminatory; see EU Commission Notice IP/10/1418 *Free Movement of Workers: Commission Requests UK to End Discrimination on other Nationals' Right to Reside as Workers* (Brussels: 28 October 2010). The appellant and intervener in *Patulavicius* cited this in the course of the appeal.

42 *Collins v Secretary of State for Work and Pensions* (Case C-138/02) [2004] 2 CMLR 8, ECJ and see *Katsouras v Arbeitsgemeinschaft (ARGE) Nürnberg 900* (Case C-22/08) [2009] ECR I-4585, ECJ.

Given the uncertainty around this, particularly in the aftermath of the European Court's controversial judgment in *Bressol*,⁴³ it was helpful when the issues came before the Supreme Court earlier this year in *Patmalniece*.⁴⁴

***Patmalniece*: economic integration and discrimination**

The appellant in *Patmalniece* was Latvian, but of Russian origin. Galina Patmalniece had been in paid employment for over forty years in Latvia before moving to the UK in 2000. Fearing persecution because of her Russian origin she sought asylum in the UK. This failed, and receiving no support from the UK welfare system she only had her Latvian pension, worth about £50 a month, to live on. Following Latvia's accession to the European Union on 1 May 2004 she claimed State Pension Credit, a means-tested source of income provided under the State Pension Credit Act 2002 and the State Pension Credit Regulations.⁴⁵ It provides eligible pensioners with support if they do not have retirement income, or need an income 'top up' to raise their income. Her claim was refused as she could not satisfy the scheme's 'presence' requirements. These impose a residence gateway that focuses on claimants' ability to demonstrate a right to reside and habitual residence. More precisely, reg 2(1) states that 'A person is to be treated as not in Great Britain if ... he is not habitually resident in the United Kingdom...'; and in regulation 2(2) 'No person shall be treated as habitually resident ... unless he has a right to reside in (as the case may be) the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland...'. As with the Income Support scheme discussed, the scheme (in somewhat tortuous fashion) goes on to say in reg (4) that 'A person is not to be treated as not in Great Britain if he is – (a) a worker ... (b) a self-employed person...' and is otherwise within the scope of the directive. The problem was that the claimant had not been in paid employment, and so had not held 'worker' status since her arrival in the UK. Nor did she come within any of the other 'qualified person' categories.

On the face of it the refusal was plainly discriminatory given that art 3 of Council Regulation (EEC) 1408/71, which like the legislation that has replaced it from 1 May 2011 as far as EEA nationals are concerned,⁴⁶ clearly accords EEA nationals the right to equal treatment with UK nationals. The President of Appeal Tribunals at the first-tier of the appeals system was very clear that this was not only discrimination, but direct discrimination given the difficulties faced by EEA claimants in comparison to UK nationals' requirements. On appeal, however, this was overturned.⁴⁷ The judge accepted that the imposition of the right to reside test, which all UK nationals, but only some EU nationals passed, was discriminatory – but it was *indirect* discrimination. He accepted that the right to reside was a necessary and proportionate means of achieving a legitimate aim (the protection of the State's public finances).

A further appeal to the Court of Appeal failed.⁴⁸ After stressing the importance of integration requirements, Moses LJ observed that 'Absent that degree of economic or social integration which both EU and domestic legislation recognise as a justifiable condition for

43 *Bressol v Gouvernement de la Communauté Française* (C-73/08) [2010] 3 CMLR 20.

44 *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11; [2011] 1 WLR 783.

45 SI 2002/1792.

46 Replaced from 1 May 2011, in regard to EEA nationals, by Regulation (EC) 883/04. Article 24(1) of Directive 2004/38 reinforces such 'equal treatment' requirements, but 'subject to such specific provisions as are expressly provided for in the Treaty and secondary law'.

47 *Commissioner's Case CPC/1072/2006* (11 June 2008).

48 [2009]3 CMLR 36 at 56.

entitlement, there is no unlawful discrimination in refusing her a benefit which has the characteristics of social assistance.⁴⁹

The Supreme Court's approach

In the leading judgment, Lord Hope (at para 20) identified three main issues:

1. Did the conditions of entitlement to support (as set out in reg 2 of the 2002 Regulations) give rise to direct ('overt') discrimination for the purposes of art 3 of Reg 1408/71 – or was any discrimination involved *indirect*?
2. If any discrimination was *indirect*, could that discrimination be objectively justified on grounds independent of the appellant's nationality?
3. Assuming the indirect discrimination could be objectively justified, was that outcome undermined by the favourable treatment given by reg 2(2) to Irish nationals?

He accepted that the disadvantage that nationals of other Member States encountered when trying to meet the requirements of reg 2(2) are 'due entirely to their nationality' and had a right to reside been the sole condition of entitlement 'it would without doubt have been directly discriminatory on grounds of nationality' (para 29). However, he thought that the effect of reg 2(2) had to be looked at in the context of the scheme in s1(2)(a) of the State Pension Credit Act 2002 and reg 2 'as a whole'. He also noted that while most UK nationals were habitually resident, others were not. Furthermore, although they could all meet the right to reside requirement in reg 2(2) because of their nationality, it was *not nationality alone that enabled them to meet the requirement in reg 2(1)*.⁵⁰ He went on to observe that in cases involving 'composite' tests like this, the reasoning in *Bressol*⁵⁰ assisted. In that case, changes in French education policy had meant that more students from France had started to come to Belgium. Belgium thereupon introduced a range of further conditions on access, conditions that did not extend to Belgian nationals. The court in that case, however, took this to be *indirect* discrimination, rejecting Advocate General Sharpston's conclusion that it was *direct*.

Lord Hope described the Advocate General's work as a 'powerful opinion'. He noted that she had said that discrimination could be considered to be direct where the difference in treatment was based on a criterion which was either explicitly that of nationality or was necessarily linked to a characteristic 'indissociable' from nationality (para 53). She had then examined each of the cumulative conditions separately. She considered that the first cumulative condition – that the principal place of residence was in Belgium – did not constitute direct discrimination because Belgians and non-Belgians alike could establish their principal place of residence in Belgium. As this, apparently neutral, condition was likely to operate mainly to the detriment of nationals of other Member States, it was indirectly discriminatory (paras 60–62). However, in contrast, the second cumulative condition was necessarily linked to a characteristic indissociable from nationality. Belgians automatically had the right to remain permanently in Belgium. They therefore satisfied the second cumulative condition

49 Presumably what he had in mind here was that in some cases a UK national might be expected to acquire, or re-establish, habitual residence. Although this can be required for some groups when coming to the UK from outside the EU, as in *Gingit v Secretary of State for Work and Pensions* [2002] 1 CMLR 587, it is not a requirement for UK nationals coming from another Member State, as determined by the ECJ and Lords in *Swordfish v Adjudication Officer* (Case C-90/97) 2 CMLR 679, HL. This would seem to be the group with which comparisons should be made.

50 *Bressol v Gouvernement de la Communauté Française* (C-73/08) [2010] 3 CMLR 20.

automatically. Non-Belgians, on the other hand, had to fulfil additional criteria to acquire a right permanently to remain in Belgium or to satisfy one of the seven other conditions. This discrimination, she concluded, was based on nationality and was therefore direct discrimination. The measures were therefore precluded by the articles of the Treaty.

The problem, though, as Lord Hope noted, was that the court had not adopted the Advocate General's approach, adding that the contrast between her 'carefully reasoned approach' and that of the court was 'so profound that it could not have been overlooked'.⁵¹ The court had examined the conditions in a way that clearly indicated the court had seen the case as one of indirect discrimination.

He observed the 'obvious similarity' between the issues in that case, and the case before the Supreme Court, commenting that the State Pension Credit scheme, and the residence and presence tests it included, were undoubtedly designed to make them more capable of being satisfied by a UK national than by other Member States' nationals. However, applying *Bressol*, the scheme was only indirectly discriminatory. Nevertheless, as the scheme put EEA nationals at a particular disadvantage it still had to be justified (para 35). In *Bidar*⁵² the ECJ had held that the criteria for granting assistance to cover the maintenance of students risked placing nationals of other Member States at a disadvantage, particularly as the condition requiring them to have residence in the United Kingdom prior to their studies was likely to be more easily satisfied by UK nationals. This could be justified only if it was based on 'objective considerations independent of the nationality of the persons concerned and was proportionate to the legitimate aim of the national provisions'. Applying this to the *Patrnabiece* case, the focus was on the reasons of the Secretary of State for the difference in treatment in the Pension Credit scheme. Did they provide an objective justification for it? Even if they did, said Lord Hope, was the justification based on considerations that were 'independent of the nationality of those concerned'?

After examining this further, Lord Hope accepted that the wish of the Secretary of State to prevent exploitation of welfare benefits by those living but not working in the UK was a 'legitimate reason'. He thought this was supported by Advocate General Geelhoed's *opinion in Trojani* (at para 70) that it is a basic principle of EU law that persons who depend on social assistance 'will be taken care of in their own Member State'. After assessing the question of whether the justification offered was 'relevant' and 'sufficient' in the Pension Credit context, and whether it operated in a way that was 'independent of the nationality of those concerned', he accepted the case made by the Secretary of State.

Baroness Hale

The main issue for Baroness Hale was whether it was legitimate to limit access by an EEA claimant like the appellant to benefits, entitlement to which depended on a residence right in the host State. She pointed out (at para 103) that: 'In answering that question, it is logical to look at the European law on the right to reside. If nationals of one Member State have the right to move to reside in another Member State under European Union law, it is logical to require that they also have the right to claim special non-contributory cash benefits there – in other words that the State in which they reside should be responsible for ensuring that they have the minimum means of subsistence to enable them to live there. But if they do not have the right

51 Interestingly, the court in *Bressol* did not provide any reasons for rejecting the Advocate General's Opinion. Lord Hope's take on this was that the court may have rejected it as being 'too analytical'!

52 *R. (Bidar) v Enfield London Borough Council* (C-209/03) [2005] QB 812.

under European Union law to move to reside there, then it is logical that that State should not have the responsibility for ensuring their minimum level of subsistence.⁵³

She accepted, as the Grand Chamber had done in *Trojani*, that a claimant seeking a benefit because of lack of resources could not derive a right to reside from art 18 of the Treaty as that 'lack of resources' took him outside the terms of Directive 90/364. In the event, the court in *Trojani*, having held that a person such as Mr Trojani did not derive a right to reside from European Union law, went on to say that a citizen of the Union who had been lawfully resident in the host Member State for a certain time or possessed a residence permit, and satisfied the conditions required of nationals of that Member State, could not be denied benefits.⁵⁴ He was entitled, during his lawful residence to benefit from the equal treatment principle in art 12. She took that to mean that, even if a claimant does not have a right of residence under European Union law, if he had the right to reside under the national law of the host country, he was also entitled to claim benefits on the same terms as nationals of the host country. She did not find anything in *Trojani*, though, to suggest that 'mere presence, without any right to reside in the host country, was sufficient'. All the emphasis, she said, in the relevant paragraphs 40 to 45 was on residence and not presence – and moreover on what she termed 'formally approved residence'.

The only dissenting voice in the Supreme Court was Lord Walker's. Despite accepting that the case had to be seen as one of indirect discrimination, he still saw the restrictions in the scheme as based, essentially, on nationality. In this respect, and in common with the President of Appeal Tribunals when he allowed the appeal in the First-tier Tribunal, he identified the provisions in reg 2(2) of the State Pension Credit Regulations 2002 as 'probably aimed at discriminating against economically inactive foreign nationals on the grounds of nationality, noting that whether or not that was intended by those framing the legislation, 'they have that effect'. He did not think the discrimination was capable of justification because once it was examined it was 'founded on nationality' (para 79).

The EU Commission's 'notice'

In his arguments on behalf of the AIRE Centre (as interveners in the appeal) Richard Drabble QC referred the court to the 'notice' of the EU Commission to the UK in which it invited the UK to submit observations on the compatibility with EU Law of the imposition of the right to reside test for benefits within the scope of Regulation 1408/71.⁵⁵ The notice, issued last year, expressed the Commission's concerns about the way the right to reside system has been operating, and requested the UK to 'end discriminatory conditions on the right to reside as a worker which exclude from certain social benefits nationals from the A8 Accession States'. It was implicit in the notice that the requirements were seen by the Commission as 'discriminatory', a breach of transitional arrangements on free movement, and of the obligation to 'ensure equal treatment on the basis of nationality'. Although Lord Hope addressed the point

53 As Baroness Hale went on to point out (para 104), this was the reason why the Court of Appeal at the previous stage of the appeal, and in the previous cases of *Abdirahman* and *Kaczmarek*, focused on art 18(1) of the Treaty, coupled with Directive 90/364/EEC (now Directive 2004/38). These provisions restrict the right to reside to those with 'sufficient resources'.

54 The benefit in question was the *Minimex*, a subsistence benefit that is not unlike the UK's Pension Credit in that it provides a floor of minimum income for claimants who either have no income, or whose income falls below a minimum level; see K Patrick *Welfare Benefits & Tax Credits: Law and Practice* 9th ed, pp215–218.

55 EU Commission Notice IP/10/1418 *Free Movement of Workers: Commission Requests UK to End Discrimination on other Nationals' Right to Reside as Workers* (Brussels: 28 October 2010).

in his judgment, he concluded that it was still 'too early' to draw any conclusions on this aspect of the case (para 40). The Commission are right to be concerned about the operation of the right to reside, particularly given the scale of its impact on A8 nationals' trying to access social benefits.⁵⁶ Like other EEA nationals, the right to reside continues to bar A8 nationals out of social benefits if they are economically inactive. Furthermore, the Border Agency also regards them as liable to removal, an issue recently highlighted when a Czech national was reported to the agency for begging. Assisted by the AIRE Centre, she won an appeal to the First-Tier Tribunal (Immigration and Asylum Chamber) after claiming Jobseeker's Allowance. Various other grounds of appeal were relied on, including the possibility that she was 'self-employed' (as a *Big Issue* seller); and 'proportionality', as she had never actually relied on social assistance.⁵⁷

Conclusions

Clearly, the system by which EEA nationals and their family members acquire and retain residence rights is problematic in key respects. UK practice, in the way claims and awards of social assistance are currently being decided, is likely to be out of kilter with what EU law expects, particularly in the way proportionality principles should inform decisions on 'residence' and support. It is also certainly the case that some groups, including single parents, carers, and older citizens are more vulnerable to current UK approaches to determining if residence rights have been acquired and retained.

The situation of older EEA nationals like Galina Patmalniece seems to be a particular concern, especially in the context of an emerging political and judicial discourse that is starting to equate economic inactivity with a 'failure to integrate'.⁵⁸ Her exclusion from a right of residence, and therefore from State Pension Credit – the most basic support needed to secure dignity in old age which is readily available to most UK and Irish claimants, including those who may never have been in any kind of paid employment – does not say much about the value of European Union citizenship. Nor does it set much of a standard for the quality of life EU nationals can expect when they reside in other Member States after spending most of their adult life in employment in another EU State. Whilst the decision may be in accordance with the UK's legal regime, the result looks harsh. Galina Patmalniece was marginalised and made destitute by no less than two UK residence rights regimes – first, as an asylum claimant, and then as a result of the habitual residence system. It is unfortunate that this is happening against a backdrop of European initiatives aimed at combating the social exclusion of European 'elders', and 'exploring new ways to support active ageing'.⁵⁹

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56 In the first four years of the post-1st May 2004 restrictions on A8 nationals, 76% of claims for tax-funded, income-related benefits and tax credits were disallowed on the basis of the right to reside and habitual residence test; *Accession, Monitoring Report 2004-2008* (Home Office/UKBA et al, 2008) p 23.

57 See 'Expulsion of homeless EEA national struck down on appeal' *Migrants Rights Network* 30 July 2011: <http://www.migrantsrights.org.uk/migration-pulse/2011/expulsion-homeless-eea-national-struck-down-appeal>.

58 Illustrated by the comment of Moses LJ at the end of his judgment in *Patmalniece* in the Court of Appeal that 'Absent that degree of economic or social integration which both EU and domestic legislation recognise as a justifiable condition for entitlement, there is no unlawful discrimination in refusing her a benefit which has the characteristics of social assistance...'

59 'Active Ageing & Empowerment of Migrant Elders' and *The European Year for Active Ageing 2012*. The 2012 European Year will provide a framework to promote active ageing; see the Proposal for a Decision of the European Parliament and of the Council on the European Year for Active Ageing (2012) COM (2010) 462 Final.

