**EEA Workers’ Free Movement and Social Rghts after Dano and St Prix: Is a Pandora’s Box of New Economic ‘Integration’ and ‘Contribution’ Requirements Opening?**

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***Keith Puttick\****

**Abstract**

Union citizenship, and the equal treatment and anti-discrimination provisions in the EU Treaties and secondary measures like the Citizens Directive (Directive 2004/38), were intended to underpin free movement, and ensure that nationals from the European Economic Area (EEA) could generally enjoy comparable social rights to those of host State nationals, albeit subject to limitations and conditions. Whilst primarily directed at the ‘economically inactive’ and those seen as failing to ‘contribute’ and reciprocate for the host community's support, the restrictions can leave some vulnerable groups at risk of exclusion from support. These include those with family and caring responsibilities who may struggle to balance those responsibilities with expectations of labour market participation. The article considers these points and the evolving regime, important developments like the *St Prix* and *Dano* cases in the Court of Justice of the European Union, and the increase in restrictions like the introduction of minimum income thresholds. It also considers the surge in anti-migrant, anti-EU, and anti-welfare feeling that preceded the May 2015 General Election in the UK, and the impact this has had on the domestic political agenda: what some commentators have called ‘the UKIP effect’. Subsequently, this has become a significant driver for policy change, with all of the UK's main political parties now signed up to a bar on EEA nationals' access to assistance in most of its forms, including social housing and in-work tax credits, pending satisfaction of integration criteria, notably periods of employment ranging between two and four years. As the article considers, it is difficult see how such differential treatment between EEA residents and host State nationals can be justified, especially in the light of reliable and authoritative evidence of the sizeable scale of EEA nationals' contribution to the economy. Furthermore, implementation would not just be divisive, it would be highly problematic.

\*Associate Professor of Law, Staffordshire University

Email: k.a.puttick@staffs.ac.uk

**Introduction**

These are difficult times for EEA nationals living and working in the United Kingdom, especially those looking to the State for assistance from the social security system but who struggle to demonstrate that they have ‘worker’ or ‘self-employed’ status, or come within the other categories of ‘qualified person’ conferring a right to reside (RtR).[**1**](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#fn0001) The RtR remains a potent barrier to most sources of support, and no more so than for claimants who try to put family or care commitments ahead of the system’s expectations of labour market participation. They are among those most at risk of being barred out of assistance. Like UK nationals in low paid work (who are not, in general, subject to such restrictions) they are likely to rely on State support. For those in short-term, part-time, seasonal, casual, or agency work prone to interruptions in wages, benefit income will often be a vital component in their overall ‘wage’ and household income. That dependency is set to continue, particularly as much of the reported growth in employment opportunities comprises that kind of work (EU Commission, *Employment and social developments in Europe 2014*, January 2015). Clearly, access to such support, reinforced by equal treatment and anti-discrimination provisions, can be essential in helping such groups make a reality of free movement rights and their Union citizenship. Whilst this may not take them out of the ranks of those in ‘poverty’ (SMCPC, [2013](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0029)) – a group comprising over six million people in families with at least one member in paid work (McInnes et al ([2014](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0022)) – it will at least keep the wolf of absolute poverty from their doors.[**2**](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#fn0002)

Among those who face the most difficulties are EEA nationals who have been in employment, but are then unable to maintain worker status – either because they cannot bring themselves within the categories for retention, and therefore lack the necessary RtR to access support; or, having sought support from benefits like income-based Jobseekers Allowance and Housing Benefit, their hours and earnings fall below the prescribed minimum earnings limit needed since 1st March 2014 to demonstrate ‘worker’ status.[**3**](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#fn0003)

This paper will examine some of the changes and newer restrictions affecting this particular group. As will be considered, much of the change process has been driven by the surge in anti-migrant, anti-welfare, and anti-EU rhetoric characterising debates ahead of the UK’s May 2015 General Election. It will argue that, in spite of helpful judicial interventions of the kind in *St Prix v Secretary of State for Work and Pensions* (C507/12) [2015] 1 CMLR 38, which saw the Court of Justice of the European Union (CJEU) extend a right to retain worker status (and thus access to the UK’s main safety-net benefit, Income Support), the evolving support regime – particularly at national level – is set to become even more restrictive. This will leave many of those on the margins of labour market participation in a highly vulnerable position. This is, in fact, already a risk for some EEA groups, particularly in the family welfare domain. The point was highlighted in the judgment of Baroness Hale at the UK Supreme Court stage of *St Prix*. She noted how pregnant women who are ineligible for mainstream support from schemes like Statutory Maternity Pay will be left destitute if they are then barred out of the safety-net assistance afforded by Income Support ([2013] 1 CMLR 38, para 4).

The prospect of a further raft of restrictions in this area, including a possible ban on access to most forms of in-work assistance pending completion of a period of ‘integration’ – one of the next steps envisaged by all the UK’s main political parties – would certainly introduce new gaps in the UK’s already fragile system of social protection.

Before examining this further, consideration is given to the role played by Union citizenship, anti-discrimination and equal treatment elements of the free movement regime.

**Union citizenship, discrimination, and equal treatment**

In principle, differences of nationality should not affect EEA nationals’ eligibility for support from host States’ welfare systems. This is the result of the combined effect of Union citizenship, and equal treatment and anti-discrimination requirements in the Treaties and secondary measures like the Citizenship Directive. The reality on the ground, though, is very different. While the directive and judgments of the CJEU frequently assert the importance of Union citizenship as the ‘fundamental status’ of Member States’ nationals, and these are often coupled with reminders of the ‘unequivocal protection from discrimination’ Union citizens enjoy under Article 18 of the Treaty on the Functioning of the European Union (TFEU), and provisions on free movement and residence like Articles 20(2)(a), 21 – substantive rights in this area are far from absolute.

The bottom line is that equal treatment rights in the measures implementing free movement, including Article 24 of the Citizenship Directive and Article 4 of Reg. 883/2004 (on the co-ordination of social security systems) come with significant limitations and derogations. Article 18(1), in particular, only prohibits discrimination on grounds of nationality ‘Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein…’; and Article 20 is accompanied by the pervasive requirement that Union citizens’ rights are to be exercised in accordance with the ‘conditions and limits defined by the Treaties and by the measures adopted there under’. Similarly, Article 21(1) TFEU subjects the right to free movement and residence to the ‘limitations and conditions laid down in the Treaties’ and ‘the measures adopted to give them effect’.

**Member states’ discretion**

Perhaps as important, though, and as explained in *Trojani*, Member States do enjoy ‘substantial discretion’ when deciding whether a national of another Member State trying to have recourse to assistance can fulfil the conditions for a right to reside.[**4**](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#fn0004)This has been reiterated more recently by the Grand Chamber of the CJEU in *Dano v Leipzig Centre* (C-333/13) (2014) 158(44) SJLB 37, 11 November 2014). Whilst the need for Member States to comply with the conditions of Directive 2004/38 and Reg. 883/2004 is embedded in EU law, implementation of the expectation that EEA nationals exercising free movement rights have sufficient resources to avoid becoming a burden on host States’ finances and social assistance programmes is a matter for *national* authorities. In *Dano*, Elisabeta Dano had made a claim for Germany’s subsistence benefit, the Existenzsichernde Regelleistung: a benefit comparable to the UK’s Income Support. This was when she was economically inactive, and not seeking work. Her son, Florin Dano, had claimed the social allowance (Sozialgeld). Their claims included requests for assistance with accommodation and heating costs. The headline point in the Grand Chamber’s judgment was that, far from providing any guarantee of income security, free movement and linked social rights are subject to important limitations – particularly if the assistance sought is non-contributory (specifically, support in the nature of special non-contributory benefits). Furthermore, the equal treatment and anti-discrimination provisions in measures like the Citizenship Directive 2004/38 on free movement and Regulation (EC) 883/2004 on the coordination of social security systems do not preclude domestic legislation to bar economically inactive nationals of other Member States out of support. On this particular point *Dano* arguably has not added very much that is new.

It did, however, provide helpful clarification about the scope of the Charter of Fundamental Rights of the EU (2000 C364/01), as a potential source which could, in theory, be relied upon by claimants. In fact, as the court observed, it does not alter the position on limitations and restrictions under the Treaties and in secondary rules. In particular, it was made clear that it cannot be invoked to supply the safety-net of social protection that many commentators have argued should be available – particularly for economically inactive citizens but vulnerable. Such claimants will continue to be barred out of most forms of social protection, including the kind of safety-net and subsistence benefits the Danos claimed. Indeed, as the court noted, the Charter cannot be engaged at all by such claimants.

The court in *Dano* did not differentiate between the different reasons why a person might be, or have become, ‘economically inactive’. There must be some concern about this, particularly as the reasons for this may be many and varied (a point explored further in the section ‘Women, Employment and Retention’ later). As a result, and subject to expectations that national authorities should be sure to carry out an effective review, case-by-case, and apply proportionality requirements fairly before removing residence rights – national authorities post-*Dano* will continue to have considerable latitude in how they deal with cases However, the limitation on support to be gained from the Charter that the court indicated applied to economically inactive claimants like the Danos would not appear to extend to formerly ‘active’ claimants like Jessy St Prix who, having previously worked as a teaching assistant, and secured ‘worker’ status, only became economically inactive as a result of pregnancy. Claimants in that position do, it seems, come within the scope and protection of Charter rights. In particular, rights based on Article 23 (Equality between Men and Women) are engaged according to Advocate-General Wahl in his Opinion in *St Prix* (Wahl, [2013](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0033)). The point was not, however, alluded to in the CJEU’s judgment.

How important is *Dano*? Arguably, the real significance of the case lies in its political impact and timing. The judgment was handed down at a time when the Right in much of Europe was enjoying a powerful resurgence in the European Parliament election, fuelled by some vociferous anti-migration stances of parties participating in the election. The judgment received considerable publicity and was seen in some political quarters as helpful in assuaging popular concerns about the vulnerability of host States’ welfare systems to perceived abuses. It also lent a degree of support to the argument that any further restrictions on EEA nationals’ access to host States’ welfare systems would be unnecessary. Manfred Weber, head of the centre-right European People’s Party (EPP) group in the European Parliament – the largest grouping – commented after the judgment that it proved EU countries could ‘avoid social benefits tourism without violating the free movement of citizens’. It also sent a ‘clear signal’ on this to the Member States and to the British Prime Minister in particular’ (BBC Europe, [2014](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0002)).

This begs the question whether the *Dano* judgment and existing restrictions, are going to be enough to assuage the concerns of the UK’s government, political parties, and public?

**The UK context and restrictions**

Full use is already made in the UK of the limitations and conditions catered for in the EU Treaties and secondary legislation. These provided the basis for the measures introduced in 2004 aimed at protecting the social security system to coincide with the accession of the A8 Member States from 1st May 2004. Since then, newer restrictions have continued to be rolled out in response to political pressures. To some extent this simply reflects the similar kinds of tensions experienced in other Member States like Germany. In consequence, an altogether tougher regime has been emerging in the UK, including new restrictions on access to benefits like Jobseeker’s Allowance [**5**](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#fn0005)**,** Housing Benefit in respect of help with housing costs **6**, and local authority social housing and services [**7**](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#fn0007)**.**

Arguably, some of the changes have gone much further than EU Law permits, and it is certainly the case that some of them have been prompting a fight-back by the EU Commission. Soon after David Cameron’s announcement that he wanted to see a four-year bar on access to benefits by EEA nationals, the EU Commission confirmed it would be taking enforcement action over what it saw as non-compliance with EU Law in relation to the conditions of take up of Child Benefit and Child Tax Credit. These are the two most basic components of family support in the UK’s suite of family welfare measures. Specifically, the Commission asked the CJEU to declare that the right to reside, as it restricts take-up of Child Benefit and Child Tax Credit, breaches the UK’s obligations under Regulation 883/2004 (Case Reference C-308/14, Curia, 5th September 2014). The central argument is that the right to reside, as applied to Child Benefit and CTC, is a ‘condition’ which Regulation 883/2004 does not allow. The Commission’s alternative contention is that the superimposition of the right to reside test on the eligibility criteria for EEA nationals, when eligibility of UK nationals is ‘automatic’, is direct discrimination contrary to Article 4 of the Regulation. The reaction of sections of the UK media to the action was predictably hostile. The Daily Mail reported the case under the headline like ‘EU says UK must dole out MORE benefits: Brussels takes legal action to force Britain to lift restrictions on migrants claiming handouts’ (Beckford/Daily Mail, [2014](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0005)).

*The minimum income threshold.* The introduction in March last year of the Minimum Earnings Threshold certainly poses a challenge to EU Law given that the determination of what is ‘work’ and a ‘worker’ has generally been assumed to be firmly within the EU’s competence (*Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses)* Case 75/63 [1964] ECR 177; and, again, *Trojani*, in which the court made it clear that the concept of ‘worker’ has ‘a specific Community meaning’, and ‘must not be interpreted narrowly’.[**8**](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#fn0008)

The superimposition of a national definition of ‘work’ that deploys a minimum earnings threshold which appears to set a much more demanding threshold than that set by EU Law would seem to be an open invitation to the EU Commission to challenge it. In fact, there is every reason to suppose that the change has already been barring EEA nationals working below the equivalent of 24 hours part-time work a week out of support. The practical effect is that they are likely to be finding it harder to access support and remain in the labour market, than would be the case if the EU standard applied. A further potential ground of challenge is that a minimum threshold of what amounts to 24 hours a week working at the national minimum wage is probably being felt harder by women than men. It is therefore likely to be indirectly discriminatory unless it can be justified, given that women are more likely than men to be seeking and working in part-time employment below that level (*Levin v Secretary of State for Justice Case* C-53/81 [1982] 2 CMLR 454). The MET and the scope for legal challenge has been discussed more fully by David Routledge in ‘Could the Earnings Threshold for Benefits be in Breach of EU Law? Lexis PSL Immigration, 7th March 2014.**9**

Whatever the validity of such changes, their cumulative effect plainly runs counter to many of the aims and values around which free movement, Union citizenship, and trans-European solidarity principles have been operating. At a practical level they also make it increasingly difficult for some groups, including jobseekers in need of support with housing costs, to reside and pursue job seeking opportunities in the UK. Recent consultations on the government’s call for a ‘re-balancing of competences between Member States and the EU’ have added further momentum to the Coalition’s view that further restrictions are necessary (HM Government, [2014](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0019)).

Radical changes, including a complete bar on access to most forms of social assistance – the area of social security which *Dano* confirmed is largely within the control of Member States – could be the eventual outcome. There is a significant gender dimension to this. Successive reports from organisations like the Fawcett Society and Institute of Fiscal Studies have highlighted how women, who make up 66% of the group on the lowest incomes in the UK, are already struggling from the changes made to the welfare system (Fawcett Society/IFS. Restrictions directed at EEA nationals in that group amount to a double whammy, hitting them on both gender *and* nationality grounds.

**A changing political landscape?**

In the lead-up to the UK General Election in May 2015, the political rhetoric around free movement and benefits ‘tourism’ intensified. The popular perception of EU migrants coming to the UK to take British jobs, undercutting wages and working conditions, and living off the British benefits system, has been part of the political landscape for some while. It gained currency in a speech in 2007 calling for ‘British jobs for British workers’ by the then Prime Minister, Gordon Brown in a speech to the Labour Party conference (Brown, [2007](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0006)). By 2014, the Coalition’s Prime Minister, David Cameron had started to target-free movement and linked social rights as part of his proposals to reform the EU, backed up by the threat of an in-out referendum on UK membership. Besides a cap on the number of EEA entrants, his demands included a requirement of four years’ residence as a pre-condition to claiming benefits, including in-work benefits (Cameron, [2014](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0007)), and the proposal is now firmly embedded in the Conservative Party’s manifesto.[**10**](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#fn0010)The Opposition, too, called for restrictions on welfare rights, coupled with pledges to tackle exploitation of migrant workers and undercutting of pay and conditions. It has proposed a two-year ‘wait’ before benefits can be claimed (Miliband, [2014](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0023)). This is now in Labour’s General Election manifesto.[**11**](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#fn0011)

The Liberal Democrats – ostensibly the most pro-EU of the main parties – also weighed in to the debate, so that by the end of 2014 the debate on EEA nationals’ social entitlements had most of the features of a Dutch auction. The Lib Dems proposed a complete bar on most forms of support, at least pending satisfaction of a range of integration and contribution conditions. Even then, their leader made clear, support would be confined to those working full-time and on the national minimum wage (Clegg, [2014](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0009)): a surprising shift, and one that appeared to completely ignore the gender and potential discrimination and equalities impact this would have (including the point that more women are likely to be in part-time work, and therefore more likely to be hit hard by such a change). Was it coincidence that this came just six days after the Rochester and Strood by-election on 20th November 2014? The party came fourth in that poll, gained just 349 votes, and lost its deposit in the face of the UKIP onslaught. The poll was fought largely on immigration, EU, and benefits issues (BBC Rochester and Strood, [2014](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0003)).

Following the *Dano* judgment, and the shifts of the main parties’ positions referred to, it is clear that there are some significant new restrictions in operation, or being planned, which are set to make it increasingly difficult for EEA nationals to access to social assistance and non-contributory support. Whilst the EU Commission and most EU leaders had drawn a red line on any changes to the free movement scheme itself, the position with regard to social security is far less clear. Plainly, any further limitations that go beyond *Dano* parameters, including support of the kind provided to workers through in-work tax credits, would require changes to secondary provisions in key instruments like the Citizens Directive, and possibly the Treaties themselves. Nevertheless, measures to reconfigure the conditions on take-up, and to counter ‘abuse’, do not appear to have been completely ruled out. This was certainly the stance of Germany’s Chancellor, Angela Merkel, when she visited the UK in January 2015 (BBC, [2015](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0004)).

Arguably, to take the current restrictions on access to State support any further than they currently operate would be very short-sighted. In a European labour market characterised by wage stagnation, weakened collective bargaining and occupational benefits, and deteriorating employment conditions – typically with underemployment and short-term periods of work becoming increasingly common – social security plays an important role in supporting the labour market. Apart from impacting on a range of stakeholders in the social security system – employers, for example, are major beneficiaries – many of the programmes operating or being developed in the UK, as in other Member States, empower and support groups like single parents, disabled people, and those needing to balance family and work responsibilities (Puttick, [2014](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0027)).

Nevertheless, the case for wider-ranging restrictions continues to be pressed, and not just by the political class. It also has some support from sections of the academic community. In particular, the case for a ban on most forms of support, at least pending fuller integration, has been put forward by two academics from the London School of Economics writing for the forum Open Europe.

**Economic integration and ‘conditionality’**

Damian Chalmers and Stephen Booth argue that EEA nationals should be barred out of most forms of social security until they have completed three years’ residence (Chalmers and Booth, [2014](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0008)). They describe what they see as ‘inconsistencies and perverse incentives’ resulting from the EU’s current rules on migrants’ access to national welfare systems and maintain that these have undermined public confidence in free movement and ‘left people in many countries feeling that the system is out of control’. They argue that ‘a complicated EU Treaty change’ is unnecessary, and that changes could be made by adopting a new EU Directive on Citizenship and Integration. These would assert the ‘supremacy of national citizenship over EU citizenship by reiterating that welfare benefits are as central to it as the right to vote in national elections’; and would ensure that welfare benefits, social housing and publicly funded apprenticeships are reserved for national citizens. They would only be granted to EU citizens in ‘limited circumstances’.

Central to what they propose is a new test for ‘sufficient integration’ in the host country. More precisely, benefits would only be paid where an EU migrant has maintained lawful residence for three years. National law and collective agreements would protect ‘local workers’ from being undercut by the exploitation of migrant labour, and this would be ‘ring-fenced from EU law provided that these national rules do not discriminate between a State’s own citizens and other EU citizens. The changes would not remove EU migrants’ rights altogether. For example, children of EU citizens would continue to have access to childcare and primary and secondary education, and citizens would receive public healthcare from the host State, but this would be paid for in the first three years by their state of nationality rather than the host community. Any shortfall would have to be met through private health insurance. One of their more controversial contentions is that the current EU regime impedes domestic active employment programmes aimed at ensuring it ‘always pays to work’; and that such subsidies or benefits, which were intended to ‘facilitate domestic employment’, end up going to EU migrants.

The changes, they say, would still ‘grant EU citizens many opportunities’, and would allow them ‘the full benefits of a society when they have integrated into it [italicised emphasis added].

**Implications for equal treatment, non-discrimination and Union citizenship**

Arguably, the proposal to remove EEA nationals’ access to host States’ social welfare support in the ways proposed would be highly problematic, if implemented. It would certainly undermine key features of the free movement system and take away much of the rationale for Union citizenship. The primary concern, however, must be that it would signal the emergence of a labour market of two key groups. On one hand, ‘Team A’ populated by UK nationals and residents enjoying unfettered access to the full range of wage subsidies, tax credits, access to social housing, and support with rents and mortgage costs – a kind of re-worked ‘permanent residence’. On the other, a new ‘Team B’ receiving considerably less in terms of State support. Action along these lines would almost certainly result in moves to remove the rights of UK nationals residing in other EU States, particularly those with nationals living and working in the UK.

It would be necessary to abandon, or at least severely constrain, non-discrimination and equal treatment standards at the heart of the European project, including the scope for interventions of the kind seen in cases like *MR v HMRC* [2011] UKUT 40 (AAC) (26 January 2011). This involved the withholding of age-related elements of Working Tax Credit (the ‘50+ element’) from Polish workers. The decision was overturned on appeal, assisted by the right to invoke non-discrimination and equal treatment rights directly against HMRC, the agency responsible for administering in-work schemes like Working Tax Credit and the new Universal Credit. For its part, the government is no doubt well aware of the need to roll back the scope of non-discrimination and equal treatment requirements, if it is to make any headway.

In this regard it clearly has some empathy with the reform proposals put forward by organisations like Open Europe, Fresh Start, and Demos including the suggestion by Demos that the principle of non-discrimination on the grounds of nationality has gone ‘too far’, with ‘EU Law and successive rulings of the ECJ having gradually dissolved all special rights, rules and privileges for national citizens’ (HM Government, [2014](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0019)).

[**Theoretical foundations and EU requirements**](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#_i11)

At a time when other EU countries and developed systems have been widening the scope of in-work support, and have recognised the importance of social security in sustaining the kinds of employment now characterising much of Europe’s labour market (as well implementing ILO recommendations for maintaining a floor of social protection to support low income and migrant groups), the kinds of restrictions put forward by Chalmers and Booth seem to run entirely counter to such initiatives. It would certainly make take-up and retention of employment by EEA nationals in many of the low-income groups serving the UK economy difficult, if not impossible. It would also fly in the face of equal treatment and anti-discrimination principles embodied in international instruments like the Convention on the Protection of the Rights of All Migrant Workers and their Families [1990](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0031) (UN Convention, 1990). Nations 1990) articles 25-27, and the [ILO’s](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0020) Migration for employment convention 1949 (Revised) (No.97), article 6. Among those likely to feel the impact of such a radical transformation would be women who, despite being in active age, may be unable to earn sufficient income as a result of family, maternity, and other roles and who despite being in low-income employment may need support from social protection schemes: one of the aims of measures like the ILO’s Social Protection Floors Recommendation 2012 (No.202) (Goldblatt and Lamarche, [2014](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0018):.2, 65).

A further expectation of such instruments, including now the Charter of Fundamental Rights of the EU, is that migrant workers residing lawfully in host States should not be treated any less advantageously than host State nationals, particularly in matters of pay and social security. Article 15 of the Charter reiterates the right to ‘engage in work’ and for Union citizens to seek employment. Indeed, it goes further and stipulates that nationals of third countries who are authorised to work are to enjoy working conditions ‘equivalent to those of citizens of the Union’.

In a labour market like the UK’s, where support from tax credits, housing benefits, and other subsidies are now an integral part of many workers’ social wage, it is difficult to envisage how schemes like flexible working, enabling groups like returnees from maternity leave, single parents, and carers, could possibly work without support from the range of State benefits available. Employment of groups like single parents and disabled workers who are EEA nationals would be difficult, if not impossible, without State support for childcare and replacement income during periods when wages are not being paid (especially as it is unlikely that most employers would be willing or able to take on such costs).

Besides undermining the free movement project, changes along the lines proposed would inevitably mark a return to a model in which EEA migrants would be perceived in terms of little more than their economic worth, and pending completion of a ‘period of integration’ detached entirely from the non-‘economic’ elements of Union citizenship. In equalities terms this would put them back on a par with non-EEA migrants, a group which has arguably been closing the equality gap with EEA nationals, but for whom integration requirements – minimum income requirement, language competences, and so forth – continue to be demanding (Puttick and Carlitz, [2012](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0026)). Acceptance into host communities on the basis of time-conditioned integration requirements would, in effect, be a reversion to the kinds of balanced or conditional ‘reciprocities’ described by Marshall Sahlins in *Stone Age Economics* (Sahlins, 2004: 191–204).

Other variants on the theme can be seen in the account of Michael Walzer, including his description in *Spheres of justice: A defence of pluralism and equality* of the State as a ‘bounded world’ in which patterns of distribution and exchange are controlled by political communities’: members who prefer, whenever possible, to avoid sharing distributable resources with anyone but themselves (Walzer, [1983](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0032)). Plainly, in times of scarcity that is a position that is not uncommon. It also seems to be enjoying a resurgence, in the UK as in other parts of Europe, and it is particularly evident when it comes to controls over resources like social housing, welfare systems, and jobs and other social goods. Bridget Andersen’s analysis in *Us and Them:* *The Dangerous Politics of Immigration Control* captures the essence of this very well when she describes what she terms as the ‘community of value’ which characterises the trade-off between migrant and host. Pending citizenship acquisition and naturalisation, new entrants to host communities are, she suggests, ‘unashamedly cast in terms of the value that they bring’ (Andersen, [2013](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0001): 10). Ie they are simply ‘economic migrants’. The proposals being made for the removal of access to benefits would certainly reinforce that model. It would also be a complete reversal of models of integration put forward by, among others, Sweden at the time it opened access to A8 States’ nationals, in which it placed great emphasis on the need to ensure that the Swedish labour market should not degenerate into two groups as a result of allowing differences in pay levels and social security between Swedish nationals and the nationals of the new States to emerge. This, it was said, would lead to ‘substantial strains’ and a labour market divided into ‘first team’ and ‘second team’ players (Puttick, [2006](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0024)).

Ten years on, it is still difficult to see on what possible basis differential treatment between EEA residents and host State nationals can be justified – particularly in the context of a quest for a single, integrated market in which Social Europe, and the social dimension, is supposedly playing as big a part as the economic and business elements in the project. Nor is it immediately obvious how the current free movement regime – already closely regulated by the Citizens Directive – can possibly disadvantage or damage countries like the UK. Indeed, all the evidence produced in the aftermath of A8 migration, including Home Office and other studies, has supported exactly the opposite conclusion (see, for example, Gilpin et al, [2006](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0017); and Sriskandarajah, [2004](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0030)).

The question of EEA nationals’ ‘contribution’ merits closer discussion informed by evidence of what this key group gives and what it takes.

**EEA nationals’ ‘contribution’**

Even if commentators like Chalmers and Booth are right in saying there is a feeling that free movement and the system is ‘out of control’, it does not follow that such ‘feelings’ are fair, or justifiable. There is scant evidence to suggest that the current regime is being abused by EEA nationals, or that it requires any greater restrictions, controls, or ‘protection’. The reality is that EEA nationals, as a group, contribute greatly to the country’s economy and well-being. They do so across a range of sectors – not least public health and the NHS, private residential and domiciliary healthcare, agriculture, and leisure and hospitality, and often in sectors like the care industry which has been experiencing serious problems relating to low wages and non-payment of the national minimum wage. Their taxes and national contributions are doing as much to sustain the welfare system as those of UK nationals – indeed there is evidence that their contribution may be greater. So, on what possible basis, other than political expediency – or simple prejudice - should welfare, social housing, and State wages subsidies be ‘reserved for national citizens’ and ‘only be granted to EU citizens in limited circumstances’?

Researchers at University College London have reinforced the point and have highlighted the positive features and scale of EEA nationals’ contribution. Christian Dustmann, Tommaso Frattini and Caroline Halls in ‘Assessing the Fiscal Costs and Benefits of A8 Migration to the UK’ concluded that in each year between 1995 and 2011, migrants from the EEA made a positive fiscal contribution. Indeed, this compared very favourably to the contributions of UK nationals and non-EEA migrants in the same period. It is evident that a particularly strong contribution has come from those coming to the UK from the countries acceding to the EU from 1st May 2004 onwards (Dustmann et al, 2014).

In an earlier paper in 2009 which focused on migrants from the A8 State, the same researchers concluded that this group was 60% less likely than natives to get State benefits or tax credits and 58% less likely to live in social housing. Furthermore, had this group shared the same demographic characteristics as native UK residents they would 13% less likely to receive benefits (and 28% less likely to occupy social housing). As a group, nationals from the A8 States ‘have a higher labour force participation rate, pay proportionately more in indirect taxes, and make much lower use of benefits and public services’ (Dustmann et al, 2009).

The expectation of ‘contribution’ and reciprocity as a condition of access to schemes like Income Support was given legislative effect in 2004 to coincide with the admission of A8 nationals to the UK and received judicial approval from the courts in cases like *Zalewska v Department for Social Development* [2008] 1 WLR 2602, House of Lords. In that case a Polish single parent who had been in employment for just under a year, but for different employers (in one case for an employer who had not been authorised under the scheme). As she had failed to re-register with the Worker Registration Scheme, and continuity of employment had been broken before the requisite period of registered employment had been completed, she was unable to meet the requirements for a right of residence. Despite her continued employment, and the reality that to all intents and purposes she was a worker contributing to the UK economy, she was unable to access Income Support to support herself and her child.

Whilst accepting the basic premise that measures to protect the social security system from abuse, two members of the court dissented on the question of the scheme’s proportionality. Baroness Hale deployed the principles set out in *Fromancais SA v Fonds d’Orientation et de Regularisation des Marches Agricoles (FORMA)* (C66/82) as a means of striking down decisions which impacted unreasonably on claimants like the appellant. She observed (at 2621) that ‘The sanction, of depriving a worker who had been employed here for 12 months of the social benefits to which she would normally be entitled as a result of having joined the United Kingdom workforce, is neither suitable nor necessary for the achievement of that limited aim. In short, it is disproportionate’. The need for proportionality as part of authorities’ assessment of residence status, and the extent of the burden they put on host States’ schemes, is now the subject of EU Commission guidance (EU Commission, [2009](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0013)).

Although the expectation of a year’s continuous employment and registration have now gone (and is only maintained as part of transitional controls, for groups like Croatian entrants), requirements of contribution, reciprocity, and economic integration remain a key feature of the UK’s support scheme. Whilst there are a number of categories of ‘qualified person’ under the EEA Regulations, including jobseekers, self-employed persons, and those who are self-sufficient, the core requirement, embedded in reg. 6, is that a person must have ‘worker’ status. Furthermore, that status must be maintained during periods when she or he may not be engaged in employment or receiving wages. This is assisted by the retention provisions in Article 7 of the Citizens Directive, and in the Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg. 6(2)-(11). These assist groups who are temporarily unable to work as the result of an illness or accident, and those who have become involuntarily unemployed.

The requirement that EEA nationals seeking means tested benefits like Income Support must be within one of the prescribed ‘qualified person’ categories in reg. 6(1) has received consistent judicial endorsement, notably in key judgments like *Abdirahman v Secretary of State for Work and Pensions* [2007] 3 CMLR 37, Court of Appeal and again in the Supreme Court in *Patamalniece v Secretary of State for Work and Pensions* [2011] 2 CMLR 45.

The need to maintain the conditions of economic integration required to satisfy residence requirements has proved to considerably more problematic, in practice – particularly in the family welfare context; and this is an area of the support regime that merits further consideration.

**Women, employment and ‘retention’**

The requirement to maintain employment and demonstrate what is, in effect, continuous employment, and therefore ‘economic integration’, sets a particularly difficult challenge to women in the labour market - and particularly when they are pregnant, in the periods before and after childbirth, and when children are young. Typically, in the latter period this can involve difficult choices, especially for those in low paid employment faced with limited and expensive childcare options who may then have little alternative but to put a return to work temporarily on hold.

For UK nationals this is problematic enough. There is the likelihood of a much-reduced standard of living for the household if a choice is made not to resume employment. The social security regime already puts pressure on parents – particularly single parents – to take up employment. This was been underlined by requiring mothers since May 2012 to be jobseekers as part of the Jobseeker’s Allowance scheme, once their youngest child has reached the age of five (Income Support (General) Regulations 1987, SI 1987/1967, Schedule 1B, para.1(1)).

For parents who are EEA nationals the expectation of a return to the labour market in the aftermath of childbirth comes much sooner – at least if they are to maintain ‘worker’ status and thereby retain a right to income replacement benefits like Incomes Support or Housing Benefit. Specifically, this will coincide with the end of the pregnancy leave period referred to by the CJEU in *St Prix*. This is a particularly difficult aspect of the operation of the current regime, and it is one that maps on to a wider range of problems associated with EEA nationals’ residence and expectations of contribution and reciprocity as requirements for the community’s support.

**Difficult choices at the family/work interface**

A decision to put children and family ahead of ‘work’ is liable to leave an EEA national making that choice in a very hard place. First, a likely cut in household income if occupational benefits and benefits like Statutory Maternity Pay linked to maternity leave are not available after wages have ceased to come in. Access to financial and other support from employers is becoming increasingly difficult for UK workers, let alone EEA nationals – many of whom may not even be in the kind of employment in which such maternity-related leave and occupational benefits are available. Even where maternity benefits are available, evidence suggests that there is, increasingly, a marked reluctance on the part of workers to assert such rights. There may be good reason for this. Pregnancy-related discrimination is still a significant feature of a lot of women’s experience at work according to TUC research in 2014.[**12**](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#fn0012) Indeed, there is often a reluctance to even ask employers about maternity leave and benefits according to research by Glassdoor.[**13**](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#fn0013) For workers who are not eligible for assistance from their employer – usually because of the type of employment they are in or because they have ceased employment – the State is, of course, the primary provider in terms of income replacement, housing costs, and other forms of assistance.

For EEA claimants who have not worked since their arrival, lack the resources to be self-sufficient, and who are not otherwise eligible under any of the other qualified person categories in the 2006 Regulations, access to mainstream support will be difficult. Indeed, the position as far as the UK courts are concerned is clear. It will generally be difficult, if not impossible, to demonstrate a right to reside, and thereby access support. This is well settled as a result of decisions like *Abdirahman* and the Supreme Court in *Patamalniece*. EEA nationals are still in a generally better position than non-EEA nationals who are affected by the pervasive ban on benefits, social housing and other forms of support if they are ‘subject to immigration control’ (Immigration and Asylum Act 1999 ss.115–123), primarily as a result of requirements on national authorities to conduct a careful assessment of their circumstances before removing a RtR, and to act proportionately - especially in the face of evidence of social and economic integration in the host community (Puttick and Carlitz, [2012](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0026)).   
This is probably the only difference. Furthermore, the *Dano* judgment has reiterated that, with that main difference, now most of this area of the support system remains firmly within national authorities’ control. The UK’s authorities have not been slow to take full advantage of this. Even access to safety-net provision through schemes like the UK’s Child Benefit or Child Tax Credits – the bedrock of the family welfare system – now depends on a RtR – although, as previously indicated, those particular changes are now about to be reviewed by the CJEU (Case Reference C-308/14, Curia 5th September 2014).

**Former workers and ‘non-returners’**

For those who have been in paid employment in the labour market, but who have elected not to return, or who have delayed their return after a period of maternity leave has ended, the position is also clear. Subject to decision-makers following a process of EU-compliant review, they will generally be at risk of losing their right to reside (*Secretary of State for Work and Pensions v Dias* [2010] Case C325/09 [2011] ECR I6387; [2011] 3 CMLR 40). In principle, loss of residence rights should not be automatic. As Commission guidance in 2009 has made clear, removal of residence rights and refusal of support should only come after an effective assessment of the claimant’s circumstances, resources, and the application of ‘proportionality’ requirements (EU Commission, [2009](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0013)).

Does this assist claimants who put forward what, on the face of it, are perfectly reasonable reasons for delaying a return – for example that a child is sick or childcare costs are too high to be met by a claimant on a low income? Apparently not, according to *Kaczmarek v Secretary of State for Work and Pensions* [2009] 2 CMLR 3. In that case the claimant was a Polish national who had resided lawfully in the United Kingdom for three years. She had done this on the basis of student status or working in a nursing home throughout most of that period. Nevertheless, she failed to gain any support from the Income Support scheme. The Court of Appeal robustly rejected the argument that a claimant in this position could derive ‘residence’, and linked social rights, directly from the Treaties on the basis of her previous residence, work, and student status; or by demonstrating sufficient social integration and settlement in the community. The court was clear that it could not extend the scope of retention in Directive 2004/38. The law-maker had not catered for this, and to rely directly on the Treaties was regarded by the court as tantamount to ‘attacking’ the directive and the clear limitations it had put in place.

**The role of derived residence rights**

Absent any clear basis for retention, if the claimant’s children are at the age where they could attend primary school (and possibly a reception class), there is scope for claimants, as a child’s primary career, to assert a derived right of residence. The development of derived rights has proceeded apace since landmark cases *like Ibrahim v Harrow LBC and Teixeira v Lambeth LBC* (Cases C-310/08 and C-480/08) [2010] ICR 1118, ECJ Grand Chamber. In those cases it was established that the child of a national of a Member State who worked or had worked in the host Member State, and a parent who is their primary carer, could assert a right of residence on basis of Regulation 1612/68, article 12, and do so without being subject to sufficient resources and sickness insurance conditions. More recently, derived rights have continued to play a key part in this area of family welfare, for example extending the right to cases where the child is enrolled in a pre-primary education reception class (*Re Shabani (EEA: Jobseekers: Nursery Education)*; *Shabani v Secretary of State for the Home Department* [2013] Imm AR 934).

On the face of it, this is one of the few areas of migration-related ‘welfare’ where challenges to the universalism of social security, and the growth of conditionality, has not been impacting on family welfare as it has been in the RtR case-law. That said, the courts’ role in setting the parameters of eligibility is still important, for example when employment status issues arise. The lack of worker status has, indeed, become one of the newer barriers to the use of derived residence rights (*Secretary of State for Work and Pensions v Czop* (C-147/11) [2013] Imm. AR 104, applied in *RM v SSWP* (IS)(Residence and Presence Conditions: Right to Reside) [2014] UKUT401 (AAC)). At a time when much of the UK labour market has seen the rise of self-employed status – largely as a means of reducing employment liabilities and cutting employers’ labour costs and on-costs – RM highlights what could be a significant problem for some groups, including those who may begin their employment as an employee, but are later expected to switch to ‘self-employed’ status – typically as part of a flexible working agreement following a return from maternity leave. Until recently, it has generally been assumed that a forced change to self-employed status – often as part of a workplace reorganisation – is a difficult process to manage, at least without risking an unfair dismissal claim. However recent cases like *Doherty and Jones v SW Global Resourcing Limited* [2013] CSIH 72 have shown otherwise, particularly if ‘fairness’ requirements are adequately factored in to the transition process. In the *RM* case a Norwegian national who was a lone parent, and who worked as a cleaner, had children in primary school. Had she held employee status she would have been eligible for Income Support on the basis of a derived right. However, once it became apparent that she was self-employed it was held that the same rights in relation to education were not available under Regulation 1612/68. Furthermore, the judge resisted suggestions that it was possible to disregard or ‘by-pass’ this limitation.

The position of EEA nationals who leave employment when they are pregnant presents yet another challenging area of family welfare. It is one which has become affected by the increasingly conditionality now characterising most social assistance programmes (Goldblatt and Lamarche, [2014](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0018)).

It is also one in which there are significant shortcomings at both EU and national levels.

What has been particularly surprising in this key area of the support regime has been the failure of the architects of the Citizens Directive to anticipate and cater for the welfare needs of EEA nationals who leave the labour market when they are pregnant and who need to look to the host State’s social assistance programmes for help. In the lead-up to the adoption of the Directive proposals were made by a committee of the European Parliament to add a new ‘pregnancy’ ground of retention to the worker and self-employed status provisions in what is now Article 7(3). This also featured in the travaux préparatoires. Despite this, the proposal was not pursued. The omission has proved to be highly problematic, particularly in jurisdictions like the UK where the courts favour what was described by the Court of Appeal in *Kakzmarek* ‘normative regulation’ rather than ‘open-textured’ provisions that then leave the courts with task of evaluating eligibility for rights in the social sphere on a ‘case-by-case basis’.

In the UK context, at a time when both decision makers in social security agencies like the DWP and the courts have come under pressure to withhold assistance, it was perhaps inevitable that this particular lacuna in the Citizens Directive scheme would prove to be problematic.

Many of the issues resulting from the EU’s omission came to a head in the *St Prix* case. In that case the claimant had undertaken agency and other work as a teaching assistant, and in a nursery, by the time she was pregnant. However, the demands of that work meant that six months into her pregnancy she had to stop working. Having sought lighter work without success, and after consulting her GP, she made a claim for Income Support. Her baby was born prematurely in May 2008, and it was not until three months later that she returned to paid employment. The baby died a year later from a heart condition. It was readily accepted that until she stopped working (in March 2008) St. Prix had ‘worker’ status, enabling her to avoid being treated as a ‘person from abroad’ and therefore ineligible for support. However, the period after that was viewed by DWP decision makers very differently. They decided that, pretty well immediately, she lost worker status, particularly in the absence of a pregnancy category for retention in the legislative scheme in Article 7(3) and … Nor was she assisted by any of the other available categories, including temporary incapacity from work (which is not appropriate to pregnancy unless the claimant suffers maternity-related illness). Accordingly, as a ‘person from abroad’ she ceased to have a right to reside; and this, in turn, meant she had an ‘applicable amount’ for IS purposes of ‘nil’ (Reg 21AA, and Schedule 7, para 17, to the Income Support (General) Regulations, SI 1987/1967).

Given that a UK national in similar circumstances has no difficulty in accessing safety-net systems like IS, and take-up is then accompanied by other ‘automatic’ support, notably in the form of Child Tax Credit, it is hardly surprising that in previous leading cases sections of the judiciary have had no difficulty in characterising such exclusion as discriminatory. In *Patmalniece,* for example, the President of Appeals Tribunals upheld an appeal against a decision refusing Pension Credit in circumstances where a UK claimant could readily show her eligibility. In these circumstances he had no difficulty in treating this as direct discrimination on grounds of nationality, contravening Article 3 of Regulation (EEC) 1408/71. On appeal, however, this was overturned, and the Supreme Court held that any discrimination was indirect and could, therefore, be ‘justified’. Interestingly, Lord Walker dissented on the question of justification, holding that the scheme’s discrimination was plainly directed at economically inactive foreign nationals. Even if the discrimination involved could be classed as indirect, it was not, he said, capable of justification given that it was ‘founded on nationality’. The appeals in St Prix followed a similar course, so that by the time the case reached the Court of Appeal Jessy St Prix’s appeal was rejected on a similar basis. As the Directive and implementing UK provisions made no explicit provision for retention of worker status on the ground of pregnancy, the court rejected an appeal. It also refused to countenance the argument put forward by Richard Drabble QC the provisions in Article 7 provided a ‘comprehensive definition’ of who could, and could not, retain worker status. Following *Patmalniece*, it concluded that any discrimination on grounds of nationality would only have been indirect discrimination, and it was capable of justification.

Notwithstanding the potency of the ‘economic integration’ requirements that now confront EEA nationals, it is evident that as a basis for refusing former workers residence rights ‘worker’ status is not a sound foundation for withholding support. In the modern labour market where an increasingly large proportion of the available employment is now characterised by breaks in employment, and what might be termed the stop-go effects of short-term, temporary, and agency work, continuity of the employment relationship is not a reliable measure of a welfare claimant’s attachment to work, or even contribution. The courts have recognised this for some while, not least in cases like *Lair v Universitat Hannover* (39/86) [1988] ECR 3161; [1989] 3 CMLR 545. In that case the ECJ observed that social rights guaranteed to migrant workers did not necessarily depend on the continuing existence of an employment relationship. Later, in *Ninni-Orasche v Bundesminister fur Wissenschaft, Verher und Kunst* (C-413/01) [2003] ECR I-13187; [2004] 1 CMLR 19 it was noted how those on renewable fixed-term contracts could maintain worker status, even after their work under the contracts had ended and the claimant had all the appearances of being voluntarily unemployed.

A further consideration, and one with which UK decision makers and courts have shown little sign of engaging, at least until recently, is that withholding assistance during gaps in employment is likely to produce a significant deterrent to free movement. This is relevant in a number of contexts – but particularly when family priorities dictate that temporary breaks from employment, are not just desirable but in many cases are an essential feature of work and family life. The point was put forward strongly on *St Prix*, at both the Court of Appeal and Supreme Court stages of the case. It was also pointed out that it would be a substantial deterrent to the free movement of female workers if they were ‘faced with the prospect of being left destitute, and threatened with removal to their home country, should they become pregnant and temporarily give up work in the later stages of pregnancy’.

Linked to this, and to general argument that the needs for retention opportunities are likely to continue developing in response to changing social and labour market conditions, is that the Citizenship Directive, whilst being a codification of the law, was only a codification as the law stood in 2004. Consequently, this should not exclude scope for new and more responsive categories evolving. This is, of course, relevant in a number of potential scenarios, and situations, not least in the area of family welfare where needs may arise which dictate new responses. This has certainly been the view of some of the UK’s Upper Tribunal judges dealing almost daily with family-related cases, for example where the main earner in the family has had to temporarily stop working to care for a child or sick partner. In one case, the claimant was a Cameroonian national married to a French national working in the UK. While she was in employment her ‘worker’ status secured her right to reside. Her partner, too, acquired a RtR as her family member. However, after he became seriously ill she had to give up her job to care for him. Without any wages coming in, and without any savings or resources to fall back on at that point, they had to look to the welfare system for support. Allowing an appeal against a decision that both partners had lost their right to reside, Judge Rowland ruled that a lack of ‘self-sufficiency’ was not the only consideration in the case, and that employment and resources should not be ‘determinative in every case’ (Case R (IS) 4-09, 31 October 2007, paras 36, 37). Unfortunately, not all such carer cases end with the same result. For example, in a case in which the claimant delayed her return to employment while she looked after her child, who was sick with diabetes, the judge dismissed her appeal on the basis that the decision to withdraw her RtR was proportionate, particularly as she would be away from employment for more than just a short time (Case CIS/599/2007, 7 December 2007).

In the *St Prix* case itself, the Supreme Court’s decision to refer the case to the CJEU, following an appeal from the Court of Appeal, was predicated on a number of other factors, including the point that pregnancy and the immediate aftermath of childbirth needed to be seen as a ‘special case’, factoring in the gender impact of withdrawal of the RtR, and the point that that equal treatment of men and women is one of the ‘foundational principles’ of EU law. As Lady Hale also observed when giving the court’s judgment, ‘unless special account is taken of pregnancy and childbirth, women will suffer comparative disadvantage in the workplace’.

In the event, the Supreme Court referred a series of questions to the CJEU seeking clarification of the precise scope of worker status in Article 7 of the Citizenship Directive, and in particular whether, and to what extent, it extends to a woman who reasonably gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth.

**Pregnancy, the RtR and judicial lacuna-filling**

As an exercise in judicial lacuna-filling and, in effect, law-making, the *St Prix* judgment offers a fascinating case study. It has also highlighted the fundamental differences between EU Law and UK law and practice, not least with regard to the assumption made by the DWP (and subsequently at every appeal stage in the tribunals and courts) that by ceasing to maintain paid employment a claimant is immediately at risk of losing a right to reside (and all social rights that depended on this). The Advocate General, Nils Wahl, and the CJEU were at pains to say otherwise. As AG put it ‘The referring court seems to work from the assumption that if Ms Saint Prix were not to be treated as a ‘worker’ for the purposes of Article 7 of the Citizenship Directive, she could not claim or receive Income Support during the time that she stopped working…I cannot unconditionally share the assumption of the referring court… At the outset, I would call to mind that the mere fact that a Union citizen has lost his or her status as a worker does not mean that all rights attaching to that status automatically and immediately disappear’. He added that the ‘mere fact’ that a national of another Member State applies for, or receives, social assistance is not sufficient in itself to show that she constitutes an unreasonable burden on the social assistance system of the host Member State. This is a significant point, and one that has been reinforced by decision in *Pensionsversicherungsanstalt v Brey (European Commission and Others Intervening)* Case C-140/12 [2014] 1 CMLR 37.

The scope for retention is, in fact, much wider than is assumed. That much is clear from cases in which, despite temporary economic inactivity, it has been held that worker status can be maintained. Among some interesting examples is *Orfanopoulosv Land Baden-Wurttemberg* (C-482/01) [2005] 1 CMLR 18; *Oliveri v Land Baden-Wurttemberg* (C-493/01) [2004] ECR I5257 [2005] 1 CMLR 18. In that case the court decided that a Union citizen who had previously worked in the host Member State remained within the scope of what is now Article 45 TFEU for the duration of a sentence spent in prison (albeit with the proviso that he should secure employment within a reasonable time of his release).

Consistent with the principles reiterated by the CJEU’s Grand Chamber in *Dano*, it is clear that EU Law generally leaves the question of what may or may not constitute an unreasonable burden on the social assistance system of the host Member State to the national authorities. However, as made clear in that case and in *Brey*, this is subject to the need for an effective assessment of the claimant’s position in relation to the scale of that ‘dependency’. When applying this consideration to the pregnancy context, and the circumstances of Jessy St Prix, Advocate-General Wahl professed to having ‘difficulty’ imagining a situation in which affording a benefit like Income Support to a woman in her situation could constitute such a ‘burden’. He accepted that it could not be ‘categorically ruled out’ that in order to avoid ‘benefit tourism’ more restraint might be warranted in the case of economically inactive Union citizens who had never established any link with their host community, notably by working and paying taxes.

For its part, the CJEU was also clear that the codification process did not, by itself, limit the scope of the concept of a worker. Plainly, this is rooted in the FEU Treaty (a position helped by judgments like *N v Styrelsen for Videregående Uddannelser og Uddannelsesstøtt* (C-46/12) [2013] 2 CMLR 37. Even after the employment relationship has ended, there may be further rights that derive that status, once it has been established. On that basis it could not be argued conclusively that Article 7(3) listed ‘exhaustively’ all the circumstances in which a migrant worker could continue to benefit from that status.

Retention of worker status for the purposes of Article 45 TFEU was assisted by a number of other factors, including the fact that Article 16(3) of the Citizens Directive for the purpose of calculating the continuous period of five years of residence leading to the acquisition of permanent residence, is not affected by absence of periods up to 12 consecutive months for important reasons such as pregnancy and childbirth. That being the case, the absence due to the physical constraints experienced in the late stages of pregnancy and the immediate aftermath of childbirth, requiring a woman to give up work temporarily, could not, a fortiori, result in loss of worker status. The only proviso was that women in that position could be expected to return to work or find another job within a reasonable period after confinement: a conclusion that was obviously assisted, by analogy, by the judgment in *Orfanopoulos and Oliveri*.

Having established what is, in effect, a further, judicially constructed retention right, the court in *St Prix* still had to tackle the important question of how, exactly, national authorities should set time limits on claimant’s access to assistance pending a return to the labour market. It answered this by stipulating that the matter was one for determination by national courts. Specifically, in order to determine whether the period that has elapsed between childbirth and starting work was ‘reasonable’, it would be for the national court to take account of the specific circumstances of cases, but also applicable national rules on the duration of maternity leave made in accordance with Article 8 of Council Directive 92/85/EEC.[**14**](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#fn0014)

Despite the positive result at the end of the proceedings in *St Prix*, it is unfortunate that such an important gap in the social protection afforded to a potentially very sizeable section of Europe’s workforce should have to depend on what was, in effect, an exercise in judicial lacuna filling. Moreover, there is still likely to be some important unfinished business. Whilst the general principles of entitlement may have been laid out by the court, the precise duration of leave, and retention of a RtR, will depend on national courts’ determination of such matters as what constitutes a reasonable period between the period before childbirth and an expected resumption of employment.

**Conclusions**

Mapping on to the wider issues around ‘residence’, and the availability of retained residence rights for groups like carers and groups like parents who have to balance expectations of labour market participation and ‘contribution’ as the price for the support they can expect from the welfare system, there are still some missing pieces in the overall family welfare jig-saw puzzle. These include potentially difficult issues that can face returnees, for example when coping with a child’s illness, or arranging childcare to facilitate such a ‘return’. Childcare issues, including the adequacy of childcare provision and its cost, are still likely to present returnees in low paid employment with problems. For these and other reasons, parents and carers may still have to run an obstacle course of problems if they are to retain a right to reside and avoid being seen as a ‘burden’ on the welfare system.

In the bigger picture, current trends suggest a continuation of restrictions on EEA nationals’ access to support. Measures like the minimum earnings threshold, and the extension of the RtR regime to schemes like Child Benefit and Child Tax Credit may prove to be just the first in a tranche of measures to emerge from a Pandora’s Box of new, even more extensive restrictions. The proposals for a ban on most forms of support for EEA nationals, at least until tougher economic integration criteria can be satisfied – a proposal that has enjoyed differing degrees of support from the UK’s main political parties – poses a very potent threat to free movement and the social rights linked to it. Such expectations of further economic integration and contribution requirements show just how far how far the ‘economic’ model is still thwarting attempts to make a reality of Union citizenship (Currie, [2009](http://www.tandfonline.com/doi/full/10.1080/09649069.2015.1028161#cit0010)).

It may be that such initiatives will yet prove to be just a knee-jerk response to current anti-migration, EU, and welfare sentiments – the so called ‘UKIP effect’ – and will be short-lived. However, the fact that they have been put forward on the eve of a General Election is perhaps symptomatic of weakening popular support for free movement and Social Europe.

**Notes**

 1. Most schemes of assistance, including Income Support (see the Income Support (General) Regulations 1987/1967, reg. 21AA), provide for claimants to be treated as a ‘person from abroad’, and barred out of support, unless they can show they have Right to Reside status or come within one of the other categories of ‘qualified person’ in the Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 6(1). Reg 6(2), (3) gives effect to Dir 2004/36, art 7(3) by providing for retention of that status in circumstances where it might otherwise be lost, for example during periods of temporary inability to work as a result of illness or accident: but until St Prix a right of retention did not extend to women who cease work on account of their pregnancy.

 2. Income-related benefits as well as in-work support in the form of income transfers to low-pay groups, is very much in line with the kind of measures envisaged by the International Labour Organisation’s Social Protection Floors Recommendation, implementing the Bachelet Report (Bachelet, M et al, *Social Protection Floor for a Fair and Inclusive Globalisation*, Geneva: ILO, 2011). As that report noted, even in countries with developed social protection systems there can be some significant ‘gaps’ in protection, including those affecting migrant workers and their families.

 3. The MET earnings threshold is linked to the Class 1 National Insurance Contributions Primary Threshold, which is £153 a week (£7956 a year) in 2014/15. In Tier 1 cases, if an EEA claimant’s average earnings over a three-month period are at or above that level she or he will be automatically treated by decision makers as satisfying ‘worker’ status. If they are below that level (Tier 2) they will consider cases more closely, having regard to factors like the work’s regularity and the hours worked, and so forth; see the guidance in DMG 1/04 JSA (IB) – Right to Reside – Establishing whether an EEA National is/was a ‘Worker’ or a Self- Employed Person’; and Housing Benefit Circular HB A3/2014: Minimum Earnings Threshold’. Assisted by guidance on EU sources and cases, a decision is then made as to whether the work being undertaken is sufficient to justify worker status, and in particular whether it is ‘genuine and effective’ because it is not on such a small scale as to be ‘marginal and ancillary’.

 4. *Trojani v Centre Public d’Aide Sociale de Bruxelles* (C-456/02) [2004] ECR I-7573; [2004] 3 CMLR 38, para 45.

 5. The Immigration (European Economic Area) (Amendment) (No.3) Regulations 2014, SI 2014/2761, for example, reduced the period in which jobseekers, including lone parents, become subject to restrictions through the ‘genuine prospect of work’ test from 182 to 91 days.

 6. Under the Housing Benefit Regulations 2006, SI 2006/213, reg 10(3B) an EEA national claiming JSA could avoid ‘person from abroad’ status, and access Housing Benefit. This changed, however, when the Housing Benefit (Habitual Residence) Amendment Regulations 2014, SI 2014/539 removed this right: jobseeker status was the only basis for their RtR. The response of the Department of Work and Pensions to the concerns of the Social Security Advisory Committee about this was revealing. It said the changes ‘deter EEA migrants from coming to the UK if they do not have a firm or realistic chance of securing work’, and those planning to come to the UK, ‘should ensure that they have sufficient resources to pay for their accommodation needs, as well as other support that they or their family may need’. It said that the ‘best option’ for those unable to find work, or who lacked savings or support networks, and who were at risk of ending up destitute, was to ‘return home’; see the Housing Benefit (Habitual Residence) Amendment Regulations 2014 Report by the SSAC and Statement by the Secretary of State for Work and Pensions, HM Stationery office, November 2014, paras. 6, 7.

 7. EEA nationals who do not have, or have lost, a right to reside and who have become a ‘restricted person’ under s.184(7) of the Housing Act 1984, are barred out of homelessness rights; *Lekpo-Bozua v Hackney LBC* [2010] H.L.R. 46, CA.

 8.*Trojani v Centre Public d’Aide Sociale de Bruxelles*, note 4, at para. 15 of the judgment.

 9. For a fuller discussion of the MET and the scope for a legal challenge, see D. Routledge ‘Could the Earnings Threshold for Benefits be in Breach of EU Law? Lexis PSL Immigration, 7th March 2014. Interestingly, EU officials reportedly made it clear, ahead of the MET’s introduction, that the change was likely to be unlawful; Financial Times, 20th February 2014.

10. The manifesto has, in fact, widened the Prime Minister’s proposal. Besides the four-year ‘wait’ the ban will extend to social housing and Universal Credit once it has been rolled out nationally. Those who have failed to find work after six months will be removed. Reform of EU free movement will ‘at the heart’ of renegotiation of Britain’s relationship with the EU. As the PM backed down on earlier proposals to introduce a ‘cap’ on entrant, the focus is now on welfare and removing ‘incentives for people to come to the UK’; see ‘BBC Manifesto Watch: Where Parties Stand on Key Issues’, BBC, 10th February 2015’ (accessed 11th February 2015).

11. ‘Tough and Fair Immigration Rules’ (section ‘Earned Entitlements: People Coming Here Won’t be Able to Claim Benefits for at Least Two Years’) in *The Issues: Our Policies to Make Britain Better*, London: The Labour Party, 2015 (accessed 10th February 2015).

12.’The Pregnancy Test: Ending Discrimination at Work for New Mothers’, London: Trade Union Congress, November 2014.

13. ‘Are Women Afraid of Employers over Maternity Benefits?’ HR Review, 13th November 2014 <http://www.hrreview.co.uk/hr-news/reward-news/are-women-afraid-of-employers-over-maternity-benefits/54106> (accessed 10 January 2015). According to research by Slater and Gordon six in 10 mothers felt ‘side-lined’ as soon as they announced to employers they were pregnant (Maternity Discrimination, August 2014).

14. Council Directive 92/85/EEC of 19 October 1992 on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who have Recently Given Birth or are Breastfeeding (10th Individual Directive within the Meaning of Article 16 (1) of Directive 89/391/EEC).

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